94480-6

No. 73794-5-1

SUPREME COURT OF THE STATE OF WASHINGTON

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BELLEVUE FARM OWNERS ASSOCIATION, et al., Respondents,

v.

CHAD STEVENS, Appellant.

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# PETITION FOR REVIEW

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## TABLE OF AUTHORITIES

## A. IDENTITY OF PETITIONER

Chad Stevens asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

## B. COURT OF APPEALS DECISION

Mr. Stevens seeks review of the Court of Appeals' published decision, filed on April 3, 2017, upholding the trial court's refusal to bifurcate and stay one of his claims in order to protect privileged information. A copy of the decision is in the Appendix at pages A-1 through A-19.

## C. ISSUE PRESENTED FOR REVIEW

The Court of Appeals' published decision presents an issue of enormous importance for parties who ask a trial court to stay the litigation of one claim, such as a bad faith claim, a legal malpractice claim, or an abuse of process claim, in order to protect privileged information regarding underlying claims until those claims are resolved:

1. After nearly two years of litigation between Mr. Stevens and the other parties, Mr. Stevens added an abuse of process counterclaim against one of the other parties, Mark Baute. The abuse of process claim is based on misconduct by Mr. Baute during the litigation of the original claims and counterclaims that caused Mr. Stevens to incur attorney's fees and costs. Mr. Stevens filed the abuse of process counterclaim because he needed to preserve his statute of limitations. However, at the same time he moved to add the abuse of process counterclaim, he contemporaneously

asked the trial court to stay the abuse of process of claim until the original claims and counterclaims were resolved. Mr. Stevens asked the trial court to stay the abuse of process of counterclaim because of concerns the counterclaim may result in the discovery of privileged information regarding the original claims and counterclaims and may result in his legal counsel being called as a fact witness, which would mean he would need to retain new counsel if the abuse of process claim was litigated at the same time as the other claims and counterclaims. The trial court refused the stay. The trial then ordered Mr. Stevens to produce privileged information regarding the original claims and counterclaims, including the time sheets of his attorneys, even though those claims and counterclaims are not resolved. Did the trial court err when it refused to bifurcate and stay the abuse of process claim and ordered Mr. Stevens to produce privileged information regarding the original claims and counterclaims?

## D. STATEMENT OF THE CASE

In September 2012, respondents Bellevue Farm Owner's Association and a number of its property owners (hereinafter "BFOA") sued appellant Chad Stevens (hereinafter "Mr. Stevens") regarding new restrictions that BFOA placed on the property of owners and on the common areas within the association.[1] For example, BFOA passed a "clarification" of its Covenants, Conditions, and Restrictions ("CC&Rs") that stated owners could not allow renters to use some of the common areas without

[1] Appendix A-2-3; CP 195-204; CP 209-216.

BFOA's permission.[2] When Mr. Stevens voted against the "clarification," BFOA sued him and asked the trial court to declare the "clarification" was lawful.[3]

Mr. Stevens filed counterclaims against BFOA that mostly mirrored the claims of BFOA and asked the trial court to declare the new property restrictions were unlawful.[4] For example, Mr. Stevens alleged the "clarification" regarding renter use of certain common areas should be declared unlawful because the CC&Rs allowed such use, renters had been using those common areas for many years.[5]

One of the other property owners who joined BFOA's lawsuit against Mr. Stevens is Mark Baute.[6] Mr. Baute is a California attorney who previously served on BFOA's Board of Directors.[7] Mr. Baute originally represented BFOA and the other homeowners who joined in BFOA's suit against Mr. Stevens. However, just eight months after BFOA's lawsuit was filed, the trial court revoked Mr. Baute's *pro hac vice* status for misconduct.[8]

On April 11, 2014, Mr. Stevens moved to add a counterclaim against Mr. Baute for abuse of process based on allegations of misconduct during

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[2] CP 195-204; CP 209-211.

[3] CP 209-211

[4] CP 686-702; CP 192-217.

[5] CP 690-92; CP 197-200.

[6] A-2-3.

[7] A-3.

[8] A-3-4.

the litigation regarding the original claims and counterclaims.[9] For example, Mr. Stevens alleged it was appropriate to add an abuse of process claim because "[i]t is now rather obvious that Mr. Baute engaged in motion practice and discovery misconduct that was designed to impede the litigation, harass Mr. Stevens, cause unnecessary delay, and needlessly increase Mr. Stevens' litigation costs."[10]

On July 17, 2014, Mr. Stevens filed his Fifth Amended Counterclaims, which included the new counterclaim against Mr. Baute for abuse of process and requested the attorney's fees and costs he incurred as a result of Mr. Baute's abusive conduct.[11] More specifically, Mr. Stevens alleged that "[o]ver the course of this lawsuit, Mr. Baute has engaged in motions and discovery processes designed to impede the litigation, harass Stevens, cause unnecessary delay, and/or designed to needlessly increased Stevens' litigation costs."[12]

Mr. Stevens provided examples of Mr. Baute's abusive conduct during the litigation regarding the original claims and counterclaims, including the "clarification" of the CC&Rs: drafting, signing, and filing pleadings, declarations, and discovery responses for himself and other plaintiffs that knowingly and falsely asserted that the reasons for the "clarification" were valid and that Mr. Stevens and his tenants had engaged

[9] CP 1-10.

[10] CP 9-10.

[11] CP 189-191; CP 211-217; A-4-5.

[12] CP 213; A-4-5.

in a wide range of misconduct to justify restrictions against his property interests.[13] In his request for relief, Mr. Stevens asked that he be awarded the attorney's fees and costs he incurred as a result of Mr. Baute's abusive conduct regarding the original claims and counterclaims.[14]

On the same day that Mr. Stevens moved to protect his statute of limitations by adding the counterclaim for abuse of process, he also moved the trial court to stay that counterclaim until the original claims and counterclaims were resolved.[15] Mr. Stevens requested a stay because he believed the abuse of process counterclaim might eventually require discovery of privileged information regarding the original claims and counterclaims and might require the parties' counsel to become witnesses:

> If the parties conduct discovery regarding the abuse of process ... claim[], all parties will likely have to produce information that would otherwise be privileged, such as communications between Mr. Baute, the BFOA Board of Directors, and the other plaintiffs regarding the basis for their claims and the manner in which the litigation was conducted. It is also possible that the parties' respective past and current counsel will become witnesses, as reflected by discovery that Mr. Baute's wife issued to defendant Stevens the day after he filed and served the new counterclaims.[16] ...
>
> If discovery is not stayed regarding [the abuse of process counterclaim], all parties ... will be forced to engage in extensive and expensive discovery, as reflected by Ms. Birchfield's recent discovery requests to defendant Stevens. Not only will that discovery be extremely wasteful if the Court's resolution of [the CC&R issues] would bring an end

[13] CP 213-14; A-4-5.

