

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 OPENING BRIEF

Darrell L. Cochran, WSBA No. 22851
Jason P. Amala, WSBA No. 37054
Beth A. Davis, WSBA No. 45674
Counsel for Appellant

PFAU COCHRAN VERTETIS
AMALA PLLC
403 Columbia Street, Suite 500
Seattle, Washington 98104
(206) 462-4334

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 MAR 14 PM 3:42

TABLE OF CONTENTS

- III
- I. INTRODUCTION 1
- II. ASSIGNMENTS OF ERROR 3
- III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3
- IV. STATEMENT OF THE CASE..... 4
 - A. Mr. Stevens’ Counterclaim Under RCW 64.38 and His Counterclaim for Claim Abuse of Process..... 4
 - B. Mr. Stevens Requests a Stay Regarding the Newly Added Counterclaims 6
 - C. The Special Master Acknowledges the Need to Prevent the Disclosure of Privileged Information..... 6
 - D. The Trial Court Concludes Mr. Stevens’ Attorney’s Fees and Costs Should Be Characterized as “Damages” for a Jury to Decide, Rather than “Costs” for the Trial Court to Decide, But Certifies Its Decision for Appellate Review 7
 - E. The Special Master Denies BFOA’s Request for Privileged Information 7
 - F. Mr. Stevens Moved for a Protective Order to Prevent Discovery of Privileged Information, and Renewed His Request that the Court Bifurcate and/or Stay Counterclaims 12 and 13..... 9
 - G. BFOA Moved for Reconsideration of the March 30th Order... 9
 - H. The Special Master Defers the Motions to the Trial Court..... 10
 - I. BFOA Issues Subpoenas for Mr. Stevens’ Counsel 10
 - J. The Trial Court Fails to Employ Any Trial Management Technique to Avoid the Acknowledged, Irreparable Prejudice

	Mr. Stevens Will Suffer from Producing Privileged Information	11
K.	This Court Determined the Trial Court Committed Probable Error and Granted Discretionary Under RAP 2.3(b)(2).....	13
V.	ARGUMENT	13
A.	The Court Should Reverse the Trial Court’s Order That Mr. Stevens’ Attorney’s Fees and Costs are “Damages” for a Jury to Decide Rather than “Costs” for the Trial Court to Decide .	14
B.	The Court Should Reverse the Trial Court’s Order Compelling Mr. Stevens to Produce Privileged Information	20
C.	The Court Should Reverse the Trial Court’s Order Refusing to Bifurcate and Stay Counterclaims 12 and 13.....	23
VI.	CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

Boone v. Vanliner Ins. Co.,
91 Ohio St. 3d. 209, 744 N.E.2d 154 (2001) 25

Dana v. Piper,
73 Wn. App. 761, 295 P.3d 305 (2013) 20, 21

Del Rosario v. Del Rosario,
116 Wn. App. 886, 68 P.3d 1130 (2003) 24

Hough v. Stockbridge,
152 Wn. App. 328, 216 P.3d 1077 (2009) 14, 15, 17

Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC,
139 Wn. App. 743, 162 P.3d 1153 (2007) 15, 16, 17

Pappas v. Holloway,
114 Wn.2d 198, 787 P.2d 30 (1990) 21

Roats v. Blakely Island Maint. Comm'n, Inc.,
169 Wn. App. 263, 279 P.3d 943 (2012) 14

Western National Assurance Co. v. Hecker,
43 Wn. App. 816, n. 1 (1986) 25

STATUTES

RCW 64.38 passim

RULES

CR 42(b) 9, 23

RAP 2.3 (b)(2) 13

RPC 3.7 22

•

I. INTRODUCTION

This case originates from a dispute over what restrictions a homeowner's association can place on the property of owners and on the common areas within the association. The appellant is Chad Stevens, one of the property owners, and the respondents are the homeowner's association, Bellevue Farm Owner's Association, and other owners.

In addition to claims and counterclaims regarding restrictions that were placed on Mr. Stevens' property and the common areas, Mr. Stevens filed a counterclaim against BFOA for violations of its duties under RCW 64.38, including a claim under RCW 64.38.025 regarding the Board's actions in pursuing the new restrictions, and a counterclaim against one of BFOA's former Board members, Mark Baute, for abuse of process.

