No. 73794-5-I

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

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

Respondents,

v.

CHAD STEVENS, *et al.*,

Appellants.

BRIEF OF RESPONDENTS
(EXCEPT RESPONDENT HOOPOE, LLC)

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I. INTRODUCTION

Except for its entertaining blend of compositional legerdemain and historical revisionism, appellant Chad Stevens' opening brief is unremarkable and offers no plausible argument to justify reversing the trial court's *discretionary* discovery order. The Court should disregard Stevens' ill-conceived attempt to distort the historical record to recast certain events or contentions in a more favorable light. As Len Wein[1] once said, "[t]here's something inherently dishonest in trying to go back and mess with the past."

The Court should not revisit the trial court's *discretionary* discovery order. It should instead affirm the trial court in all respects and award attorney fees and costs on appeal to BFOA.[2]

II. COUNTERSTATEMENT OF THE ISSUES

BFOA acknowledges Stevens' assignments of error, but believes the issues associated with those errors are more appropriately formulated as follows:

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[1] Len Wein is an American comic book writer and editor best known for co-creating DC Comics' *Swamp Thing* and Marvel Comics' *Wolverine*. www.imdb.com

[2] The nineteen respondent homeowners and the respondent BFOA will be referred to collectively as "BFOA" for ease of reading.

1. Did the trial court appropriately exercise its discretion when it determined the jury should decide an essential element of a homeowner's tort-based counterclaims?

2. Did the trial court appropriately exercise its discretion when it determined a homeowner impliedly waived the attorney/client privilege and the work product protections by placing his attorney fees and costs at issue as an essential element of his tort-based counterclaims?

3. Did the trial court appropriately exercise its discretion when it declined to stay discovery into a homeowner's counterclaims and to bifurcate them from the other claims the parties were already litigating because the homeowner had not requested that relief and to do so would be a costly and duplicative drain on the resources of the judicial system and the parties?

III. COUNTERSTATEMENT OF THE CASE

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. Br. of Appellant at 1, 4. 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.*; *see also,* Br. of Appellant at 19. Rather, it began when BFOA sued Stevens for violating *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 homeowner association's Board ("Board") 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.

Stevens' refrain that the trial court revoked the *pro hac vice* status of respondent homeowner and attorney Mark Baute for misconduct plays like a broken record. Br. of Appellant at 5. Both the discovery master and the trial court have put this issue to bed.

So should Stevens, especially since Baute has not acted as counsel of record in this case for more than three years.

Stevens' assertion that the trial court was "surprised" he did not amend his counterclaims sooner is both misleading and self-serving. Br. of Appellant at 5.

Stevens selectively quotes from two letter rulings issued by the discovery master on June 19, 2014 and March 30, 2015, respectively. Br. of Appellant at 6.[3] Unsurprisingly, he 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 his counterclaims; (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 similarly abbreviates his discussion of the discovery master's April 27, 2015 report and order resolving BFOA's motion

[3] Stevens refers the Court to CP 236-37 for the discovery master's June 19th ruling. Br. of Appellant at 6 n.8. But the statement to which Stevens refers does not appear at CP 236-37. It appears instead at CP 124.

for reconsideration and his motion for protective order, which abrogated the March 30th ruling he recites. Br. of Appellant at 10. The discovery master recommended the trial court order unredacted disclosure of all attorney billings related to Counterclaims 12 and 13 because Stevens' only claimed damages with respect to those counterclaims are his attorney fees and costs. CP 1291-97.[4] 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.

Stevens then incorrectly states the trial court denied his

[4] As the discovery master observed:

> [Stevens] cannot establish all required elements of [his] two causes of action at trial without proving at least the fact of damage. The requested billing information is necessary so that [BFOA] can determine whether [Stevens'] claimed damages, *i.e.,* his costs and attorney fees, are in fact causally related to the counterclaims . . . . redacted billings would not give a true picture of the fees claimed. [Stevens] cannot be permitted to present to the jury evidence of attorney billings if [BFOA is] denied the right to examine those billings in discovery.

CP 1291-92.

motion for protective order, including his request to stay/bifurcate Counterclaims 12 and 13. Br. of Appellant at 11. In reality, the trial court denied his motion for a protective order. It did not rule on a motion to stay/bifurcate because there was no such motion pending. Regardless, the trial court recognized Stevens' recurring refrain as a stalling technique it was not inclined to entertain. RP (6/5/15) 60-61.

