No. 73794-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

BELLEVUE FARM OWNERS ASSOCIATION,
a non-profit corporation; *et al.*,

Respondents,

v.

CHAD STEVENS, *et al.*,

Appellant.

RESPONDENTS' ANSWER TO APPELLANT'S PETITION FOR REVIEW

William W. Simmons, WSBA #35604
LEWIS BRISBOIS BISGAARD & SMITH LLP
1111 Third Avenue, Suite 2700
Seattle, Washington 98101
(206) 436-2020
Attorneys for Respondents

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I. IDENTITY OF RESPONDENTS

Respondents consist of a small non-profit homeowners' association, Bellevue Farm Owners Association, and eighteen neighbors who own vacation properties[1] on San Juan Island and are the plaintiffs in the underlying action. (Collectively "BFOA").

II. COURT OF APPEALS DECISION

The Court of Appeals filed a published decision on April 3, 2017 that affirmed the trial court's August 5, 2015 discovery order, lifted a temporary stay and remanded to the trial court for further proceedings. A copy of the decision is appended to Appellant's Petition for Review at pages A-1 through A-19.

III. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

The Court of Appeals affirmed the August 5, 2015 discovery order, holding that 1) the tort of abuse of process requires proximately caused harm; 2) under the *Hearn*[2] test for implied waiver of attorney/client privilege, adopted in *Pappas*[3], the Appellant, Chad Stevens ("Stevens"), waived attorney/client privilege purportedly contained in the only

[1] Plaintiffs Glen Corson and Kim Kyllo-Corson now reside at their Bellevue Farm property on a permanent basis. They are the only on-island residents among the respondents.

[2] *Hearn v. Rhay*, 68 F.R.D. 574, (E.D. Wash. 1975).

[3] *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990).

evidence of his alleged proximately caused harm; and 3) the trial court did not abuse its discretion in refusing to bifurcate Counterclaim 13.

In his Petition for Review ("Petition"), Stevens challenges only the bifurcation issue under RAP 13.4(b)(4). The Petition does not present any issue of substantial public interest. Denying the Petition will not cause any other litigants – let alone Stevens himself – to face a disclosure of significant privileged information.

Stevens' bifurcation argument was considered and rejected by the trial court at the August 5, 2015 hearing on the subject discovery order. This marked the third or fourth or fifth time that the bifurcation argument was rejected by either the trial court or discovery master. The Court of Appeals considered whether the trial court abused its discretion and determined that the trial court did not abuse its discretion in refusing to bifurcate. Appendix A18-19.

This decision does not significantly impact the public interest. The discovery master, the trial court and the Court of Appeals all considered whether Stevens waived the attorney/client privilege under the *Hearn* test. All three correctly concluded that under the circumstances of this case Stevens did in fact waive the privilege. Appendix A16-17. This case specific decision does not impact the public interest and Stevens has not challenged the Court of Appeals' affirmance on waiver.

Stevens failure to challenge the Court of Appeals' decision that he waived the privilege renders his bifurcation argument moot. There is no reason to bifurcate the abuse of process claim if the privilege has been waived. This alone should convince the Court that the Petition should be denied. But even if the issue is not moot, the Petition should be denied because the determination that the trial court did not abuse its discretion in refusing to bifurcate has no bearing on the public interest. It is a case specific decision made by the trial court after it carefully weighed the potential prejudice to both sides when it entered the August 5, 2015 discovery order and again rejected the bifurcation argument.

IV. COUNTERSTATEMENT OF THE CASE

Once again, Stevens suffers from selective amnesia when summarizing the factual background of this case. His efforts to rewrite history begin with his opening remarks about the origins of the parties' dispute. Petition 2-3. This case did not, as Stevens suggests, originate in a dispute over what *new* restrictions a homeowners' association could place on an owner's property. *Id.*. Rather, it began when BFOA sued Stevens regarding *existing* covenants, conditions, and restrictions ("CC&Rs") imposed on his property to protect the privacy, seclusion, natural beauty, and peace and quiet of the surrounding waterfront neighborhood. CP 854-55. Tellingly, Stevens avoids mentioning the CC&Rs were in place when

he purchased his property in 2005 and *already* restricted its use. The CC&Rs were not "new."