The trial court ordered that the attorney's fees and costs that Mr. Stevens has incurred for the alleged violations of RCW 64.38 and abuse of process are "damages" for the jury to decide rather than "costs" for the trial court to decide. Based on that conclusion, the trial court further ordered Mr. Stevens to produce privileged information regarding his attorney's fees and costs and denied Mr. Stevens' request to bifurcate and/or stay the RCW 64.38 and abuse of process claims until the other claims and counterclaims are resolved.

Within that context, this appeal presents two questions of law. First, if a plaintiff asserts a homeowner's association is liable under RCW 64.38.050, and further asserts one of its Board members is liable for abuse of process, are the plaintiff's attorney's fees and costs "damages" for a jury to decide or "costs" for the trial court to decide?

Second, even if attorney's fees and costs under either claim are "damages" for the jury to decide, is it error for a trial court to compel the plaintiff to produce information protected by the attorney/client privilege and work product doctrine regarding his attorney's fees and costs rather than bifurcating and/or staying the RCW 64.38 and abuse of process claims until the other claims and counterclaims in the case are resolved?

Mr. Stevens respectfully requests the Court (1) reverse the trial court's conclusion that Mr. Stevens' attorney's fees and costs are "damages" for the jury to decide, rather than "costs" for the trial court to decide, (2) reverse the trial court's order compelling Mr. Stevens to produce privileged information, and (3) reverse the trial court's refusal to bifurcate and/or stay the RCW 64.38 and abuse of process claims until the other claims and counterclaims are resolved.

Mr. Stevens 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 the RCW 64.38 and abuse of process claims shall be bifurcated and stayed until the other claims and counterclaims are resolved.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the attorney's fees and costs Mr. Stevens is seeking for his claim under RCW 64.38 ("Counterclaim 12") and his claim for abuse of process ("Counterclaim 13") are "damages" for a jury to decide, rather than "costs" for the trial court to decide, after liability is established.

2. Based on its erroneous conclusion that Mr. Stevens' attorney's fees and costs are "damages" for a jury to decide, the trial court further erred in ordering Mr. Stevens to produce information protected by the attorney/client privilege and work product doctrine regarding his attorney's fees and costs rather than bifurcating and/or staying Counterclaims 12 and 13 until the other claims and counterclaims are resolved.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in concluding that it will allow a jury to decide the amount of attorney's fees and costs Mr. Stevens should

recover pursuant to his claim under RCW 64.38 and his claim abuse of process?

2. Whether the trial court erred in ordering Mr. Stevens to produce information protected by the attorney/client privilege and work product doctrines based on its conclusion that Mr. Stevens had waived the privilege and that it would allow a jury to decide the amount of his attorney's fees and costs, rather than bifurcating and/or staying Counterclaims 12 and 13 until the other claims and counterclaims are resolved?

IV. STATEMENT OF THE CASE

A. Mr. Stevens' Counterclaim Under RCW 64.38 and His Counterclaim for Claim Abuse of Process

This case was filed in late 2012 and originates from a dispute over what new restrictions a homeowner's association can place on an owner's property. Chad Stevens is one of the owners, and the respondents are the homeowner's association, Bellevue Farm Owner's Association, its Board of Directors, and the other owners (collectively referred to as "BFOA").¹

All parties initially asked for declaratory relief regarding whether those new property restrictions were lawful. However, after more than a

¹ CP 209-217.

year of discovery, during which plaintiff Mark Baute's² *pro hac vice* status was revoked for misconduct, Mr. Stevens added counterclaims against plaintiff Bellevue Farm Owners Association for violations of RCW 64.38 ("Counterclaim 12") and against plaintiff Mr. Baute for abuse of process ("Counterclaim 13"). The basis for those counterclaims was Mr. Stevens' belief that he had gathered evidence showing not only that the HOA was violating its various statutory duties and that the new property restrictions were unlawful, but that BFOA and Mr. Baute knew they were acting unlawfully and were using their power to target and punish Mr. Stevens.³

The trial court granted Mr. Stevens' motion to amend, noting he was surprised Mr. Stevens had not done so earlier.⁴ On July 17, 2014, Mr. Stevens filed his Fifth Amended Counterclaims. Counterclaim 12 alleged BFOA breached the duties it owed Mr. Stevens under RCW 64.38, including RCW 64.38.025, and Counterclaim 13 alleged Mr. Baute and his marital community are liable for abuse of process. Mr. Stevens asked the trial court for declaratory relief and for his attorney's fees and costs.⁵

² Plaintiff Mark Baute is a California attorney. He is not only a property owner within Bellevue Farm, but also a long time BFOA Board member. He also represented all of the plaintiffs until the trial court revoked his *pro hac vice* status for misconduct.