Stevens repeats his contention that his counsel will have to withdraw if the Court permits the ordered discovery to proceed because his counsel will be a fact witness not only as to the amount of fees and costs he incurred, but also as to BFOA's alleged misconduct. Br. of Appellant at 12. But Stevens did not list his counsel as witnesses and has stated that he will not be calling them to testify. Ans. to Mot. Dis. Rev., App. 85. Regardless, BFOA devised a simple solution to address the problem of which Stevens complains by propounding CR 31 interrogatories to his counsel. Mot. Dis. Rev., Amala decl., Ex. 14. The information BFOA needs to challenge Stevens' claimed damages is easily obtainable if Stevens' counsel complies with the trial court's order and responds to the outstanding interrogatories. *Id.* Their trial testimony will therefore not be necessary. *Id.*

Stevens' most egregious mischaracterizations of the record occur when he references the counterclaim he levied against the Board, which the parties refer to as Counterclaim 12. Stevens maintains he filed the counterclaim against the Board based on its "violations of its duties under RCW 64.38" and its "violations of RCW 64.38," suggesting he alleges only a statutory violation that permits post-trial fee-shifting rather than attorney fees as damages. *See, e.g.,* Br. of Appellant at 1, 5, 14. Not so. The gravamen of Counterclaim 12 shifted dramatically between 2013 and 2015, morphing from a technical violation of the statute to a tort.[5] CP 209-11.

By July 2013, Stevens had amended his counterclaims three times. CP 686-701. Counterclaim 12, as it then-existed, succinctly stated the Board failed to comply with the requirements of RCW 64.38. CP 700. Stevens asked the trial court to award attorney fees and costs as generally allowed by law. CP 700. But when Stevens moved the following year to amend his counterclaims a fifth time, he unambiguously added a tort-based breach of fiduciary

[5] Stevens employs a very clever subterfuge to mislead the Court about Counterclaim 12. His opening brief replicates his motion for discretionary review nearly word-for-word, with a critical exception. Each time Stevens refers to Counterclaim 12 in his brief, he portrays it as a pure technical violation of RCW 64.38. *See, e.g.,* Br. of Appellant at 1, 5, 14. But in his motion, he repeatedly described Counterclaim 12 as a claim for "breach of fiduciary duty" under RCW 64.38. *See, e.g.,* Mot. at 1-3.

component to Counterclaim 12. CP 209-211. Although he asserted in his fifth amended counterclaims that the Board failed to comply with RCW 64.38, he also broadly declared that the Board acted in bad faith and contrary to the CC&Rs, that it breached its fiduciary duties, and that it failed to use ordinary care and prudence. CP 209-211; RP (8/5/15) 61-64. He also expanded his request for relief, seeking compensation for the attorney fees and costs incurred as a consequence of both the Board's alleged fiduciary breach and its statutory violation. CP 216. Recognizing the fundamental shift in Counterclaim 12, the discovery master and the trial court determined the jury should decide Stevens' damages as an essential element of his tort-based counterclaim.

Finally, Stevens again overlooks an important point. The order for which he seeks review is a *discretionary discovery order*.

IV. ARGUMENT

A. Standards of Review

Stevens conspicuously avoids mention of the applicable standard of review. This Court reviews 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). *See also, 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).

Here, the trial court reasonably exercised its discretion to

control the litigation before it and issued an appropriate order under the circumstances. The Court should affirm rather than reverse.

B. The Court Should Affirm Because The Challenged Discovery Order Represents A Proper Exercise Of The Trial Court's Discretion

Stevens argues the trial court erred when it determined his attorney fees and costs are damages to be decided by the jury rather than costs to be decided by the court. Br. of Appellant at 13. He contends the trial court exacerbated its error by ordering him to produce privileged information rather than staying/bifurcating Counterclaims 12 and 13 until the parties resolve the other claims and counterclaims. *Id.* at 13. Stevens offers no rational basis to revisit the trial court's discretionary ruling. This Court should affirm.