[14] CP 216; A-4-5.

[15] CP 11-21; A-5-6.

[16] CP 12.

> to all of the litigation, but allowing that discovery to proceed will likely result in each party having to disclose information that would otherwise be privileged. All of the parties ... will be unfairly prejudiced if they have to produce information that would otherwise be privileged regarding the CC&R issues. *See e.g. Ullerich v. Sentry Ins.*, 344 Wis.2d 708, 716, 824 N.W.2d 876, 880 (2012) ("permitting discovery relevant to the bad faith claim would risk prejudice to the insurer on the breach of contract claim because there would be disclosure of work product and attorney-client material under the bad faith discovery.").[17]

The trial court denied the motion and refused to stay the abuse of process claim.[18]

Shortly after the trial court refused to stay the abuse of process counterclaim, Mr. Baute issued discovery that asked for information regarding Mr. Stevens' attorneys and costs regarding the original claims and counterclaims.[19] However, the Special Master appointed to this case cautioned the parties that "special care must be taken to preserve attorney client privilege and attorney work product because the case has not yet been heard," urged the parties to confer on the issue, and suggested they "seek a ruling from the trial judge before discovery of time sheets proceeds."[20]

Mr. Baute then moved to compel Mr. Stevens to produce privileged information regarding the original claims and counterclaims, which have not been resolved and are still being litigated, including the detailed time

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[17] CP 20.

[18] CP 233-235; A-6.

[19] CP 123-124; A-5.

[20] CP 123-124; A-5.

sheets of his attorneys.[21] On March 30, 2015, after an *in camera* review of the time sheets that reflected work done by Mr. Stevens' counsel on the original claims and counterclaims, the Special Master denied Mr. Baute's motion to obtain the privileged information.[22] In her order, the Special Master found the information would disclose privileged information regarding the original claims and counterclaims, would invade the attorney/client privilege and work product doctrines, and would compromise the ability of Mr. Stevens' counsel to continue to represent him regarding the underlying claims and counterclaims:

> [A] review of the billings indicates that producing them would disclose both descriptions of attorney/client communications and attorney work product, i.e. strategy, areas of research, names of individuals being interviewed, etc. ...
>
> ... there is no way to reasonably redact sensitive entries and permit examination of the rest. It would be an overly burdensome and expensive task and the redacted billings would not give an accurate picture of what the attorney fees are.
>
> The Discovery Master cannot appropriately order that defense counsel produce these billing records before the liability trial without invading the attorney/client privilege and work product doctrine protections. Disclosure of the billings pre-trial would compromise defense counsel's ability to represent his client.[23]

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[21] CP 318-328; A-6-7.

[22] CP 1380-82; A-7-8.

[23] CP 1382.

To avoid that severe and irreparable prejudice, the Special Master proposed the parties stipulate "to plaintiffs' full discovery of defendant's fees and costs post trial, as is customary, if the jury finds for defendant" and "to [the trial judge's] determination of the amount of damages after trial if liability is established."[24] The Special Master noted "[t]here may be other solutions that protect both parties' interests."[25]

Despite the Special Master's order, Mr. Baute issued 70 new interrogatories and 58 requests for production. The majority asked for discovery regarding Mr. Stevens' attorney's fees and costs, including information in the time sheets the Special Master concluded were privileged.[26]

Mr. Stevens timely moved for a protective order renewing his request that the abuse of process claim and any related discovery be stayed until the original claims and counterclaims were resolved.[27] Mr. Stevens reiterated that the discovery Mr. Baute sought regarding the attorney's fees and costs Mr. Stevens incurred as a result of Mr. Baute's abusive conduct would disclose privileged information regarding the original claims and counterclaims that are still being litigated:

> [Mr. Baute's requests] also ignore the Special Master's conclusion that any of their relief requested would "compromise defense counsel's ability to present his client." Disclosing this information would severely prejudice Mr. Stevens as even the redacted information would disclose the

[24] CP 1382.

[25] CP 1382.

[26] CP 1543-1569.

[27] CP 1501-13; A-9.

> work product of his counsel regarding both his claims and his counterclaims, particularly since most of the fees and costs were incurred as a result of Mr. Baute and the Board's misconduct regarding the underlying claims. There is no way to disclose that information, even partially, without prejudicing Mr. Stevens, as the Special Master concluded after her *in camera* review of the information sought by plaintiffs.[28]

Given the Special Master previously agreed the trial court needed to protect Mr. Stevens from having to disclose privileged information regarding the underlying claims and counterclaims until those claims and counterclaims were resolved, Mr. Stevens proposed the Special Master bifurcate and stay the abuse of process claim under CR 42(b).[29]

After Mr. Stevens filed his motion for a protective order, Mr. Baute rejected the Special Master's proposed stipulated procedures and asked for reconsideration.[30] While Mr. Baute demanded that Mr. Stevens produce privileged information, he suggested the Special Master could alternatively allow Mr. Stevens to redact privileged information.[31]

Mr. Stevens opposed the motion and reiterated the irreparable prejudice he would suffer if he was compelled to produce privileged information regarding the original claims and counterclaims that remain unresolved.[32] To the extent Mr. Baute suggested Mr. Stevens could provide

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[28] CP 1623; *see also* CP 1627-28 (Mr. Stevens' counsel discussing with the trial court his proposal that any discovery regarding privileged information be stayed until the original claims and counterclaims are resolved).

[29] CP 1625-26.

[30] CP 1325-35; A-9.

[31] CP 1334.

[32] CP 1425-37

redacted information, Mr. Stevens noted redactions would not provide sufficient relief because Mr. Stevens would be limited in what evidence he provided to the jury on the abuse of process claim: "For example, Mr. Stevens might very well choose to call one or more of his attorneys to testify regarding the work that was done and the fees and costs that were incurred, which would make it impossible for those attorneys to represent Mr. Stevens in the same trial. Likewise, Mr. Stevens might want to provide the jury with unredacted copies of the time entries for the fees and costs at issue."[33]

Mr. Stevens also clearly explained how the information Mr. Baute sought regarding the attorney's fees and costs Mr. Stevens incurred as a result of Mr. Baute's abuse of process would disclose privileged information regarding the original claims and counterclaims:

> As the Special Master is aware from her *in camera* review, the vast majority of the time entries at issue reflect work that is related to those other claims. For example, the counterclaims are based in part on the misrepresentations that Mr. Baute and the BFOA Board made regarding tenant use of the waterfront. However, the parties are still litigating the "clarification" CC&R 4, which was based in part on those same misrepresentations. There is simply no way for Mr. Stevens to provide discovery on the work that has been done regarding those misrepresentations without revealing information protected by the attorney client privilege or work product doctrine, and without severely compromising his claims and defenses. Likewise, it would be impossible for Mr. Stevens to have a jury trial regarding the "clarification" of CC&R 4, while in the same jury trial present evidence and witnesses regarding the counterclaims for abuse of process and breach of fiduciary duty. While

[33] CP 1429-30.