³ CP 1-28.

⁴ CP 192-217.

⁵ CP 209-216.

B. Mr. Stevens Requests a Stay Regarding the Newly Added Counterclaims

On the same day that Mr. Stevens moved to add Counterclaims 12 and 13, he also moved the trial court to stay those counterclaims while the parties focused on resolving the claims regarding whether BFOA's new property restrictions were lawful.⁶ Mr. Stevens requested a stay because he believed the new counterclaims (Counterclaims 12 and 13) might eventually require discovery of privileged information from all parties. The trial court denied the motion and refused to stay the new Counterclaims.⁷

C. The Special Master Acknowledges the Need to Prevent the Disclosure of Privileged Information

Shortly after the trial court refused to stay Counterclaims 12 and 13, BFOA issued discovery that asked for information regarding Mr. Stevens' attorneys and costs. In a letter ruling, the Special Master appointed to this case cautioned the parties on how discovery would proceed: "When attorney fees and costs are claimed as damages, however, special care must be taken to preserve attorney client privilege and attorney work product because the case has not yet been heard. ... 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."⁸

⁶ CP 11-20.

⁷ CP 233-235.

⁸ CP 236-237.

D. The Trial Court Concludes Mr. Stevens' Attorney's Fees and Costs Should Be Characterized as "Damages" for a Jury to Decide, Rather than "Costs" for the Trial Court to Decide, But Certifies Its Decision for Appellate Review

Mr. Stevens filed a motion with the trial court to stay the discovery of his attorney fees and costs. The trial court concluded it would allow some discovery regarding Mr. Stevens' attorney's fees and costs based on its conclusion that his fees and costs are "damages" to be decided by a jury rather than "costs" to be decided by the trial court after liability is determined. However, the trial court certified its order for discretionary review because it agreed a "substantial ground for a difference of opinion" exists on this issue and immediate review "may materially advance the ultimate termination of the litigation."⁹

E. The Special Master Denies BFOA's Request for Privileged Information

Based on the trial court's conclusion that Mr. Stevens' attorney's fees and costs are "damages" rather than "costs," BFOA moved to compel Mr. Stevens to produce privileged information, including the detailed time sheets of his attorneys. On March 30, 2015, after an *in camera* review of the time sheets related to Counterclaims 12 and 13, the Special Master denied BFOA's motion to obtain privileged information:

⁹ CP 641-649.

[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.¹⁰

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.” The Special Master noted “[t]here may be other solutions that protect both parties’ interests.”¹¹

¹⁰ Declaration of Jason Amala In Support of Appellant’s Motion for Discretionary Review (“Amala Decl.”), Ex. 8, at 2-3.

¹¹ *Id.* at 3.

F. Mr. Stevens Moved for a Protective Order to Prevent Discovery of Privileged Information, and Renewed His Request that the Court Bifurcate and/or Stay Counterclaims 12 and 13

Despite the Special Master's order, BFOA issued 70 new interrogatories and 58 requests for production. The majority asked for discovery regarding Mr. Stevens' fees and costs, including information in the time sheets the Special Master concluded were privileged.¹² BFOA also expanded its request to include information unrelated to Counterclaim 12 and Counterclaim 13. For example, one request asked for "all invoices for all your work in this case" and another asked for "all time sheets and task descriptions which reflect or identify all your work in this case."¹³

Mr. Stevens timely moved for a protective order, renewed his request that Counterclaims 12 and 13 be stayed, and asked the Special Master to bifurcate those claims from the claims and counterclaims regarding BFOA's new property restrictions pursuant to CR 42(b).¹⁴

G. BFOA Moved for Reconsideration of the March 30th Order

After Mr. Stevens filed his motion for a protective order, BFOA rejected the Special Master's proposal that BFOA stipulate to the fact of damage and asked for reconsideration. Mr. Stevens opposed the motion and explained the substantial prejudice he would suffer not only if discovery

¹² See generally Amala Decl., Ex. 9; see also Amala Decl., Ex. 10.

¹³ Amala Decl., Ex. 11, at 2-4.