1. The trial court did not abuse its discretion when it determined the jury should decide Stevens' damages, which are an essential element of his tort-based counterclaims

Stevens first claims the trial court erred when it determined the jury should decide his attorney fees and costs because he alleges just a technical violation of RCW 64.38.05 and his attorney fees are not an element of his abuse of process claim. Mot. at 13. He misconstrues the foundation of his counterclaims. Counterclaims 12 and 13 are torts, which require Stevens to prove

duty, breach, causation, *and damages*.[6] *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). It is a basic principle of tort law that, if any of these four elements are not proved, there can be no liability. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 467-68, 656 P.2d 483 (1983).

One of the more fundamental flaws in Stevens' analysis is his vast overstatement that the trial court rather than the jury determines whether attorney fees and costs are appropriate if he prevails on Counterclaim 12. Br. of Appellant at 14. He is correct that RCW 64.38.050[7] contains a fee-shifting provision that entitles the prevailing party to attorney fees and costs. But he is wrong to suggest that his claim against the Board is not a tort. Among the various allegations in Counterclaim 12, he contends the Board acted in bad faith and failed to use ordinary care and prudence in performing its functions. CP 209. He also alleges the Board breached the fiduciary duty it owed him. *Id.* Despite his wishful

[6] Assuming, *arguendo*, that the current iteration of Counterclaim 12 alleges just a statutory violation, the fact remains that Counterclaim 13 alleges a tort-based claim against Baute for abuse of process.

[7] RCW 64.38.050 states: "Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party."

thinking, he alleges tort-based misconduct.

RCW 64.38.025(1) establishes the standard of care for the board of directors of a homeowners' association:

> the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

Chapter 24.03 RCW is the nonprofit corporation statute. A director of a nonprofit corporation has a duty to act "in good faith, in a manner [believed to be] in the best interests of the corporation, and with such care . . . as an ordinarily prudent person[.]" RCW 24.03.127. While courts and litigants may sometimes refer to this statutory duty as a "fiduciary" duty, it is not a fiduciary duty in the literal, common law sense. The duty is instead premised upon a lesser standard of care; *inter alia*, an ordinary person or negligence standard. *Alexander v. Sanford*, 181 Wn. App. 135, 170-71, 325 P.3d 341 (2014). Where the Board owes the homeowners the obligation to act in good faith and with the care of an ordinarily prudent person, it can be liable to them for its *negligent* actions. *See Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85, 92, 332 P.3d 1133 (2014). Stevens' breach of fiduciary duty claim, no matter how labeled, constitutes a tort that requires him to prove proximately caused harm to prevail. *See, e.g., Miller v. U.S.*

Bank of Wash., 72 Wn. App. 416, 426, 865 P.2d 536 (1994) (explaining a plaintiff claiming a breach of fiduciary duty must prove, among other elements, damage resulting from the breach and proximately caused injury).

Another major flaw in Stevens' argument is his blunt statement that the elements for an abuse of process claim do not include proximately caused harm. Br. of Appellant at 14, 19. His position borders on the frivolous. To prove abuse of process, Stevens must prove that Baute caused him harm by misusing the legal process. *See, e.g., Mark v. Williams*, 45 Wn. App. 182, 191, 724 P.2d 428 (1986). Critically, Washington courts impose liability only for "*harm caused* by the abuse of process." *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 806, 699 P.2d 217 (1985) (noting Washington adopted the RESTATEMENT (SECOND) OF TORTS § 682 (1977) definition of "abuse of process," which imposes liability only for "*harm* caused by the abuse of process.") (emphasis added).

Stevens simply elides the critical distinction between fees that are recoverable as costs and fees that are recoverable as damages.[8] *See Jacob's Meadow Owners Ass'n v. Plateau 44 II,*

[8] Stevens' reliance on *Hough v. Stockbridge*, 152 Wn. App. 328, 216

LLC, 139 Wn. App. 743, 757-62, 162 P.3d 1153 (2007). Courts routinely award attorney fees as damages in analogous circumstances, when attorney fees are a fair measure of the harm impermissibly caused by the defendant. For example, in an action against a union for breach of the duty of fair representation, an employee who proves that his union impermissibly failed to pursue a grievance on his behalf may recover compensatory damages, *see Vaca v. Sipes*, 386 U.S. 171, 195-96, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), such as the attorney fees he expended pursuing his employer for breach of contract, *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275-76 (9th Cir. 1983). In *Dutrisac*, the Ninth Circuit rejected an argument that awarding the employee attorney fees as damages for breach of a union's duty of fair representation violated the American rule on attorney fees because there was no statutory or contractual provision authorizing the award. 749 F.2d at 1275-76. Recognizing that "an exception to the American rule cannot be justified solely on the ground that a losing defendant's wrongful conduct forced the plaintiff to resort to litigation," that court nevertheless upheld the fee award because the litigation expense