> some of the evidence will overlap, Mr. Stevens still has the burden of proof regarding damages, which means that same trial would involve him presenting evidence and witnesses to support those damages, including privileged information.[34]

Mr. Stevens explained he had been unable to find a single case in the United States "where a litigant was forced to waive the attorney-client privilege and conduct discovery on the issue of attorney's fees and costs before a trial on the underlying claims or issues has been decided. As is the case here, to do so would force Mr. Stevens to make the improper and 'painful choice' alluded to [by federal appellate courts].[35]

The Special Master requested the trial court resolve Mr. Stevens' motion for a protective order and Mr. Baute's motion for reconsideration:

> The trial court has previously declined to stay or bifurcate [the abuse of process claim]. 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.[36]

Before the trial court could address the Special Master's request for guidance on how to proceed, Mr. Baute issued subpoenas for the depositions of Mr. Stevens' counsel, which were stayed until the trial court decided whether it would protected Mr. Stevens' privileged information.[37]

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[34] CP 1430.

[35] CP 1436.

[36] CP 672; A-9-10.

[37] RP, dated June 5, 2015, at 58-60.

On August 5, 2015, the trial court denied Mr. Stevens' motion for a protective order, including his request that the abuse of process claim be bifurcated and stayed until the original claims and counterclaims are resolved. The trial court also declined to follow the Special Master's recommendation that the trial court take steps to protect Mr. Stevens from having to disclose privileged information regarding the original claims and counterclaims until they are resolved.[38]

Instead, the trial court ordered Mr. Stevens to produce unredacted copies of his time sheets for all attorney's fees and costs he incurred as a result of Mr. Baute's abusive conduct, including time sheets that contain privileged information regarding the original claims and counterclaims.[39] The trial court also ordered Mr. Stevens to produce copies of all other attorney's fees and costs he has incurred, without task descriptions.[40] The order reserved compelling Mr. Stevens to answer the other 70 interrogatories and 58 requests for production until Mr. Baute reviewed the unredacted time sheets and privileged information and decides whether he wants additional discovery of more privileged information.[41]

At the hearing before the trial court, Mr. Stevens again pointed out the order means his counsel for the past three years will have to withdraw because he will be a fact witness not only as to the amount of attorney's fees

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[38] CP 671-675; A-11.

[39] CP 674.

[40] CP 674.

[41] *Id.*

and costs, but the underlying misconduct by Mr. Baute that caused those fees and costs to be incurred.[42] Mr. Stevens also pointed out the statute of limitations on the abuse of process claim had also likely run because more than three years had elapsed regarding some of the misconduct.[43] The trial court acknowledged this severe prejudice to Mr. Stevens, but indicated the case needed to move forward and Mr. Stevens would have to live with what the trial court deemed were the "consequences" of his decision to protect his statute of limitations by filing the abuse of process counterclaim.[44]

The trial court made no effort to remedy the severe, irreparable prejudice Mr. Stevens will suffer from having to retain new counsel and from being compelled to disclose privileged information regarding the original claims and counterclaims, particularly where those original claims and counterclaims remain unresolved.[45] The trial court failed to address those issues even though the irreparable prejudice Mr. Stevens will suffer was repeatedly acknowledged by the Special Master and by the trial court in prior hearings, which the trial court described as "serious stuff" and "major damage":

> ... The problem we've got here is that if I'm wrong, [the Special Master] and I are wrong about this, you know, we've done some pretty major damage here. ...

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[42] RP, dated August 5, 2012, at 7-12, 45-47.

[43] *Id.* at 45-47.

[44] *Id.* at 45-46.

[45] CP 671-675.

> ... And if I order disclosure of these attorney billing records and then find out two weeks after they've been turned over that [the Special Master] and I were wrong, we've done some harm.
>
> ... this is serious stuff when you start getting attorney/client-privilege information and then it turns out you shouldn't have had it, or at least at this stage you shouldn't have had it, and then maybe you wouldn't be entitled to it because you may not even prevail on your defense of the claims on the merits without the damages issue. ...[46]

Mr. Stevens filed a motion for an emergency stay and discretionary review of the August 5, 2015, order.[47] The Court of Appeals accepted review and entered a stay that prevents the trial court from compelling Mr. Stevens to produce any privileged information until appellate review is terminated.[48]

On April 3, 2017, the Court of Appeals affirmed the trial court's refusal to bifurcate and stay the abuse of process claim.[49] The court concluded Mr. Stevens waived any privilege regarding the attorney's fees and costs he incurred as a result of Mr. Baute's abusive conduct, but did not address the trial court's failure to protect Mr. Stevens from disclosing privileged information regarding the original claims and counterclaims until those claims are resolved.[50] The court also did not address the fact that without bifurcation and a stay of the abuse of process counterclaim, Mr.

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[46] RP, dated June 5, 2015, at 58, 62-64.

[47] A-11.

[48] A-11.

[49] A-1-19.

[50] A-16-19.

Stevens' counsel for the past four years would have to withdraw because his counsel would be fact witnesses in the same trial as the original claims and counterclaims. Nowhere did the court acknowledge that the privileged information Mr. Stevens is being compelled to produce regarding the attorney's fees and costs he incurred as a result of Mr. Baute's abusive conduct will disclose privileged information regarding work his counsel performed while litigating the original claims and counterclaims.[51]

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Washington courts have long-recognized both the role of the abuse of process tort as a vital tool for combatting and deterring bad faith litigation conduct. Likewise, Washington courts have long recognized the sanctity of the attorney-client privilege; the incredibly prejudicial effects when it is invaded during the course of litigation; and the necessity of both courts and parties to utilize available procedures and mechanisms to mitigate any prejudice from invasion of the privilege during ongoing litigation.

Here, the Court of Appeals held that "Stevens must prove damages as an element of the claim for abuse of process and the jury must determine whether he is entitled to attorney fees and costs proximately caused by abuse of process." *Bellevue Farm Owners Ass'n v. Stevens*, No. 73794-5-L, 2017 WL 1293482, at *8 (Wash. Ct. App. Apr. 3, 2017). It further held, as a result, that "Because discovery is necessary to determine the proximate cause of his alleged harm, Stevens waived the right to assert attorney client

[51] A-18-19.

privilege and work product for attorney fees and cost billing records." *Bellevue Farm Owners Ass'n*, 2017 WL 1293482, at *9. Despite these holdings, however, the Court of Appeals granted its imprimatur to the trial court's refusal to bifurcate and stay the abuse of process claim and discovery in order to ameliorate the expressly recognized prejudice to Mr. Stevens essentially on the theory that Mr. Stevens simply had to live with the consequences of bringing an abuse of process claim. *Id.*, at *9.

