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No. 73794-5-1

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

CHAD STEVENS,

Appellant,

v.

BELLEVUE FARM OWNERS ASSOCIATION, et al.,

Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. REPLY 2

 A. The Trial Court Committed Reversible Error in Ordering That Appellant’s Attorney’s Fees and Costs are “Damages” for a Jury to Decide Rather than “Costs” for the Trial Court to Decide 2

 B. The Trial Court Committed Reversible Error in Compelling Appellant to Produce Privileged Information 5

 C. The Trial Court Committed Reversible Error in Refusing to Bifurcate and Stay Counterclaim 13 6

 D. Respondents’ Request for Attorney’s Fees and Costs Should Be Denied..... 8

 E. Appellant Is Entitled to Statutory Attorney Fees and Costs Pursuant to RAP 14..... 9

III. CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

Helenius v. Chelius,
131 Wn. App. 421, 120 P.3d 954 (2005)..... 4

Mark v. Williams,
45 Wn. App. 182 (1986) 4

McCoy v. Kent Nursery, Inc.,
163 Wn. App. 744, 260 P.3d 967 (2011)..... 10

Sales v. Weyerhaeuser Co.,
163 Wn.2d 14, 177 P.3d 1122 (2008)..... 2

State v. Sinclair,
192 Wn. App. 380, 367 P.3d 612 (2016)..... 10

STATUTES

RCW 64.38 1, 3, 9

RULES

CR 42(b)..... 7

RAP 14.3..... 9

RAP 14.4..... 10

RAP 18.9..... 8

RAP 2.3..... 8

RAP 7.2..... 1

RPC 3.7..... 5, 6

I. STATEMENT OF THE CASE

After Appellant Chad Stevens filed this appeal, Respondent BFOA abandoned the position it maintained for two years that Appellants' attorney's fees and costs under RCW 64.38.050 are "damages" for a jury to decide, and filed multiple motions to strike Appellant's jury demand and set a bench trial on Counterclaim 12. On June 24, the trial court struck Appellant's jury demand and set a bench trial on Counterclaim 12.

This ruling by the trial court is not only the same relief Appellant had been proposing for two years, but it renders one of the issues pending before this Court moot; namely, whether attorney's fees and costs under RCW 64.38.050 are "damages" for a jury to decide or "costs" for the trial court to decide. Because the trial court seeks to enter a formal order that "change[s] a decision then being reviewed by the appellate court," Appellant filed a concurrent motion along with this reply brief requesting permission from this Court for the trial court to enter a formal order pursuant to RAP 7.2(e) ("If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.").

II. REPLY

Because BFOA has now abandoned its position regarding Counterclaim 12, the only remaining issues before this Court are (1) whether the trial court committed reversible error in concluding that the attorney's fees and costs sought by Appellant for a claim for abuse of process are "damages" to be decided by a jury rather than "costs" to be decided by the trial court; and, (2) whether this error led the trial court to commit the additional error of ordering Appellant to produce privileged information regarding those attorney's fees and costs rather than bifurcating and/or staying Counterclaim 13 until all other claims and counterclaims are resolved.

A. The Trial Court Committed Reversible Error in Ordering That Appellant's Attorney's Fees and Costs are "Damages" for a Jury to Decide Rather than "Costs" for the Trial Court to Decide

The trial court's decision that Appellant's attorney fees and costs related to his abuse of process claim are "damages" for a jury to decide, rather than "costs" for the trial court to decide after liability has been established, is based on an erroneous view of the law and necessarily constitutes an abuse of discretion. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122, 1124 (2008) ("A decision based on an erroneous view of the law necessarily constitutes an abuse of discretion.").

Respondents try to save the error they created by suggesting their “fees as damages” mantra is somehow “in harmony with *Hough* because it distinguishes between attorney fees claimed as damages and attorney fees claimed as costs.” Respondents’ Brief at 13, n. 8. This appears to be an acknowledgment that *Hough* plainly states the trial court is required to award attorney’s fees as “costs” if Appellant prevails, but Respondents then try to muddy that admission by asserting his fees and costs should instead be labeled as “damages.” Nothing could be further from the truth. The fees and costs Appellant seeks for his abuse of process claim are costs, not damages. The only confusion here stems from Respondents’ refusal to acknowledge the harm that Mr. Baute’s abuse of process caused Appellant. Appellant has never taken the position that Mr. Baute’s abuse of process did not cause him harm. Rather, he maintains that Mr. Baute caused him harm by violating his rights under RCW 64.38, and then Mr. Baute went further and misused the legal process to further those statutory violations until the trial court put a stop to it.