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P.3d 1077 (2009) to suggest his attorney fees are merely costs and thus not discoverable is unavailing because *Hough* distinguishes between attorney fees claimed as damages and attorney fees claimed as costs.

incurred in such fair representation cases "is not merely a result of the harm that [the union] did . . .; it is the harm itself." *Id.* at 1275. The Ninth Circuit reaffirmed that principle several years later, emphasizing that "the traditional American rule that attorney fees are not ordinarily recoverable" does not "affect[] those cases in which attorney fees are not awarded to the successful litigant in the case at hand, but rather are the subject of the law suit itself." *Zuniga v. United Can Co.*, 812 F.2d 443, 455 (9th Cir. 1987) (citing First, Fourth, and Sixth Circuit cases elaborating the same rule).

A Washington statutory fee provision further illustrates the sorts of situations in which attorney fees are recoverable as damages. Washington law codifies the common law rule that the victim of malicious prosecution can recover the reasonable costs, including attorney fees, incurred in defending against the false accusations. *See* RCW 4.24.350; *see also,* RESTATEMENT (SECOND) OF TORTS § 671 (b) (1977).

Stevens' attorney fees and costs are an essential element of his tort-based counterclaims and constitute damages rather than costs he must prove to the trier of fact. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 103, 285 P.3d 70 (2012) (holding attorney fees must be proved to the trier of

fact when they constitute an element of tort damages). BFOA is thus entitled to test the validity of Stevens' attorney fees and costs by examining whether they were proximately caused by BFOA or Baute's misconduct and whether those fees are overstated, duplicated, unrelated to his counterclaims, or subject to Washington's litigation privilege. *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-46, 771 P.2d 711, 780 P.2d 260 (1989) (holding a party has a constitutional right to a jury determination of the amount of damages to which the plaintiff is entitled). *See also, James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (noting the jury has the ultimate power under the constitution to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact). As the trial court correctly concluded, the determination of the amount of damages to which Stevens is entitled is within the jury's province. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

2. The trial court did not abuse its discretion by compelling Stevens to produce privileged information because he waived the applicable privileges when he placed his fees at issue

Stevens next argues the trial court erred by compelling him to produce privileged information where he did not waive the attorney/client privilege or the protection of the work product

doctrine by asserting Counterclaims 12 and 13. Br. of Appellant at 20-22. According to Stevens, the implied waiver of privilege doctrine is limited to legal malpractice cases under *Dana v. Piper*, 173 Wn. App. 761, 295 P.3d 305 (2013). He is mistaken. Even the *Dana* court recognized the attorney/client privilege and work/product protections can be waived. 173 Wn. App. at 770 (citing *Dietz v. John Doe*, 131 Wn.2d 835, 850, 935 P.2d 611 (1997)). The trial court did not abuse its discretion by compelling Stevens to produce his billing records where he impliedly waived any applicable privilege by placing his fees and costs at issue.

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).

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. Br. of Appellant at 6. He appears to have mistakenly assumed the disclosure of privileged information would be one-way and to his advantage. Stevens cannot counterclaim against BFOA for abuse of process and breach of fiduciary duty and at the same time conceal from BFOA innocuous billing records that 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 BFOA the right to a fair trial.

The parade of horribles that Stevens trots out to support his request for a reversal is a figment of his overactive imagination. Br. of Appellant at 22. First, the discovery master has already confirmed that much of the discovery BFOA seeks from Stevens is innocuous. CP 1382. For example, the redacted billings the trial court ordered in paragraph 1 of its August 5th order contain date and time entries *without task descriptions*. CP 683. Nothing in the circumstances of this case suggests that requiring Stevens to

disclose the amount, form, and date of payments of his legal fees would in any way convey the substance of confidential professional communications with his counsel. *In re Osterhoudt*, 722 F.2d 591, 594 (9th Cir. 1983). Mundane information of this sort is not protected by the attorney/client privilege or the work product doctrine. *See, e.g., In re Special Inquiry Judge 1987*, 52 Wn. App. 707, 711, 763 P.2d 1232 (1988); *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 532, 688 P.2d 506 (1984). The information BFOA seeks is discoverable and critical to its defenses. CP 1413-18, 1419-22. BFOA is entitled to evaluate and disprove the validity of Stevens' claimed fees by showing they were not proximately caused by its misconduct and by showing they are overstated, duplicative, or unrelated to the issue. It cannot do so without access to Stevens' routine billing records.