The cumulative effect of the Court of Appeals' opinion, then, is to create a chilling effect on every civil litigant in the State of Washington. Any lawsuit could devolve into bad faith litigation conduct, yet every litigant faced with such conduct must face the Hobson's choice created by the Court of Appeals' opinion: suffer the irreparable prejudice of seeing privileged information spill over into the underlying litigation by bringing an abuse of process counterclaim seeking wrongfully-incurred attorney fees and costs, the primary damages caused by such conduct; or refrain from ever bringing such a claim at all, allowing bad faith litigation conduct to go unchallenged and undeterred. Accordingly, the chilling effect created by the Court of Appeals' decision presents an issue of substantial public importance under RAP 13.4(b)(4).

This Court expressly has recognized "the long-standing principle that litigants cannot be allowed to abuse the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims. . . ." *Davis v. Cox*, 183 Wn.2d 269, 292, 351 P.3d 862 (2015) . In so doing, this Court expressly recognized the tort of abuse of process as an important

remedy for "punishing or deterring frivolous or sham litigation." *Davis*, 183 Wn.2d at 292-93. And Washington courts have described abuse of process conduct in the strongest terms, characterizing it as "'a form of extortion.'" *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 699, 82 P.3d 1199 (2004) (quoting *Batten v. Abrams*, 28 Wn. App. 737, 746, 626 P.2d 984 (1981)).

Similarly, this Court has repeatedly recognized the sanctity of the attorney-client privilege and the integral role it plays in insuring a functioning, efficient legal system. The privilege is "instrumental in achieving social good because it induces clients to consult freely with lawyers and by doing so acquire expert legal advice and representation that helps them operate within the complex legal system." *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 161, 66 P.3d 1036 (2003). "Because the privilege encourages clients to communicate fully with an attorney, lawyers are able to defend clients vigorously against charges and to assure them that the law will be applied justly." *Schafer*, 149 Wn.2d at 161. "Without an effective attorney-client privilege, clients may be inhibited from revealing not only adverse facts but also favorable information that the client might mistakenly believe is damaging." *Id.* at 161-162. "Impairing the attorney-client privilege ***must be avoided*** because '[t]he attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as an advocate . . . [and] confidential

counselor in law.'" *Id.* at 162 (emphasis added) (alterations and omissions in original) (quoting Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1061 (1978)).

As a necessary corollary, Washington courts have expressly recognized the irreparable prejudice that occurs when privileged information unnecessarily is injected into litigation. As the Court of Appeals has aptly observed, "no bell can be unrung" when privileged information becomes part of a case. *Dana v. Piper*, 173 Wn. App. 761, 769, 295 P.3d 305 (2013). Accordingly, Washington courts can and should employ whatever measures are available to ameliorate the deleterious effects of disclosures of privileged information in a case. *See Dana*, 173 Wn. App. at 769, 777 n. 15 (although party had already disclosed privileged information pursuant to trial court's order, Court of Appeals would grant discretionary review and remand with instructions to preclude use of privileged information in underlying litigation).

One such mechanism is bifurcation of a claim for a separate trial under CR 42, along with a stay of related discovery. For example, as the Court of Appeals recently observed in the context of bad faith claims, "insurers often obtain bifurcation and stay orders in Washington courts by relying on cases from other jurisdictions, analogous Washington case law, and by identifying for Washington courts the problems presented when discovery and trial of the claims proceed simultaneously." *Fortson-Kemmerer v. Allstate Ins. Co.*, No. 34640-4-III, 2017 WL 1153451, at *5 (Wash. Ct. App. Mar. 28, 2017). The underlying rationale for utilizing these

mechanisms is that they provide "'significant procedural protections, including the nondisclosure of [privileged materials] until the completion of the [underling litigation],'" *Fortson-Kemmerer*, 2017 WL 1153451, at *5 (quoting *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1010 (R.I.2002)), thereby avoiding "gross[] prejudice to [the disclosing party], and, thus, an abuse of discretion." *Id.* (quoting *Garg v. State Automobile Mutual Insurance Co.*, 155 Ohio App.3d 258, 266, 800 N.E.2d 757 (2003)). Accordingly, it is reversible error for a trial court to order privileged information to be produced in a bad faith claim while the underlying claim is on-going, which is why such claims are universally stayed. *See e.g. Western National Assurance Co. v. Hecker,* 43 Wn. App. 816, n. 1 (1986); *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d. 209, 744 N.E.2d 154 (2001).

Here, the Court of Appeals' affirmance of the trial court's refusal to bifurcate the abuse of process claim and stay related discovery tremendously undermines the goals and practical effects of the tort of abuse of process and the attorney-client privilege and because requiring disclosure of privileged communications any time a party seeks wrongfully-incurred litigation fees and costs under an abuse of process claim without any attempt to mitigate the prejudicial effect of such disclosures on the underlying lawsuit would have a broad chilling effect on litigation preparation in every civil lawsuit in this state. Any civil lawsuit at any time could devolve into an abuse of process situation. Yet the Court of Appeals' decision nullifies the utility of the tort of abuse of process because parties contemplating bringing such a claim would labor under the specter that their privileged

communications can and will be injected into the underlying litigation. Such a specter undoubtedly would deter parties from bringing abuse of process claims; distort both client communications with counsel counsel's own practices in giving advice and preparing cases for trial; and fatally would undermine the goals and policies promoted in the Washington legal system by the tort, the privilege, and the case law enshrining each. Thus, because the Court of Appeals' decision potentially impacts the entire practice of civil litigation in Washington, it presents an issue of substantial public interest under RAP 14.4(b)(4) warranting review by this Court.

## F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse the trial court's refusal to bifurcate and/or stay the abuse of process claim until the other claims and counterclaims are resolved. This court should also instruct the trial court that no discovery of privileged information shall take place until the other claims and counterclaims are resolved.

Dated: May 3, 2017.

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## CERTIFICATE OF SERVICE

I, Alina Svyryda, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Pfau Cochran Vertetis Amala PLLC and that on this date I served the foregoing on all parties or their counsel of record via email, legal messenger, and/or facsimile by directing delivery addressed to:

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DATED this 3rd day of May 2017.