Stevens also fails, for obvious reasons, to mention the homeowners association and 19 homeowners were compelled to clarify Article 4 and to amend Article 5 of the CC&Rs in 2012 to resolve significant concerns over his proposal to use his property for commercial purposes. CP 855. Nearly lost in all of Stevens' natural exaggeration is the undeniable fact that the trial court determined the 2012 clarification and amendment of the CC&Rs were lawful. CP 144-47, 735, 786-97, 855. In particular, the trial court ruled the Article 4 clarification was consistent with the 1997 CC&Rs and enforceable. CP 714. The court also ruled that a large portion of the Article 5 amendment was valid; however, it revised the remainder of the amendment and ordered the revised amendment recorded. CP 713, 796.

In June 2014, Stevens moved to amend his counterclaims to include abuse of process against one neighbor Mark Baute ("Baute") and to include a tort based breach of fiduciary duty claim[4] against BFOA into his existing counterclaim 12 that was initially based solely on violation of RCW 64.38 *et. Seq*. Over BFOAs' objection, Stevens was allowed to

[4] The August 5, 2015 discovery order also compelled Stevens to produce a spreadsheet related to Counterclaim 12 billings. That issue became moot when Stevens, in a recurring theme, dismissed the tort based breach of fiduciary duty claim returning Counterclaim 12 to its original state as a claim based solely on RCW 64.38. *See* RP (8/5/15) 49-50.

amend his counterclaims and immediately thereafter, he asked the trial court to bifurcate those two claims and stay all discovery as to those two claims. The trial court denied Stevens' motion. Appendix at A6.

Stevens selective and incomplete memory continues when he quotes from two letter rulings issued by the discovery master on June 19, 2014 and March 30, 2015, respectively. The first is a concern noted by the discovery master that the parties should be wary of protecting privileged materials when possible. To that end, BFOA made a very reasonable concession in the first motion to compel that was filed in August 2014 regarding Stevens' alleged attorneys fees as damages. BFOA proposed that Stevens could simply produce innocuous time sheets that contained dates, amount of fees and simple, non-privileged task descriptions. RP (8/5/15) 31. The discovery master initially ordered Stevens to respond to the discovery without privileged time sheets. Appendix at A6.

However, Stevens refused to accept this proposal and would not produce innocuous time sheets. RP (8/5/15) 31. Instead, when ultimately compelled to provide the billing spreadsheets for *in camera* review by the discovery master, rather than do the necessary work to provide innocuous time sheets and avoid any privilege concerns, Stevens purposely included what the discovery master later determined to be privileged material.

Unsurprisingly, Stevens does not disclose that the discovery master recognized the bulk of the time entries BFOA sought to discover were "innocuous." CP 1382. More critically, he refuses to acknowledge the discovery master made three important pronouncements impacting this case: (1) he must prove the fact of damage to establish liability on counterclaim 13; (2) his only claimed damages are his attorney fees and costs; and (3) BFOA's right to a fair trial will be violated if he is permitted to claim the full amount of his attorney fees without allowing BFOA discovery into those fees. *Id.*

Stevens' Petition also ignores the fact that the discovery master and the trial court considered and rejected his bifurcation request multiple times. RP (8/5/15) 36. In the March 30, 2015 letter ruling, the discovery master suggested an alternative method of proceeding by having Baute stipulate to the fact of damage under Counterclaim 13. *Id.* Naturally, Baute declined the suggestion that he should stipulate to the fact of damage in a meritless counterclaim when the person suing him was abusively trying to prevent him from evaluating the alleged damages. BFOA filed a motion for reconsideration of the March 30, 2015 letter. That motion resulted in the discovery master's April 27, 2015 Report and Proposed Order, which in turn the trial court entered on August 5, 2015 as the order on appeal.

Stevens similarly abbreviates his discussion of the discovery master's April 27, 2015 report and order resolving BFOA's motion for reconsideration and his motion for protective order, which abrogated the March 30th ruling he recites. The discovery master recommended the trial court order unredacted disclosure of all attorney billings related to Counterclaim 13 because Stevens' only claimed damages with respect to that counterclaim are his attorney fees and costs. CP 1291-97.