Second, Stevens' counsel will not have to withdraw. Stevens did not list his counsel as witnesses and has stated that he will not be calling them to testify. Ans. to Mot. Dis. Rev., App. 85. Regardless, BFOA devised a simple solution to address the problem of which Stevens complains by propounding CR 31 interrogatories to his counsel. Mot. Dis. Rev., Amala decl., Ex. 14. The information BFOA needs to challenge Stevens' claimed

damages is easily obtainable if Stevens' counsel complies with the trial court's order and responds to the outstanding interrogatories. *Id.* 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). BFOA would question Stevens' counsel on only those issues to assist its experts in determining the reasonableness of Stevens' claimed damages.

3. The trial court did not abuse its discretion by refusing to stay/bifurcate

Stevens' final argument is that the trial court erred by refusing to stay discovery into Counterclaims 12 and 13 and to bifurcate them from the claims the parties were already litigating because it failed to protect his legal rights. Br. of Appellant at 23-25. The trial court did not abuse its discretion by refusing to stay/bifurcate consideration of Stevens' counterclaims because it properly balanced the parties' legal rights.

To clarify the procedural posture of the case below, the trial court did not deny a motion to stay/bifurcate on August 5th as Stevens claims. Br. of Appellant at 23. Although the court denied Stevens' motion for a protective order, it did not decide a motion to

stay/bifurcate because no such motion was pending. CP 671-75.

More to the point, bifurcation would be a costly and duplicative drain on the Court and the parties' resources. Bifurcation is simply another tactic Stevens hopes to employ to avoid producing actual evidence to support his frivolous counterclaims. Trial should proceed as scheduled in December 2016.

C. The Court Should Not Award Stevens Attorney Fees And Costs On Appeal Even If He Prevails

Under RAP 18.1(a), a party can recover attorney fees and costs on appeal if applicable law grants the right to such recovery and the party devotes a section of the opening brief to the request. RAP 18.1(a), (b). Here, Stevens did not comply with RAP 18.1 because he failed to devote a section of his opening brief to attorney fees. He is therefore not entitled to attorney fees and costs from this Court even if he prevails on appeal.

D. The Court Should Award BFOA Attorney Fees And Costs On Appeal

This Court may award attorney fees on appeal if granted by applicable law. RAP 18.1(a). Under the American Rule on attorney fees, the parties bear their own legal expenses unless a statute, contract, or recognized equitable exception to that rule authorizes

the recovery of fees. *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941). BFOA is entitled to its fees on appeal once it prevails insofar as it asserts grounds upon which fees may be awarded.

RCW 64.38.050[9] permits the Court to award attorney fees to the prevailing party. It does not limit an award of fees to aggrieved homeowners. The rule permits a homeowners' association, which is funded by the community as a whole, to recoup expenses incurred in defending against non-prevailing homeowners. *Casey v. Sudden Valley Cmty. Ass'n*, 182 Wn. App. 315, 333 n.16, 329 P.3d 919 (2014) (awarding attorney fees to homeowner's association as the prevailing party on appeal). Where BFOA successfully defends against Stevens' appeal, the Court should award it the reasonable attorney fees and costs it incurs in mounting that defense.

RAP 18.9(a)[10] authorizes the Court to award terms and compensatory damages for a frivolous appeal. *See also, In re*

[9] RCW 64.38.050 states:

> Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.

[10] RAP 18.9(a) permits the Court to impose terms or compensatory damages on a party or counsel who "uses the rules for the purpose of delay, files a frivolous appeal, or fails to comply" with the rules.

Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114 (1983) (noting an appeal may be so devoid of merit as to warrant the imposition of sanctions and an award of attorney fees). An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no possibility of reversal.[11] *Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187 (1980). "A lawsuit is frivolous when it cannot be supported by an[y] rational argument on the law or facts." *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687 (2000). In the instance of a frivolous appeal, an award of attorney fees under RAP 18.9(a) is appropriate. *See Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987); *Watson v. Maier*, 64 Wn. App. 889, 901, 27 P.2d 311 (1992).