None of the cases cited by Respondents support their position. Instead, they confirm that actual “damage” is not an element in an abuse of process claim. While the defendant “is subject to liability to the other for harm caused by the abuse of process,” no Washington law requires a showing of *harm* above and beyond proof of“(1) the existence of an ulterior

purpose to accomplish an act 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.” *Mark v. Williams*, 45 Wn. App. 182, 191 (1986). The elements for abuse of process do not require actual damage from the improper act that was done for an improper purpose. The improper act for an improper purpose, in and of itself, is by definition “harmful.” *See e.g. Helenius v. Chelius*, 131 Wn. App. 421, 454, 120 P.3d 954, 971 (2005) (“[T]he result of the tortious interference and abuse of process was that Questar, Helenius and Tilley lost any meaningful opportunity they might have had to enforce the indemnity provisions of the SPA against Send.com and obtain indemnification for the wage claim judgment entered against them.”). The only question is whether the judicial system “has been misused to achieve another, inappropriate end,” but the plaintiff does not have to show that he was actually damaged by the defendant’s effort to achieve an inappropriate end. *Id.* (“We conclude the trial court did not abuse its discretion in crafting an equitable remedy to directly address the injury Helenius and Tilley would suffer because of Chelius’ and Feuer’s tortious interference and abuse of process.”) (emphasis added).

Appellant alleges he was harmed by Mr. Baute’s abuse of process, even if he is not asserting damages for that harm. There is no way to harmonize Respondents’ assertion that fees and costs in an abuse of process

claim can be both “damages” to be decided by the jury and “costs” to be decided by the trial court. They are one or the other. No Washington case supports Respondents’ position that they become “damages” for the jury to decide just because the plaintiff chooses not to pursue actual damages or because the defendant engaged in abuse of process but was not successful in causing actual damage. The trial court’s conclusion that they are “damages” directly conflicts with *Hough*.

The Court should reverse the trial court because it erred in concluding that Appellant’s attorney’s fees and costs are “damages” for a jury to decide rather than “costs” for the trial court to decide after liability is established.

B. The Trial Court Committed Reversible Error in Compelling Appellant to Produce Privileged Information

Both the Special Master and the trial court repeatedly acknowledged Appellant will suffer severe, irreparable prejudice if he is forced to produce privileged information. Respondents’ answer tries to pretend no such prejudice exists, and goes so far as to suggest the privileged information at issue is “innocuous.” Nothing could be further from the truth.

After trying to claim the detailed time sheets of Appellant’s counsel are “innocuous,” Respondents then try to assert withdrawal of Appellant’s counsel for the last three years will not be required under RPC 3.7(a)(2).

But Respondents ignore the fact that the trial court's order would not only require Appellant to produce information that is plainly privileged, but Appellant would also have to call his own counsel to explain why the fees and costs were incurred, including the strategy behind the work done. Alternatively, Appellant would have to call an expert to explain why the fees and costs were incurred, but again, the expert would need to rely on privileged information provided by Appellant's counsel regarding the strategy behind the work that was done.

Respondents' position also ignores Comment 3 to RPC 3.7, which states the withdrawal of counsel is ordinarily not an issue because "the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony." But here, the trial court determined the issue of attorney's fees and costs will be submitted to the jury, not "the judge." This is more evidence that the trial court's order constitutes reversible error.¹

C. The Trial Court Committed Reversible Error in Refusing to Bifurcate and Stay Counterclaim 13

Neither Respondents nor the trial court identified any tenable or reasonable basis to refuse to bifurcate and stay Counterclaim 13. The trial

¹ Mr. Stevens has not yet listed his counsel as trial witnesses because of the issues presented by this motion. Their time sheets and their testimony will only become relevant if Mr. Stevens prevails and the trial court must decide the amount of reasonable attorney's fees and costs.

court's refusal to bifurcate was based on its erroneous conclusion that a jury must decide these issues. The trial court committed further obvious error by repeatedly acknowledging that it was ordering Appellant to produce privileged information, but then doing *nothing* to protect Appellant's interests as the Special Master had repeatedly recommended.

Respondents make no effort to justify the trial court's abuse of discretion. Instead, they try to suggest this issue was not before the trial court. This is wrong – before the trial court was Respondents' *own* motion for reconsideration of the Special Master's March 30th ruling that stayed any further discovery regarding Counterclaims 12 and 13 and proposed the parties agree to some form of relief that would protect Appellant's interests, including bifurcation and a stay. For that reason, when Appellant opposed Respondents' motion, he reiterated that bifurcation and a stay was appropriate under CR 42(b).² His motion for a protective order requested the same relief.³

The Special Master's subsequent order put this issue squarely before the trial court: "Only the trial court can decide whether some other trial management technique should be employed to protect defendant's work

² Declaration of Jason Amala In Support of Appellant's Motion for Discretionary Review ("Amala Decl."), Ex. 13, at 10-12.