The discovery master determined Stevens cannot establish all of the required elements of his counterclaims without proving at least the fact of damage; consequently, BFOA is entitled to his billing records to determine whether his claimed damages are in fact causally related to his counterclaims. *Id.* Importantly, the discovery master concluded that Stevens had waived his attorney/client privilege and work product protections by placing protected information at issue. *Id.* at 1292.

As noted by Stevens, in the April 27 report and proposed order, the discovery master suggested that the trial court is in the best position to determine whether some alternative method of discovery and trial management could diminish the potential prejudices to either side.

At hearing on the August 5, 2015 discovery order, the trial court adopted the discovery master's report and order, and it again considered and rejected Stevens' request for bifurcation. The trial court identified the

focus of the hearing as "the second issue she presented, which is this difficult issue about the timing of the release of these billing records." RP (8/15/15) 7. By this time both the discovery master and the trial court had repeatedly concluded that proximately caused harm was an essential element of abuse of process and that Stevens had waived any privilege that existed in his attorney fee billings.

The trial court had continued a prior hearing (June 5, 2015) on the April 27, 2015 report and proposed order. As noted by the trial court it believed the April 27, 2015 report "made pretty good sense," there was only reluctance to rule on it pending Court of Appeals decision on Stevens first motion for discretionary review, which was denied. *Id*.

At the hearing, the trial court considered the substantial prejudice to BFOA if Stevens were allowed to force BFOA to agree to his bifurcation or, in the alternative, stipulate to the fact of damage without Stevens ever having to produce any evidence of those alleged damages. RP (8/5/15) 30-36.

The trial court indicated its struggle with the competing interests but that ultimately, like the discovery master, the trial court agreed they weighed in favor of BFOA and yet another rejection of Stevens' request for bifurcation:

> The Court: If I was confident that it could be done, I would be inclined to reconsider the decisions I

> made in the past not to bifurcate, but I'm still not persuaded that that puts – that that really is fair to the plaintiffs because I'm not sure they can prove—
> …
> The Court: or defend against the causation issue without having access to the work that was done. I just am not sure how they're going to do that. How do they do that?

RP (8/5/15) 47.

Counsel for Stevens had no answer other than to again try to shift the focus and pretend the attorney fees at issue were akin to post-judgment fee shifting rather than proximately caused harm. *Id*. Ultimately the trial court returned to its proper reasoning for repeatedly rejecting bifurcation:

> So it doesn't get us out of the difficult situation. I have said, every time we've covered this, I'm really bothered by having to order a party to divulge what is work product and what is attorney-client privilege, but I'm certainly less so when it's the party who's filed the claim and particularly where they've filed claims in which they're alleging their only damages are the attorneys' fees, which they now want to be protected from.
> I'm just then—I mean, I think that undercuts the concern I have for protecting the attorney-client privilege. That's what the discovery master's concern is too, how do you balance that?

RP (8/5/15) 61; *see also* RP (8/5/15) 63.

The trial court recognized and weighed the counter-arguments made by Stevens, considered and ultimately rejected his proposal that BFOA be forced to stipulate to the fact of damage without evidence of those damages, or face bifurcation.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Stevens' argument that the Court of Appeals decision creates a chilling effect on every civil litigant in Washington is absurd. Stevens hopes that this Court will ignore the trial court's and discovery master's repeated careful consideration of Stevens' bifurcation requests and rejection of bifurcation after weighing the various competing interests.

For three years now, Stevens has had a basic misunderstanding of the relevant law that has caused unnecessary delay. *Assuming arguendo* that Stevens delay and stalling tactic was not intentional, there has been a refusal on his part to accept basic and well-accepted general principles of tort law and implied waiver. Proximately caused harm is an essential element of the tort of abuse of process. If attorneys fees are the only alleged damages supporting that essential element, they are discoverable. It is not akin to post-judgment fee shifting. Stevens has always had a misconstrued idea of the sword/shield doctrine. He believes that he can file an abuse of process claim, allege significant damages and then hide the only evidence of those damages by claiming privilege.

There is no need for bifurcation. There never was. There is only a need to deny the Petition and put an end to Stevens' abusive litigation tactics that are designed to stall and delay this litigation and make it as costly as possible for BFOA.