In this case, there was no need for this appeal. Stevens' sole purpose in pursuing it is simply to overturn a reasoned, *discretionary* decision of the trial court 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

[11] This Court considers the following factors when evaluating whether an appeal is frivolous: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Griffin v. Draper*, 32 Wn. App. 611, 649 P.2d 123 (1982).

foreclosing his arguments. He wastes the time of this Court and the parties on meritless arguments. Even resolving all doubt in favor of Stevens, his appeal raises no debatable issues upon which reasonable minds could differ. Sanctions are appropriate.

V. CONCLUSION

If Stevens spent half as much time preparing for trial as he does in seeking appellate review of adverse trial court 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 trial court's discretionary discovery order.

This Court should affirm the trial court in all respects and award attorney fees and costs on appeal to BFOA.

DATED this 16th day of April, 2016.

Respectfully submitted,

/s/ Emmelyn Hart

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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR SAN JUAN COUNTY

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

Plaintiffs,

vs.

CHAD STEVENS, et al.,

Defendant.

No. 12-2-05184-5

ORDER ON
DISCOVERY MASTER'S REPORT AND PROPOSED ORDER REGARDING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DEFENDANT'S MOTION FOR PROTECTIVE ORDER

The Discovery Master presents this matter to the trial court as a Report and Proposed Order. This procedure is adopted because the two motions present important issues that are best resolved by the trial judge. It is anticipated that this procedure will also permit counsel to note oral argument before the trial court on whether the order should be issued.

The proposed order requires unredacted disclosure of all attorney billings related to Counterclaims 12 and 13.[1] Attorney fees and costs are defendant's only claimed damages with respect to these counterclaims. Defendant cannot establish all required elements of these two causes of action at trial without proving at least the fact of damage. The requested billing information is necessary so that plaintiffs (counterclaim defendants) can determine whether

[1] Although the trial court dismissed Counterclaim 12 pursuant to plaintiffs' anti-SLAPP motion, this ruling as well as the trial court's ruling on Counterclaim 13 are before the Court of Appeals, and it is appropriate to complete discovery on both claims.

defendant's claimed damages, i.e. his costs and attorney fees, are in fact causally related to the counterclaims. The Discovery Master has reviewed the billings and believes redacted billings would not give a true picture of the fees claimed. Defendant cannot be permitted to present to the jury evidence of attorney billings if plaintiffs are denied the right to examine those billings in discovery. Defendant has waived his attorney client privilege and work product protections by placing protected information at issue. *Pappas v. Holloway*, 114 Wn.2d 198, 207 (1990).

There are two issues presented by these motions that are more appropriately addressed by the trial judge:

1. Defendant claims that the appeals of right concerning Counterclaims 12 and 13 have stayed any discovery related to these issues, citing RAP 7.2. Plaintiffs respond that their proposed relief here is not subject to stay because it is in aid of the Discovery Master's prior rulings on attorney fee billings, and therefore falls within the stay exception described in RAP 7.2 (c). Plaintiff's proposed relief does concern the issue of attorney billing records previously addressed by the Discovery Master, but it is not clear the relief falls within the ambit of a trial court's enforcement of its decision, as those terms are used in RAP 7.2. This issue is best resolved by the trial court.

2. The Discovery Master had proposed in an earlier ruling that the parties stipulate to the fact of damage in the liability phase of trial on Counterclaims 12 and 13, while reserving the amount of damage to later determination by the court. The proposal was rejected, as is the parties' right. The trial court has previously declined to stay or bifurcate Counterclaims 12 and 13. Only the trial court can decide whether some other trial management technique should be employed to protect defendant's work product and privilege in his billing records while granting plaintiffs the discovery necessary to guarantee a fair trial.