³ Amala Decl., Ex. 11, at 7-11

product and privilege in his billing records while granting plaintiffs the discovery necessary to guarantee a fair trial.”⁴ This why the trial court at the hearing repeatedly framed the issue before him as whether or not he should bifurcate and stay Counterclaims 12 and 13.⁵

The Court should reverse the trial court’s order because the trial court clearly abused its discretion in doing nothing to protect Appellant’s interests.

D. Respondents’ Request for Attorney’s Fees and Costs Should Be Denied

This appeal is far from “frivolous” or “improper” under RAP 18.9(a) given this Court granted discretionary review and determined that “Stevens demonstrates a probable error that merits discretionary review under RAP 2.3(b)(2).”⁶ Moreover, BFOA is not entitled to its attorney’s fees and costs under RCW 64.38.050 because it is not the “prevailing party” on appeal. To the contrary, BFOA abandoned its position that attorney’s fees and costs under RCW 64.38.050 are “damages” for a jury to decide, and filed multiple motions to strike Appellant’s jury demand and set a bench trial on Counterclaim 12, rendering this issue on appeal moot. If anyone is the

⁴ CP 671-675.

⁵ Verbatim Report of Proceedings from August 5, at 17-18, 21, 22, 36, 38-39, 45-47, and 61-66.

⁶ Commissioner’s Ruling Granting Discretionary Review, filed September 22, 2015.

prevailing party regarding Counterclaim 12 it is Appellant, whose consistent position over the past two years was finally adopted by both BFOA and the trial. Put another way, if BFOA had agreed two years ago that Appellant's attorney's fees and costs under RCW 64.38.050 were "costs" for the trial court to decide, and had agreed that Counterclaim 12 should be bifurcated, the trial court would not have committed reversible error on these issues and the appeal on those issues would not have occurred. Instead, BFOA took the exact opposite position and caused the trial court to commit reversible error, only to reverse its position after this Court concluded BFOA had led the trial court to probable error.

Finally, it is of course ironic that BFOA requests attorney's fees and costs under RCW 64.38.050 when it tried to justify its now-abandoned position by claiming Appellant was not seeking relief under RCW 64.38.050. *See* Respondents' Br. at 10-11.

E. Appellant Is Entitled to Statutory Attorney Fees and Costs Pursuant to RAP 14

Respondents erroneously claim Appellant is not entitled to attorney fees and costs even if he prevails on appeal because he did not devote a section of his opening brief to this request. But Respondents again confuse the concept of attorney's fees as "costs." RAP 14.3(a) provides that "statutory attorney fees and the reasonable expenses actually incurred by a

party ... may be awarded to a party as costs.” As this Court has made clear, a party “is not obliged to request an award of costs [under RAP 14] in its appellate briefs.” *State v. Sinclair*, 192 Wn. App. 380, 385, 367 P.3d 612, 614 (2016).

The Court should award Appellant his attorney fees and costs regarding Counterclaim 12 because he is plainly the prevailing party on that issue. If Appellant is the prevailing party on Counterclaim 13, he will likewise follow with the procedure provided in RAP 14.4 to recover his statutory attorney fees and costs. *See e.g. McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 772, 260 P.3d 967, 982 (2011) (“Because Kent Nursery and Fir Run Nursery prevail on appeal, however, we award their costs on appeal, including statutory attorney fees, to be determined upon compliance with RAP 14.4.”).

III. CONCLUSION


Appellant respectfully requests the Court (1) reverse the trial court’s erroneous conclusion that Appellants’ attorney’s fees and costs under Counterclaim 13 are “damages” for the jury to decide, rather than “costs” for the trial court to decide, (2) reverse the trial court’s erroneous order compelling Appellants to produce privileged information, and (3) reverse the trial court’s refusal to bifurcate and/or stay Counterclaim 13 until the other claims and counterclaims are resolved.

Appellant further requests the Court remand this case to the trial court for further proceedings, with an instruction that the trial court is to decide the issue of attorney's fees and costs after liability is established, that no discovery shall take place regarding attorney's fees and costs until after liability is established, and that Counterclaim 13 shall be bifurcated and stayed until the other claims and counterclaims are resolved.

Dated: July 27, 2016.

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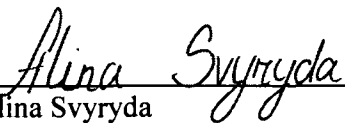
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