Stevens conspicuously avoids mention of the applicable standard of review. This Court reviews discovery orders and the manner in which a trial court controls litigation under the abuse of discretion standard. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991) (noting it is the proper function of the trial court to exercise its discretion to control the litigation before it); *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012); *Myers v. Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990) (noting a trial court's bifurcation decision is a matter within that court's discretion); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 519, 20 P.3d 447(2001) (noting a trial court has wide discretion in ordering pretrial discovery).

Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956).

The Court will find an abuse of discretion and reverse a discovery ruling only on a "clear showing" that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). *See also, Salas v. Hi-Tech Erectors*, 168 Wn.2d 664,

668-69, 230 P.3d 583 (2010) (noting a trial court abuses its discretion only when it adopts a view that no reasonable person would take, applies the wrong legal standard, or relies on unsupported facts).

The trial court is in the best decision to control the litigation before it and is in the best position to weigh the competing needs of the litigants. *See Marine Power & Equip. Co. v. Dep't of Transp.*, 107 Wn.2d 872, 734 P.2d 480 (1987) (noting the discretionary authority of the trial court to control the litigation before it) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984) (holding the trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery and noting the unique character of the discovery process requires that the trial court have substantial latitude).

Stevens does not address this in his Petition in hopes that the Court will not recognize the lack of any public interest at stake in the Court of Appeals decision. On the issue of bifurcation, the Court of Appeals simply rejected Stevens incorrect assertion that the trial court did not abuse its discretion when it balanced the competing interests of the parties, entered the August 5, 2015 discovery order and again rejected bifurcation. Appendix at A18-19.

There is no question that the trial court in this case is in the best position to understand the competing interests of the parties and the

potential prejudices. The trial court understands that under Stevens' theory of the case, BFOA has two options - either stipulate to the fact of damage thereby admitting liability under the abuse of process claim, without gaining access to the only evidence of those alleged damages; or sixteen off-island owners would be forced to incur exorbitant costs to appear for multiple trials on the same underlying factual issues.

The trial court understood the unfairness to BFOA under either of those scenarios. The trial court weighed that unfairness against the potential unfairness to Stevens in having to produce purportedly privileged information. In weighing that unfairness, the trial court noted its agreement with the discovery master that by placing the claim at issue, and trying to hide the only evidence of an essential element under the guise of privilege, Stevens waived the privilege and the potential prejudice to BFOA outweighed that of Stevens.

This does not create any chilling effect on litigants. It is not based on untenable grounds or made for untenable reasons. It is a sound decision made by the trial court after careful consideration. The chilling effect on litigants would result from Stevens' theory of this case. In his alternate universe, litigants would be able to sue an opposing party and force them to stipulate to essential elements of the claim, while hiding the only evidence that may establish those essential elements under a claim of

privilege. While that may be a workable solution in some other case, it is not here where we are dealing with a meritless counterclaim and apparent fake damages.

Stevens does not challenge the Court of Appeals decision on the issues of proximately caused harm as an essential element of the tort of abuse of process or the implied waiver of any privileged materials contained in the subject attorney fee spreadsheets. This is relevant to denial of Stevens' Petition because the waiver renders bifurcation moot.

The attorney/client privilege is waived when: (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. *Pappas v. Holloway*, 114 Wn.2d 198, 207, 787 P.2d 30 (1990) (citation omitted). Importantly, waiver is decided on a case-by-case basis. *Steel v. Olympia Early Learning Ctr.*, 195 Wn.App. 811, 823-24, 381 P.3d 111 (2016) (holding legal precedent does not expressly limit application of the implied waiver doctrine to legal malpractice claims and that implied waiver should be considered on a

case-by-case basis.)[5]

Once a privilege is waived it cannot be regained and there would be no reason for a bifurcation[6]. S*tate v. Smith*, 84 Wn. App. 813, 929 P.2d 1191 (1997) (holding privilege, once waived, cannot be regained); *In re G-I Holdings, Inc.*, 218 F.R.D. 428 (D.N.J. 2003) (denying motion to bifurcate discovery or trial where debtor impliedly waived attorney-client privilege).