¹⁴ See generally *id.*; see also Amala Decl., Ex. 12.

continued on Counterclaims 12 and 13, but if those claims are tried in the same jury trial as the claims and counterclaims regarding BFOA's new property restrictions.¹⁵

H. The Special Master Defers the Motions to the Trial Court

On April 27, 2015, the Special Master issued a report to the trial court regarding Mr. Stevens' motion for a protective order and BFOA's motion for reconsideration. The Special Master issued the report because "the two motions present important issues that are best resolved by the trial judge."¹⁶ The second issue reflects the threshold issue before this Court:

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.¹⁷

I. BFOA Issues Subpoenas for Mr. Stevens' Counsel

Before the trial court could address the Special Master's report, BFOA issued subpoenas for the depositions of Mr. Stevens' counsel and depositions upon written questions.¹⁸ When BFOA moved to compel, the

¹⁵ Amala Decl., Ex. 13, at 5-7.

¹⁶ CP 672.

¹⁷ CP 672.

¹⁸ Amala Decl., Ex. 14.

Special Master stayed the motion until the trial court could decide how to manage this issue in a manner that respects the rights of all parties.¹⁹

J. The Trial Court Fails to Employ Any Trial Management Technique to Avoid the Acknowledged, Irreparable Prejudice Mr. Stevens Will Suffer from Producing Privileged Information

On August 5, 2015, the trial court denied Mr. Stevens' motion for a protective order, including his request that Counterclaims 12 and 13 be stayed and/or bifurcated until the claims and counterclaims regarding BFOA's new property restrictions are resolved. Instead, the trial court ordered that "[i]f 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."²⁰ For that reason, the trial court ordered Mr. Stevens to produce (1) unredacted copies of his time sheets for all attorney's fees and costs he has incurred related to Counterclaims 12 and 13, and (2) copies of all other attorney's fees and costs he has incurred, without task descriptions. The order reserved ruling on the 70 interrogatories and 58 requests for production until BFOA reviews the unredacted time sheets and decides whether it wants additional discovery of more privileged information.²¹

¹⁹ Amala Decl., Ex. 15 ("I have reviewed this motion and believe it requests the same information covered by my report and proposed order ... I would take the same approach as I did on the earlier discovery requests. I will hold the motion pending Judge Eaton's ruling on my prior proposed order, and then decide whether the motion should be briefed and considered.").

²⁰ CP 674.

²¹ CP 671-675.

At the hearing, Mr. Stevens 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 fees and costs, but the underlying misconduct by BFOA and Mr. Baute that caused those fees and costs to be incurred. Mr. Stevens also pointed-out the statute of limitations on Counterclaims 12 and 13 have also likely run because more than three years has elapsed regarding some of the misconduct at issue. 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 the consequences of his decision to file Counterclaims 12 and 13.²²

The trial court made no effort to address the severe, irreparable prejudice Mr. Stevens will suffer, even though this prejudice was repeatedly acknowledged by the Special Master and by the trial court in prior hearings:

... The problem we've got here is that if I'm wrong, Judge Armstrong and I are wrong about this, you know, we've done some pretty major damage here. ...

... And if I order disclosure of these attorney billing records and then find out two weeks after they've been turned over that Judge Armstrong 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

²² Amala Decl., ¶ 18.

even prevail on your defense of the claims on the merits without the damages issue. ...²³

K. This Court Determined the Trial Court Committed Probable Error and Granted Discretionary Under RAP 2.3(b)(2)

On August 11, 2016, Mr. Stevens timely filed a Notice for Discretionary Review, which asked this Court to accept review of the August 5th order.²⁴ On September 22, 2015, this Court granted review and determined that “Stevens demonstrates a probable error that merits discretionary review under RAP 2.3 (b)(2).”²⁵

V. ARGUMENT

The trial court committed reversible error in concluding that the attorney’s fees and costs sought by Mr. Stevens for a claim under RCW 64.38.050 and a claim for abuse of process are “damages” to be decided by a jury rather than “costs” to be decided by the trial court. This error led the trial court to commit the additional error of ordering Mr. Stevens to produce privileged information regarding those attorney’s fees and costs rather than bifurcating and/or staying Counterclaims 12 and 13 until all other claims and counterclaims are resolved.

²³ Verbatim Report of Proceedings from hearing on June 5, 2015, at 58, 62-64.

²⁴ CP 676-684.