JAP EA. 02

[PROPOSED] ORDER

This matter came before the undersigned court-appointed Discovery Master on April 22, 2015 upon Plaintiff's Motion for Reconsideration Regarding March 31, 2015 Ruling and Defendant's Motion for Protective Order. The Discovery Master reviewed the following documents:

1. Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
2. Declaration of William W. Simmons in Support of Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
3. Declaration of Mark Baute in Support of Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
4. Declaration of Patrick Maloney in Support of Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
5. Declaration of Jerry McNaul in Support of Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
6. Defendant's Opposition to Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
7. Declaration of Jason Amala in Support of Defendant's Opposition to Plaintiffs' Motion for Reconsideration Regarding Discovery Master's March 31, 2015 Letter Ruling.
8. Defendant's Motion for Protective Order.
9. Declaration of Jason Amala in Support of Defendant's Motion for Protective Order.
10. Plaintiffs' Opposition to Defendant's Motion for Protective Order.
11. Declaration of William W. Simmons in Support of Plaintiffs' Opposition to Defendant's Motion for Protective Order.
12. Declaration of Patrick Maloney in Support of Plaintiffs' Opposition to Defendant's Motion for Protective Order.
13. Declaration of Jerry McNaul in Support of Plaintiffs' Opposition to Defendant's Motion for Protective Order.

04.05A 03

Judge Sharon S. Armstrong (Ret.)
JAMS
600 University Street, Suite 1910
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14. Defendant's Reply in Support of Motion for Protective Order.

15. Declaration of Jason Amala in Support of Defendant's Reply in Support of Motion for Protective Order.

16. April 14, 2015 letter from James Clark to Jason Amala.

17. April 21, 2015 letter from Jason Amala to James Clark.

18. April 21, 2015 letter from William Simmons to Judge Armstrong.

19. April 22, 2015 letter from Jason Amala to Judge Sharon Armstrong.

The Discovery Master also heard oral argument on the motions. Based on the foregoing, the Discovery Master recommends that Plaintiffs' Motion for Reconsideration of the March 31, 2015 ruling regarding disclosure of attorney billing records and Defendant's Motion for Protective Order be GRANTED IN PART as follows:

by August 14, 2015

1. Defendant shall produce all invoices, dates, time entries and spreadsheets for attorney billings in this case for all attorneys, without task descriptions, for work performed from July 2012 through the present. The spreadsheet labeled "Attorney's Fees (Comprehensive)," submitted to the Discovery Master for *in camera* review on March 13, 2015, shall be produced in its entirety, without task descriptions. ~~shall produce by August 14, 2015.~~

by August 14, 2015

2. Defendant shall also produce in their entirety, without redaction, the two spreadsheets labeled "Attorney's Fees for Abuse of Process" and "Attorney's Fees for Breach of RCW 64.38" submitted to the Discovery Master for *in camera* review on March 13, 2015.

4 3. Plaintiffs' motion to compel production of responses to Plaintiff Mark Baute's Second Set of Interrogatories and Document Requests to Defendant Chad Stevens and Plaintiff Glen Corson's Second Set of Interrogatories and Document Requests to Defendant Chad Stevens is deferred. It is expected that plaintiffs' review of the billing records will substantially narrow their requests for production. Plaintiffs may renew their motion as appropriate.

~~4.~~ 5. The remainder of the two motions is DENIED.

~~5.~~ 6. This proposed order shall be enforced only by order of the trial court.

3. Updated information responsive to Paragraphs 1 and 2 shall be produced up until August 5, 2015, by August 21, 2015.

OR ~~6.~~ 7. If counterclaim 12 or 13 go to the jury, the court has concluded the jury will decide the appropriate amount of attorney's fees and costs.

DATED this 27th day of April, 2014.

Judge Sharon S. Armstrong (Ret.)
Discovery Master

Having reviewed the Report and Proposed Order of the Discovery Master Regarding Plaintiffs' Motion for Reconsideration and Defendant's Motion for Protective Order, the undersigned Judge of the Superior Court adopts the same.

IT IS SO ORDERED.

Dated this 5th day of August, 2015.

HONORABLE DONALD E. EATON
JUDGE OF THE SUPERIOR COURT

William Stamos
Atty for Plaintiffs/Counter defendants

Jason P. Amala
Attorney for Defendants

ORDER ON
Discovery Master's Report and Proposed Order Regarding Plaintiff's Motion for Reconsideration Defendant's Motion for Protective Order

Judge Sharon S. Armstrong (Ret.)
JAMS
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 16, 2026,, she caused a true and correct copy of the foregoing **Brief of Respondents** to be served on the parties below via email per agreement of parties.

Darrell L. Cochran	☐	via U.S. Mail
Jason P. Amala	☐	via Legal Messenger
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Original e-filed with:

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Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 16th day of April, 2016 at Seattle, Washington.

/s/ Julie J. Johnson
Julie J. Johnson