Here, Stevens committed an affirmative act and put protected information at issue by asserting his only claimed damages are his attorney fees and costs. Notably, he was aware of the risk that his counterclaims might require the discovery of privileged information and chose to proceed irrespective of that risk. He appears to have mistakenly assumed the disclosure of privileged information would be one-way and to his advantage.

Stevens cannot counterclaim against Baute for abuse of process and at the same time conceal from Baute innocuous billing records that

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[5] *See also Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981) (holding defendant waived attorney-client privilege in partial stipulation, thereby allowing discovery of privileged document); *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn. App. 576, 196 P.3d 735 (2008) (holding school district waived attorney-client privilege attached to letters with its counsel and further holding trial court did not abuse its discretion by admitting letters into evidence).

[6] See also 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2389(4) at 860-61 (McNaughton rev. 1961) (stating: "A waiver . . . takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only.").

have a direct bearing on his counterclaims simply because the attorney/client privilege or the work product doctrine protects those records. To allow him to do so would enable him to use as a sword the protection the Legislature awarded him as a shield. *Pappas*, 114 Wn.2d at 208. As the discovery master correctly observed, it would also deny Baute the right to a fair trial. These are all factors considered by the trial court in finding the waiver and rejecting bifurcation. The fact that Stevens has not challenged the Court of Appeals decision affirming the waiver finding, renders bifurcation moot.

Stevens argument that counsel will have to withdraw is a red herring and barely requires a response. Stevens failed to inform the court that he did not list his counsel as witnesses for trial and he affirmatively stated in response to discovery that he will not be calling them to testify. Regardless, even if BFOA were to call Stevens' counsel to testify at trial, the prohibition against an attorney serving as both advocate and witness at trial does not apply where the attorney will provide testimony relating to the nature and value of legal services rendered in the case. RPC 3.7(a)(2).

Stevens' Petition must be denied. He has engaged in nearly a three year campaign to delay and stall this litigation by filing meritless counterclaims and unnecessary appeals. Stevens' sole purpose in pursuing this appeal is to overturn a reasoned, discretionary decision of the trial

court, and affirmance of that decision by the Court of Appeals, with which he disagrees and thereby delay resolution of this case- an illicit purpose for an appeal. Stevens brings this appeal despite ample, unambiguous case law foreclosing his arguments. He wastes the time of this Court and the parties on meritless arguments.

The abuse of process counterclaim is itself meritless, filed purely as a stalling tactic by Stevens, who hoped its pendency would enable him to escape the consequences of the material losses that he sustained below at the trial court level, in which nearly all of his counterclaims have been dismissed by summary judgment, or voluntarily dismissed under CR 41 with a summary judgment motion pending.

The only party that has abused the system here is Stevens, not any of his neighbors. Baute is merely one of nineteen plaintiffs, but for tactical reasons Stevens finds it convenient to attack Baute to divert attention from the fact that all of the plaintiff neighbors are unified in protecting the privacy and seclusion of Bellevue Farm. All of the BFOA Respondents jointly seek denial of this Petition to bring years of stalling by Stevens to a graceful and definitive end, this year.

Stevens omits entirely from his Petition that he dismissed all traditional economic loss from his counterclaims years ago (CP117) and when pressed to explain what remaining damages he had left, if any, the

only thing he could conjure up was "attorney fees damages." Since then he has been on a dilatory campaign to hide the evidence of those "damages." This is, of course, the reason why all three tribunals, the discovery master, the trial court and the Court of Appeals found that those "damages" are discoverable as the only evidence of an essential element of abuse of process. Stevens chose to voluntarily open that door in order to gain what he hoped would be tactical advantage of stalling the resolution of this case. Stevens did not challenge the essential element and waiver decisions by the Court of Appeals. It is clear that his real motive for filing the current Petition, on an issue that is rendered moot by the decisions on the other two issues, is that he seeks to delay the trial date for another four to five months while this Petition is pending.

Even if bifurcation is not rendered moot, the Court of Appeals correctly ruled that the trial court did not abuse its discretion in rejecting bifurcation. In addition to the reasons stated above, bifurcation is completely unnecessary and would be a complete waste of the trial court's and the plaintiffs' time and costs. There is no real privileged information at stake here. The discovery master noted that the bulk of the time entries are innocuous. At the inception of this dispute BFOA proposed that Stevens provide simple innocuous task descriptions which he refused and instead purposefully included mental impressions in the spreadsheets.