²⁵ Commissioner’s Ruling Granting Discretionary Review, filed September 22, 2015.

A. The Court Should Reverse the Trial Court's Order That Mr. Stevens' Attorney's Fees and Costs are "Damages" for a Jury to Decide Rather than "Costs" for the Trial Court to Decide

The Court should reverse the trial court's order that Mr. Stevens' attorney's fees and costs are "damages" for a jury to decide because (1) the trial court, not a jury, decides whether fees and costs are appropriate in a claim under RCW 64.38.050 and a claim for abuse of process, and (2) a party's fees and costs are not an element in a claim under RCW 64.38 or a claim for abuse of process. Neither the trial court nor BFOA have ever cited any law holding that a party's fees and costs are an issue for the jury to decide in a claim under RCW 64.38 or a claim for abuse of process.

Instead, the plain language of RCW 64.38.050 states the trial court, not the jury, decides whether fees are appropriate if a party prevails in a claim against a homeowner's association arising from violations of RCW 64.38, and if so, the trial court can award a reasonable amount. RCW 64.38.050 ("The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party."); *see e.g. Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 284, 279 P.3d 943 (2012).

Likewise, in *Hough v. Stockbridge*, 152 Wn. App. 328, 216 P.3d 1077 (2009), the Court stated that the amount of attorney's fees and costs in an abuse of process claim is for the trial court to decide, not the jury:

Attorney fees must be determined by the trier of fact only when the measure of the recovery of attorney fees is an element of damages. Attorney fees are considered damages when the defendant's wrongful act causes the plaintiff to be involved in litigation with others.

The Stockbridges have sued only Mr. Hough as a result of his wrongful actions. And Mr. Hough cites no authority for the proposition that attorney fees are an element of damages in an abuse of process case. The Stockbridges' attorney fees, then, are costs and not an element of damages. The trial court here, however, apparently considered the Stockbridges' attorney fees to be an element of damages because it asked the jury to determine damages, including attorney fees. And the jury awarded the Stockbridges more than \$30,000 in attorney fees. Mr. Hough, nonetheless, does not have a right to a jury determination of the amount of attorney fees to which the Stockbridges were entitled.

Id. at 347-48 (citations omitted).

In reasoning that attorney fees are not an element of damages in an abuse of process case, the court in *Hough* noted that attorney fees are considered damages only “when 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)) (emphasis added). Tracing this language back to *Jacob's Meadow* shows that this rule articulates the very limited circumstances where attorney fees are recoverable as damages. As recognized by the Court in *Jacob's Meadow*, this rule is only applied in cases involving equitable indemnity:

The case law regarding attorney fees awardable as costs of an action is well-developed. When authorized, the

determination of a reasonable attorney fee award is a matter within the discretion of the trial court. A party is not, therefore, entitled to have such a determination made by a jury.

The case law regarding attorney fees recoverable as damages is significantly less well-developed. In the majority of cases which have discussed attorney fee damage recoveries, such recoveries have been based on principles of equitable indemnity:

[W]hen the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including compensation for attorney's fees.

Wells v. Aetna Ins. Co., 60 Wash.2d 880, 882, 376 P.2d 644 (1962); *Manning v. Loidhamer*, 13 Wash.App. 766, 769–74, 538 P.2d 136 (1975). See also *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wash.App. 529, 531, 618 P.2d 1341 (1980) (noting that attorney fees incurred in defending suit against third party were recoverable pursuant to contractual indemnity provision as damages, the measure of which was determined by the jury). Pursuant to this rule, such attorney fees are considered to be damages rather than costs.

Jacob's Meadow, 139 Wn. App. at 759 (citations and emphasis omitted). Consistent with these rules, *Jacob's Meadow* held that “[a]ttorney fees recoverable pursuant to a contractual indemnity provision are an element of damages, rather than costs of suit.” *Id.* at 760.

As *Hough* correctly noted, an abuse of process claim is not based on the notion that the defendant's wrongful act caused the plaintiff to be involved in litigation *with a third party*, raising equitable immunity considerations. Rather, the claim is based solely on this defendant's "wrongful actions" and the litigation is with this defendant, not a "third party." *Id.* (abuse of process is defined as "an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit").