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4814-9488-5959, v. 7

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| BELLEVUE FARM OWNERS ASSOCIATION, A Non-profit Corporation; LAUREN BARRETT and WILLIAM BARRETT, husband and wife respectively, trustees of the Laurie Barrett Residential Trust and of the Bill Barrett Residential Trust; WEBSTER AUGUSTINE III, an individual; HOOPOE LLC, a Washington Limited Liability Company; GIGI BIRCHFIELD and MARK BAUTE, husband and wife; TIMOTHY DOHERTY and CHRISTINE DOHERTY, husband and wife; GLEN CORSON and KIM KYLO-CORSON, husband and wife; JANTANA KUPPERMANN and BARUCH KUPPERMANN, husband and wife; RODNEY SMITH and MARY MARGARET SMITH, husband and wife; MATTHEW STRAIGHT and VERONICA STRAIGHT, husband and wife; TOM TUCCI and DIANE TUCCI, husband and wife; and DANA PIGOTT, an individual,<br><br>Respondents,<br><br>v.<br><br>CHAD STEVENS and "JANE DOE" STEVENS, husband and wife,<br><br>Appellants, | ) | No. 73794-5-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION |

PETE FINDLEY and "JANE DOE" FINDLEY, husband and wife; CASCADE MOUNTAIN RENTALS LLC, a Washington limited liability company; ROBERT STEVENS, an individual; and DOES 1 to 10, Inclusive,

Defendants.

FILED: April 3, 2017

SCHINDLER, J. — To establish abuse of process, the claimant must prove (1) an ulterior purpose to accomplish an object not within the proper scope of the process, (2) an act not proper in the regular prosecution of proceedings, and (3) harm caused by the abuse of process. Chad Stevens filed a counterclaim against Mark Baute for abuse of process. Stevens alleged as damages that he incurred attorney fees and costs as a result of abuse of process. We affirm the August 5, 2015 order to produce the "Attorney's Fees for Abuse of Process" spreadsheet. We also affirm denial of the motion to bifurcate liability and damages, lift the temporary stay of the August 5, 2015 discovery order, and remand.

FACTS

The original owners of the Friday Harbor Bellevue Farm property owned the waterfront portion of the property as tenants in common. In 1991, the owners recorded a "Grant Deed of Conservation Easement." In 1994, the owners recorded a short plat to create four lots and a common waterfront. In May 1997, the Bellevue Farm Owners Association (BFOA) recorded a declaration of protective covenants, conditions, and restrictions.

In 2005, Chad Stevens purchased 10 acres of waterfront property in the Bellevue Farm plat. Mark Baute and his spouse Gigi Birchfield own waterfront property located adjacent and to the south of Stevens' property. Baute and Birchfield also co-own

waterfront property with Jantana and Baruch Kuppermann adjacent and to the north of Stevens' property.

Baute was a BFOA board member and an attorney licensed to practice in California. Baute began representing BFOA in May 2012. In August 2012, BFOA board members clarified and amended the covenants, conditions, and restrictions and adopted a revocable license agreement.

In September 2012, BFOA filed a lawsuit against Stevens alleging violation of the covenants, conditions, and restrictions. In November, the court granted the motion to admit Baute pro hac vice. Baute acted as lead attorney in the lawsuit.

Stevens asserted a number of counterclaims against BFOA, BFOA board members, and other property owners (collectively, BFOA). Stevens alleged the 2012 clarification and amendments to the covenants, conditions, and restrictions and adoption of the revocable license agreement were unlawful. In counterclaim 12, Stevens asserts BFOA did not comply with the statutory requirements that govern a homeowner association, chapter 64.38 RCW. Stevens sought declaratory and injunctive relief.

In April 2013, the court revoked pro hac vice admission of Baute. The court found, in pertinent part:

> Mr. Baute's personal interest as a party plaintiff appeared to be causing a relatively straightforward lawsuit to be increasingly characterized by unprofessional personal invective, excessive and unnecessary pleadings, and a lack of civility between himself and counsel for the defendants.
> . . . ...Mr. Baute has ignored the court's warning and again engaged in unnecessary and intentionally provocative behavior that has only increased the level of personal antagonism and rancor that infects this litigation.
> . . . .

> . . . Provocation is exactly the type of behavior the court had warned Mr. Baute to refrain from and that should no longer be tolerated.
> . . . ...the Court is convinced that Mr. Baute's conduct continues to manifest an intentional disregard for this Court's directions and a flippant disregard for the clearly adverse effect his personal feelings of animosity and disrespect for the Defendants and their attorneys have had on the manner in which this lawsuit has been conducted.[1]

Stevens filed a motion for leave to file amended counterclaims to add a counterclaim against Baute and the marital community (collectively, Baute) for abuse of process, counterclaim 13. Stevens also alleged breach of fiduciary duty and sought damages against BFOA under chapter 64.38 RCW.

The abuse of process counterclaim alleged that during the course of the litigation, Baute engaged in conduct "based upon the existence of his ulterior motives and was coercion for the purpose of obtaining collateral advantage."

> The conduct of Baute has been based upon the existence of his ulterior motives and was coercion for the purpose of obtaining collateral advantage not properly involved in the litigation process itself, and constitutes the misuse of the litigation process for purposes other than those which constitute legitimate litigation proceedings.
> . . . As a result of the conduct of Baute, Defendant/Counterplaintiff Chad Stevens has been damaged.

Stevens alleged the litigation strategy was designed to harass Stevens and "needlessly increase" litigation costs. The counterclaim alleged that despite the April 2013 court order revoking pro hac vice admission, Baute "continued and continues to provide to the plaintiffs legal advice and engaged in the unlawful practice of law for the continued purpose of harming Stevens through use of the litigation process." Over the objection of BFOA and Baute, the court granted the motion to file the amended counterclaims on May 6. BFOA filed a demand for a jury trial.

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[1] Some alterations in original, internal quotation marks omitted.

On June 13, 2014, Baute propounded interrogatories and requests for production of documents to Stevens, including a request to produce invoices for the legal fees and costs allegedly incurred for abuse of process.[2] In a June 19 letter, the special master directed the parties to "confer about how to approach this issue" and urged the parties to take steps to preserve attorney client privilege and attorney work product.[3]

In July 2014, Stevens filed a motion to stay discovery and a motion to file amended counterclaims. Stevens alleged Baute made assertions in pleadings that Baute knew were false, continued to harm Stevens through "the litigation process," and engaged in conduct designed to "harass" and "needlessly increase Stevens' litigation costs." Stevens alleged Baute was "liable for the attorney's fees and costs that

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[2] The requests for production state, in pertinent part:

**DOCUMENT REQUEST NO. 43:**

Produce copies of the fee agreement or retainer agreement for each lawyer or law firm whose fees YOU seek to recover as damages for abuse of process.

. . . .

**DOCUMENT REQUEST NO. 49:**

Produce all DOCUMENTS, and law firm invoices, which reflect in any way the legal fees and costs YOU have incurred in this lawsuit, or the lawsuit brought against YOU by Mr. Campisi, which YOU contend are recoverable as damages for abuse of process by Mark Baute.