Had Stevens acted reasonably and provided the innocuous time sheets the last three years of motions and appeals would have been avoided.

Instead Stevens furthered his dilatory campaign to delay and stall. Despite that campaign, Baute has already had multiple summary judgment motions and motions in limine on Counterclaim 13 granted by the trial court, thereby reducing the scope of Stevens alleged damages by over half to less than $100,000. Nowhere does Stevens identify or even hint at what "irregular abusive filing" was made by Baute which would cause Stevens to have to reveal sensitive privileged information. That is because abuse of process cases are based entirely on the "irregular abusive filing," that causes real damages to the claimant. For example, a wrongfully filed lis pendens, filed not to win a lawsuit, but instead to block a profitable sale of real estate. Stevens does not identify any "irregular act" by Baute because there is none, and Stevens has been hiding his "damages" for three years because he has no damages at all.

Finally, Stevens sidesteps the fact that when a litigant seeks only fees as damages, he or she normally volunteers to produce the evidence quickly to support the damages. Here, Stevens chose to do the opposite, hiding even the most basic non-privileged time entries for years, while arguing that all discovery should be stayed or blocked. Even more absurd, Stevens argues that mere "bifurcation" or delay will solve the waiver

dilemma that he himself created, when, in fact, delay solves nothing because ultimately Stevens has to prove causation of the fee damages linked to "irregular abusive filings." It should be done efficiently in a single consolidated trial. The reason Stevens has engaged in such tactical sophistry and gamesmanship is simple: his goal is to stall, for as long as possible.

VI. CONCLUSION

The bottom line here is Stevens failed in his Petition to establish that there is a significant public interest at stake. The Petition should be denied because bifurcation would be a costly and duplicative drain on the Court's and the parties' resources. Bifurcation is simply another tactic Stevens hopes to employ to avoid producing actual evidence to support his meritless counterclaim.

If Stevens spent half as much time preparing for trial as he does in seeking appellate review of adverse trial court and appellate decisions, then the parties would be that much closer to resolving the few issues that remain in this case. He instead diverts precious time and resources away from that endeavor. More to the point, he fails to present sufficient argument or authority to warrant revisiting the Court of Appeals affirmance of the trial court's discretionary discovery order.

DATED this 2nd day of June, 2017.

Respectfully submitted,

/s/ William W. Simmons

William W. Simmons, WSBA #35604
LEWIS BRISBOIS BISGAARD & SMITH LLP
1111 Third Avenue, Suite 2700
Seattle, Washington 98101
(206) 436-2020
Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on June 2, 2017, she caused a true and correct copy of the foregoing **Respondents' Answer to Appellant's Petition for Review** to be served on the parties below via email per agreement of parties.

Dianne K. Conway
Gordon Thomas Honeywell
dconway@gth-law.com; cscheall@gth-law.com
Counsel for Defendants/Counter Plaintiff Chad Stevens

Jason Amala
Pfau Cochran Vertitis Amala, PLLC
Jason@pcvalaw.com;bdavis@pcvalaw.com;
vnappo@pcvalaw.com
alina@pcvalaw.com; ssahlstrom@pcvalaw.com
Counsel for Defendants/Counter Plaintiff Stevens

Bradley Westphal
bdw@leesmart.com
Counsel for Defendant/Counter Plaintiff Stevens

Rhys Farren
Davis Wright Tremaine, LLP
rhysfarren@dwt.com;
susanbright@dwt.com; ericmarsh@dwt.com
Counsel for Plaintiff, Hoopoe, LLC

Christopher I. Brain/Chase S. Alvord
Tousley Brain Stephens, PLLC
cbrain@tousley.com;
calvord@tousley.com; jmrozek@tousley.com
Counsel for Plaintiffs and Associated Counsel for Plaintiffs/Counterdefendants

Mark Baute, *pro se*
mbaute@bautelaw.com; JDIEP@bautelaw.com

Original e-filed with:

Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 2nd day of June, 2017 at Seattle, Washington.

/s/ Silvia Webb
Silvia Webb