The trial court's order reflects clear error under *Hough* because it misapplies the rules from these cases and concludes that Mr. Stevens' attorney's fees and costs are "damages" rather than "costs." As explained above, this holding is in direct conflict with *Hough* and *Jacob's Meadow*. Mr. Stevens' claim under RCW 64.38.050 and his claim for abuse of process are based on the plaintiffs' wrongful actions and those wrongful actions are being litigated *with the plaintiffs*, not "third parties." Nowhere in Mr. Stevens' counterclaims does he allege that these wrongful actions caused him to be involved in litigation with a third party. Under *Hough* and *Jacob's Meadow*, Mr. Stevens' attorney's fees and costs are costs to be determined by the trial court following entry of judgment.

It appears the trial court may have concluded Mr. Stevens' attorney's fees and costs are "damages" because BFOA has occasionally asserted that Mr. Stevens' "only damages" are his attorney's fees and costs. But this assertion ignores the remedies actually sought by Mr. Stevens. An actionable violation of RCW 64.38 does not require proof of "damages." Instead, "[a]ny violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity." RCW 64.38.050 (emphasis added). Those requirements are met here. Mr. Stevens alleges the new property restrictions BFOA attempted to impose are not just unlawful, but that BFOA and its Board knew they were unlawful and "used their authority to try to punish [him] through the exercise of their authority and discretionary powers, and ultimately for their own personal benefit."²⁶ Based on this misconduct, which violates RCW 64.38.025, Mr. Stevens asked the trial court to (1) declare the restrictions unlawful, and (2) enjoin BFOA from enforcing them.²⁷

Mr. Stevens further alleges BFOA "has failed to comply with the requirements of RCW 64.38," including failing to make meetings open to all owners, keeping minutes of actions taken by the Board, and making

²⁶ CP 209-217.

²⁷ CP 215-217.

records available to owners in a timely fashion.²⁸ In turn, Mr. Stevens asked the trial court to order BFOA to comply with its statutory obligations.²⁹

BFOA's mantra as to the abuse of process claim fails for the same reason. Mr. Baute engaged in abuse of process while wearing three hats: while a plaintiff, while a BFOA Board member, and while counsel to BFOA before his *pro hac vice* was revoked. His abuses were harmful because they were an effort to perpetuate the harm that Mr. Stevens suffered as a result of BFOA violating RCW 64.38 and imposing new restrictions on his property that BFOA and its Board knew were unlawful.³⁰ The harm from his abuses was curtailed when the trial court revoked his *pro hac vice* status.

Washington case law confirms 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, 724 P.2d 248 (1986). The elements for abuse of process

²⁸ CP 202; 209.

²⁹ CP 216.

³⁰ CP 211-215.

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.” 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.

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

B. The Court Should Reverse the Trial Court’s Order Compelling Mr. Stevens to Produce Privileged Information

The Court should reverse the trial court’s order compelling Mr. Stevens to produce privileged information because (1) Mr. Stevens did not waive the attorney/client privilege or the work product privilege by asserting Counterclaims 12 and 13, and (2) the trial court made no effort to protect Mr. Stevens’ interests, as reflected by its refusal to bifurcate and/or stay Counterclaims 12 and 13 until the other claims and counterclaims are resolved.

In *Dana v. Piper*, 73 Wn. App. 761, 295 P.3d 305 (2013), the Court reversed the trial court’s decision that asserting attorney fee damages impliedly waives the attorney-client privilege. In *Dana*, the plaintiff alleged

legal malpractice, breach of fiduciary duty, fraud, and Consumer Protection Act violations against the law firm that represented him in a flawed business transaction:

In ruling that [the plaintiff] waived the attorney-client privilege, the trial court relied exclusively on its determination that the protected communications were *relevant* to [plaintiff's] damages and [the defendant's] defense.³¹ But relevance is not the test for waiver of attorney-client privilege. Accordingly, we hold that the trial court abused its discretion and we vacate all four of the discovery orders.” *Id.* at 777 (emphasis added). The Court further explained “even though Dana has put his *damages* at issue, he did not put his *communications* with [his attorneys] at issue.

Id. at 773 (emphasis added).

Moreover, the trial court committed error because Washington courts have limited implied waiver to legal malpractice claims. *See Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990); *Dana*, 173 Wn. App. at 774. Both *Pappas* and *Dana* demonstrate that Washington courts have carefully limited application of the doctrine to the context of legal malpractice cases based on the unique allegations and issues inherent in such claims. Because a claim for violations of RCW 64.38 and a claim for abuse of process are qualitatively distinct from legal malpractice claims, the

³¹ One of the defendant's affirmative defenses stated: “Plaintiff Troy Dana sought and received advice of other advisors with respect to the transaction at issue. To the extent there is any fault by any advisor to plaintiff Troy Dana with respect to the underlying transaction, that fault was the responsibility of others.”

trial court erred in ruling that Mr. Stevens impliedly waived these sacrosanct privileges.