. . . .

**DOCUMENT REQUEST NO. 54:**

Produce copies of all law firm invoices, if any, from the South BFOA v. Stevens and Findley case which you contend reflect recoverable damages for abuse of process by Mr. Baute.

[3] The letter states, in pertinent part:

[BFOA counsel] has forwarded Plaintiff [Baute]'s Second Set of Interrogatories and Second Set of Requests for Production and suggests that the Special Master direct a timely and complete response to these requests. It would be inappropriate to issue a ruling without the parties having met and conferred as required by CR 26(1). The Special Master is available for a conference call, if necessary, after counsel have held a discovery conference.

. . . When attorney fees and costs are claimed as damages, . . . special care must be taken to preserve attorney client privilege and attorney work product because the case has not yet been heard. If the case is tried to a jury, it may be appropriate that the jury determine only the fact of damage, leaving the attorneys fee calculation to the trial judge. I am not aware of cases in which a jury evaluates the amount of attorney fees during trial.

I urge counsel to confer about how to approach this issue. It may be appropriate to seek a ruling from the trial judge before discovery of time sheets proceeds.

defendant Stevens has incurred as a result of Mr. Baute's abuse of process." Stevens alleged BFOA was "liable for the attorney's fees and costs that defendant Stevens has incurred because of their breach of fiduciary duty to him." Stevens argued the court should stay discovery on the counterclaims for breach of fiduciary duty and abuse of process, counterclaim 12 and counterclaim 13.

BFOA did not object to filing the amended counterclaims. BFOA objected to the motion to stay discovery on counterclaim 12 and counterclaim 13. The court denied the motion to stay discovery on the counterclaims.

In late August, BFOA filed a motion to compel Stevens to respond to the June 13, 2014 interrogatories and requests for production. The motion states BFOA sought information that was "not privileged" on "the amount of legal fees that [Stevens] claims are linked to any alleged abuse of process by Mr. Baute." The discovery master granted the motion to compel based on the "agreement of the parties." The order states Stevens "is not at this time required to produce privileged time sheets."

Stevens filed a motion to stay the order of the special master granting the motion to compel and certification to the appellate court. The court denied the motion to stay. The court ruled the discovery master "was correct in ruling that [Stevens'] attorney's fees are discoverable because he had alleged that those fees are his damages under Counterclaims 12 and 13." The court ruled that "where attorney's fees constitute an element" of tort damages, "they must be proved to the trier of fact." But the court granted the request to certify "whether [Stevens'] alleged damages of attorney fees/costs under abuse of process and breach of fiduciary duty are discoverable, where those fees/costs are the only allegation of proximately caused harm under each claim."

On February 23, 2015, Stevens submitted supplemental responses to the interrogatories and requests for production. Stevens states he is entitled to $204,000 in attorney fees and costs as damages for abuse of process and $185,000 in attorney fees and costs as damages for breach of fiduciary duty under chapter 64.38 RCW. Stevens did not provide attorney time sheets.

BFOA filed a motion for sanctions under CR 37. BFOA argued the responses did not allow BFOA to evaluate whether the attorney fees were the proximate cause of breach of fiduciary duty or abuse of process. Baute propounded additional discovery requests asking for production of attorney fee invoices including time entries and task descriptions.[4]

The discovery master conducted an in camera review of the attorney billing records. On March 31, the special master issued a letter ruling. The discovery master denied the motion for CR 37 sanctions.

The discovery master ruled that to establish liability for breach of fiduciary duty and abuse of process, Stevens must prove the fact of damages.

> [T]o establish liability on his counterclaims, defendant must prove the fact of damage, and his only claimed damages are his attorney fees. Permitting defendant to claim the full amount of his attorney fees without allowing plaintiffs' discovery of them violates plaintiffs' right to a fair trial.

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[4] The requests for production state, in pertinent part:

**REQUEST FOR PRODUCTION NO. 28:** Produce the invoices for [your attorney]'s law firm in this case.

. . . .

**REQUEST FOR PRODUCTION NO. 34:** Produce the invoices, work[ ]sheets and documents which reflect the time entries and/or task descriptions which reflect the work done by [your attorney] that is listed in response to interrogatory number 39 for [your attorney]'s time charges for abuse of process damages.

The special master agreed BFOA was entitled to determine whether the attorney fees were proximately caused by the alleged breach and harm.

> Plaintiffs are correct that plaintiffs are entitled to test the validity of the claimed fees by examining whether they were proximately caused by plaintiff's alleged misconduct, and whether they are overstated, duplicated, or unrelated to the issue, etc.

However, based on the in camera review, the special master concluded that there "is no way to reasonably redact" attorney communications and work product and that producing the billing records would disclose information protecting the attorney client privilege and work product.

> However, a review of the billings indicates that producing them would disclose both descriptions of attorney/client communications and attorney work product, i.e. strategy, areas of research, names of individuals being interviewed, etc. Of course, many of the entries are innocuous . . . . But there is no way to reasonably redact sensitive entries and permit examination of the rest. It would be an overly burdensome and expensive task and the redacted billings would not give an accurate picture of what the attorney fees are.

Because disclosure would violate the attorney client privilege and work product, the special master concluded production of the attorney billing records before a trial on liability was not inappropriate.

> The Discovery Master cannot appropriately order that defense counsel produce these billing records before the liability trial without invading the attorney/client privilege and work product doctrine protections. Disclosure of the billings pre-trial would compromise defense counsel's ability to represent his client.

As a solution to the competing interests, the special discovery master suggested the parties stipulate to the fact of damages and to bifurcate the trial on liability and damages.

> One solution is for the parties to stipulate (1) to the fact of damage; (2) to plaintiffs' full discovery of defendant's fees and costs post trial, as is

> customary, if the jury finds for defendant; [and] (3) to [the] Judge['s] . . . determination of the amount of damages after trial if liability is established.

A commissioner of this court denied discretionary review of the question certified by the court. "In light of the discovery master's suggested solution, which has yet to be considered by the trial court, appellate review is not warranted at this time."

BFOA refused to stipulate to the fact of damage or bifurcation and filed a motion to reconsider the March 31, 2015 decision. Stevens filed a motion for a protective order.

On April 27, the discovery master filed a report and proposed order on the motion to reconsider and the motion for a protective order. The report states the "two motions present important issues that are best resolved by the trial judge."

The special master states Stevens must prove the fact of damage and the requested billing information is necessary to determine whether his attorney fees and costs are causally related to the counterclaims. But the "redacted billings would not give a true picture of the fees claimed."

> 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 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.

The proposed order states attorney fees and costs are Stevens' "only claimed damages" for violation of chapter 64.38 RCW and abuse of process and that Stevens "waived his attorney client privilege and work product protections by placing protected information at issue." The proposed order requires Stevens to produce all invoices,

dates, time entries, and spreadsheets related to his attorney billings since July 2012 but with redaction of all "task descriptions."

> 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.[5]

By contrast, the proposed order requires Stevens to produce two spreadsheets—"Attorney's Fees for Abuse of Process" and "Attorney's Fees for Breach of RCW 64.38"— "without redaction."

> 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.[6]

The special master notes that because the trial court previously declined to stay discovery on the breach of fiduciary duty and abuse of process counterclaims, the court would need to "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."

> 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.

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[5] Emphasis added, italics omitted.

[6] Emphasis added, italics omitted.

Following a hearing, the court adopted the report and proposed order and on August 5, 2015, entered the "Order on Discovery Master's Report and Proposed Order Regarding Plaintiffs' Motion for Reconsideration and Defendant's Motion for Protective Order." The court ordered Stevens to produce the attorney billing records and spreadsheets by August 21. The order also states, "If Counterclaim 12 or 13 go to the jury, the Court has concluded the jury will decide the appropriate amount of attorney's fees."

Stevens filed a motion for an emergency stay and discretionary review. We granted interlocutory discretionary review and entered a temporary stay of the August 5, 2015 order.

After we accepted review, BFOA filed a motion to strike the jury demand for the counterclaim alleging breach of fiduciary duty in violation of chapter 64.38 RCW and damages, counterclaim 12.[7] The court granted the motion.[8] Therefore, the only question on appeal is whether the trial court erred in entering the order that requires Stevens to produce the spreadsheet for "Attorney's Fees for Abuse of Process."

ANALYSIS

Abuse of Process

Stevens asserts attorney fees and costs is not an element of a cause of action for abuse of process that a jury must decide. Stevens argues Washington law requires proof of only two elements: (1) the existence of an ulterior purpose to accomplish an

[7] See RCW 64.38.050 (court may award reasonable attorney fees to prevailing party for violation of chapter 64.38 RCW).

[8] We grant Stevens' motion to allow the trial court to enter the order. See RAP 7.2.

object not with the proper scope of process and (2) an act in the use of process that is not proper in the regular litigation of the proceedings. We disagree.

In Sea-Pac Co. v. United Food & Commercial Workers Local Union 44, 103 Wn.2d 800, 699 P.2d 217 (1985), the Washington Supreme Court addressed the elements of abuse of process. The Supreme Court cites the Court of Appeals decision in Fite v. Lee, 11 Wn. App. 21, 27, 521 P.2d 964 (1974), that characterized the existence of an ulterior purpose and an improper act as the "essential elements" of abuse of process. Sea-Pac Co., 103 Wn.2d at 806. The Fite court identifies the "essential elements" of the tort of abuse of process as:

> (1) [T]he existence of an ulterior purpose—to accomplish an object not within the proper scope of the process—and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.

Fite, 11 Wn. App. at 27.

But the Washington Supreme Court also adopted the Restatement (Second) of Torts § 682 (1977) definition for abuse of process. Sea-Pac, 103 Wn.2d at 806. Restatement (Second) of Torts § 682 defines the tort of abuse of process as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

The plain and unambiguous language of the Restatement (Second) of Torts § 682 states that an essential element of the tort of abuse of process is "harm caused by the abuse of process." To establish the tort of abuse of process, a claimant must prove (1) an ulterior purpose to accomplish an object not within the proper scope of the process, (2) an act not proper in the regular prosecution of proceedings, and (3) harm

proximately caused by the abuse of process. Where the claimant seeks damages for attorney fees and costs incurred as a result of abuse of process, those damages are an element of the tort cause of action that the claimant must prove and the fact finder must determine.

Stevens relies heavily on Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009), to argue damages for attorney fees and costs are not an essential element of abuse of process. Hough does not support his argument.

Hough sued the Stockbridges for defamation and malicious prosecution. Hough, 152 Wn. App. at 334. The Stockbridges filed a counterclaim for abuse of process. Hough, 152 Wn. App. at 334. The arbitrator awarded the Stockbridges $5,000 in damages and $20,315 in attorney fees. Hough, 152 Wn. App. at 334. Hough filed a demand for trial de novo. Hough, 152 Wn. App. at 334.

The Stockbridges called their former attorneys to testify at trial. Hough, 152 Wn. App. at 335. The court instructed the jury on the essential elements of a claim for abuse of process, including an instruction based on the Restatement (Second) of Torts § 682, Jury instruction 10. Jury instruction 10 stated, " 'One who uses a legal process against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by his abuse of process.' " Hough, 152 Wn. App. at

343.[9]

The jury found Hough liable for abuse of process. Hough, 152 Wn. App. at 336. The jury awarded the Stockbridges $200,500.00 in damages. The damages the jury awarded included $30,467.08 for attorney fees and costs. Hough, 152 Wn. App. at 336. Because Hough did not improve his position in the trial de novo, the trial court awarded the Stockbridges $40,844.50 in attorney fees and costs under Mandatory Arbitration Rule 7.3. Hough, 152 Wn. App. at 336.

On appeal, Hough argued the jury instructions defining "abuse of process" did not correctly state the law. Hough, 152 Wn. App. at 341-42. Hough also argued substantial evidence did not support the verdict and the trial court erred in awarding attorney fees and costs under MAR 7.3. Hough, 152 Wn. App. at 344-50. Hough did not challenge, and the court notes it does not address, the jury award of damages. Hough, 152 Wn. App. at 348 n.1.

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[9] Jury instructions 7, 8, and 9 also defined the elements of abuse of process. Hough, 152 Wn. App. at 342-43. Jury instruction 7 stated:

> " 'Abuse of process' is the misuse of the power of the court. It is an act done in the name of the court and under its authority by means of use of a legal process not proper in the conduct of a proceeding for an ulterior purpose(s) or motive(s)."

Hough, 152 Wn. App. at 342. Jury instruction 8 stated the essential elements of a claim of abuse of process are:

> "(1) The existence of an ulterior purpose to accomplish an object not within the proper scope of the process, and (2) An act in the use of legal process not proper in the regular prosecution of the proceedings.
>
> "The test as to whether there is abuse of process is whether the process has been used to accomplish some end which is without the regular purview of the process; or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be compelled to do."

Hough, 152 Wn. App. at 343. Jury Instruction 9 stated, " 'The ulterior motive or purpose may be inferred from what is said or done about the process, but the improper act may not be inferred from the motive. The purpose for which the process is used, once it is issued, is the only thing of importance.' " Hough, 152 Wn. App. at 343.

The court held the jury instructions "correctly state[d] the law on abuse of process." Hough, 152 Wn. App. at 343. The court rejected the argument that substantial evidence did not support the jury verdict. Hough, 152 Wn. App. at 346-47.

> A jury could, and did, infer from the frequency, number, and nature of Mr. Hough's motions and other process that the documents were not only improper but filed to harass the Stockbridges and increase their cost of litigation. . . . We will not disturb the jury's verdict. . . .
> . . . And, moreover, there was ample evidence of damages in this record.

Hough, 152 Wn. App. at 346-47.

Hough argued that the jury should have determined attorney fees under MAR 7.3. Hough, 152 Wn. App. at 347-49. The court disagreed. Because Hough did not improve his position at trial, MAR 7.3 authorized the trial court to award attorney fees and costs.

> Here, the jury awarded the Stockbridges $200,500 in damages. The arbitrator awarded the Stockbridges only $5,000. It was Mr. Hough who requested trial de novo. And it was Mr. Hough who did not improve his position at trial. MAR 7.3, then, authorized the court's attorney fees award.

Hough, 152 Wn. App. at 349.

In dicta, the court addressed circumstances where a jury determines attorney fees and costs, such as equitable indemnification where "the defendant's wrongful act causes the plaintiff to be involved in litigation with others." Hough, 152 Wn. App. at 348 (citing Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 759, 162 P.3d 1153 (2007)). The court states attorney fees are "determined by the trier of fact only when the measure of the recovery of attorney fees is an element of damages."

Hough, 152 Wn. App. at 348.[10] But Hough "cite[d] no authority for the proposition that attorney fees are an element of damages in an abuse of process case." Hough, 152 Wn. App. at 348.

As previously addressed, in Sea-Pac, the Supreme Court adopts the Restatement (Second) of Torts § 682 and identifies harm caused by abuse of process as an element of the tort cause of action. Sea-Pac, 103 Wn.2d at 806. Here, there is no dispute Stevens alleged he incurred attorney fees as a result of abuse of process and his only damages are attorney fees and costs.

We hold Stevens must prove damages as an element of the claim for abuse of process and the jury must determine whether he is entitled to attorney fees and costs proximately caused by abuse of process. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 646, 771 P.2d 711, 780 P.2d 260 (1989) (constitutional right to a jury determination of damages); see also Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997) ("Determination of the amount of damages is within the province of the jury.").

Waiver

Stevens contends that under Pappas v. Holloway, 114 Wn.2d 198, 787 P.2d 30 (1990), the doctrine of implied waiver applies only in legal malpractice cases. In Pappas, the Washington Supreme Court adopted the test from Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975), to determine implied waiver of attorney client privilege. Pappas, 114 Wn.2d at 207-08.

> [W]here the following three conditions are satisfied, an implied waiver of the attorney-client privilege should be found: (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting

[10] See RCW 64.38.050 ("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.").

> 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, 114 Wn.2d at 207.

We recently considered and rejected the same argument in Steel v. Olympia Early Learning Center, 195 Wn. App. 811, 381 P.3d 111 (2016). In Steel, we concluded the Supreme Court in Pappas did not limit application of the Hearn test to legal malpractice cases. Steel, 195 Wn. App. at 823-24.

> Petitioners first argue that our legal precedent limits application of implied waiver of the attorney-client privilege to legal malpractice claims. We disagree.
>
> Both parties rely primarily on Pappas and [Dana v. Piper, 173 Wn. App. 761, 295 P.3d 305 (2013),] to support their contentions regarding the application of implied waiver outside the legal malpractice context. . . . We disagree and instead conclude that the application of the implied waiver doctrine is not so limited.
>
> . . . .
>
> . . . [W]hile both Pappas and Dana applied the implied waiver doctrine in the context of legal malpractice, neither case expressly limited application of the doctrine solely to legal malpractice cases.

Steel, 195 Wn. App. at 823-24.[11]

Under Hearn, Stevens impliedly waived the attorney client privilege and work product by claiming attorney fees as his only damages for abuse of process. Because discovery is necessary to determine the proximate cause of his alleged harm, Stevens waived the right to assert attorney client privilege and work product for attorney fees and cost billing records.

[11] Emphasis in original.

Bifurcation

Even if proof of damages and attorney fees and costs is an element of abuse of process, Stevens argues the court erred in refusing to stay discovery and bifurcate the abuse of process counterclaim.

We review discovery orders for abuse of discretion. Fellows v. Moynihan, 175 Wn.2d 641, 649, 285 P.3d 864 (2012); Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 778, 819 P.2d 370 (1991). A court abuses its discretion when the decision is based on untenable grounds, is made for untenable reasons, or is manifestly unreasonable. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Stevens asserts the court did not balance the prejudice that will result from disclosure of attorney client privilege and work product. Contrary to his assertion, the record reflects the court considered bifurcation at length during the hearing on the discovery master's report and proposed order to compel disclosure of the attorney billing records. The parties addressed the special master's previous suggestion that the court bifurcate liability and damages. Although BFOA refused to stipulate to the fact of damages, Stevens argued the court should bifurcate the trial on liability and damages to protect attorney client privilege and work product. BFOA argued the discovery was necessary to determine whether the attorney fees incurred were proximately caused by the alleged abuse of process. The court recognized "the unfairness to [BFOA]" but states, "I also have a concern, as the discovery master does, about the unfairness to Mr. Stevens." But the court concluded the proposal to produce the spreadsheet for the abuse of process legal fees was "the best we can do to try to protect Mr. Stevens' right,

given the fact that he's the one who filed the claim and has put the damages at issue here." The trial court did not abuse its discretion in refusing to bifurcate.

Nonetheless, we note that at oral argument, the BFOA attorney agreed Stevens is entitled to discovery of the attorney fees and costs incurred by BFOA and Baute to establish the reasonableness and amount of an award of damages for attorney fees and costs.[12] On remand, the court has the authority to reconsider and decide whether to bifurcate the trial on the counterclaim for abuse of process from other claims. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 300, 840 P.2d 860 (1992) (an order that adjudicates fewer than all claims is subject to revision at any time before entry of a final judgment as to all claims and the rights and liabilities of all parties).

We affirm the August 5, 2015 discovery order, lift the stay, and remand.[13]

WE CONCUR:



[12] A comparison of hours charged by opposing counsel is relevant to determine the reasonableness of attorney fees for the prevailing party. See McGinnis v. Ky. Fried Chicken of Cal., 51 F.3d 805 (9th Circ. 1994); Citgo Petroleum Corp. v. Krystal Gas Mktg. Co., 466 F. Supp. 2d 1263 (N.D. Okla. 2006); Blowers v. Lawyer's Coop. Publ'g Co., 526 F. Supp. 1324 (W.D. N.Y. 1981); Heng v. Rotech Med. Corp., 720 N.W.2d 54, 65 (N.D. 2006).

[13] We deny BFOA's request for an award of attorney fees on appeal under RAP 18.9.