The trial court erred in ordering Mr. Stevens to produce privileged information because he did not waive the privilege and the trial court was mistaken in finding this information was discoverable based on its erroneous conclusion that Mr. Stevens' attorney's fees and costs are "damages" for the jury to decide. If the trial court's decision is affirmed, Mr. Stevens would have to divulge privileged information to both BFOA and the jury, including information regarding Mr. Stevens' legal strategy and work product regarding the separate claims and counterclaims over BFOA's new property restrictions. Not only that, but Mr. Stevens will have to retain new counsel to replace his counsel from the past three years, who will then be a material witness at the same jury trial.³²

³² BFOA has suggested Mr. Stevens' counsel will not need to withdraw under RPC 3.7 because that rule does not require disqualification if the attorney is testifying regarding the amount of attorney's fees and costs. But BFOA ignores the fact that Mr. Stevens' counsel would not just testify about fees and costs, but about the misconduct by BFOA and Mr. Baute that gave rise to those fees and costs. BFOA's argument also highlights the trial court's error: the comments to RPC 3.7 state an attorney does not have to withdraw if only testifying about fees and costs 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." RPC 3.7 (Comment 3). But here, the trial court determined the issue of attorney's fees and costs will be submitted to the jury, not "the judge."

C. The Court Should Reverse the Trial Court's Order Refusing to Bifurcate and Stay Counterclaims 12 and 13

The Court should reverse the trial court's order refusing to bifurcate and/or stay Counterclaims 12 and 13 because the trial court committed error in ordering Mr. Stevens to produce privileged information without any regard to Mr. Stevens' interests, how the information was supposedly relevant, or whether alternatives existed that would balance the parties' respective interests. Not only did the trial court error in concluding that this information was discoverable based on its erroneous conclusion that Mr. Stevens' attorney's fees and costs are "damages" for the jury to decide, rather than "costs" for the trial court to evaluate after liability is established, but the trial court could have at least bifurcated Counterclaims 12 and 13 from the other claims and counterclaims and stayed that discovery and litigation until the other claims and counterclaims were resolved.

Even though the trial court and the Special Master repeatedly recognized that irreparable prejudice will result to Mr. Stevens if he is forced to prosecute Counterclaims 12 and 13 alongside the other claims at trial, the trial court refused to bifurcate and/or stay or them. CR 42(b) gives the trial court authority to order separate trials of any issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Refusal to bifurcate requires

reversal if the trial court's decision rests on untenable bases. *Del Rosario v. Del Rosario*, 116 Wn. App. 886, 901, 68 P.3d 1130 (2003).

In *Del Rosario*, the trial court based its decision to hold a single trial on the lack of any prejudice and its belief that very little time would be saved by bifurcating the trial. The appellate court upheld the trial court's decision, noting that "those are tenable bases" to decline to bifurcate and that the plaintiffs had "failed to demonstrate how they were prejudiced by a single trial or explain how severing the trial would promote judicial economy." *Id.* at 901.

This case presents the complete opposite situation: both the trial court and the Special Master acknowledged that Mr. Stevens will suffer irreparable prejudice if he is forced to prosecute Counterclaims 12 and 13 alongside the other claims and counterclaims, yet the trial court refused to bifurcate these claims based on its erroneous conclusion that Mr. Stevens' attorney's fees and costs are "damages" for the jury to decide. The trial court's reasoning is untenable and its refusal to bifurcate and/or stay Counterclaims 12 and 13, or to employ any other method to protect Mr. Stevens' interests, was an abuse of discretion.

The trial court's erroneous decision forces Mr. Stevens to choose whether he wants to exercise his right to bring Counterclaims 12 or 13, but then disclose privileged information, or to dismiss those counterclaims after

the statute of limitations has likely expired. The unreasonableness of the order is reflected by a simple fact: this issue would not exist if the original claims had been resolved quickly, and then Mr. Stevens filed these particular claims, which are in some ways derivative of the original claims, just like a claim for bad faith is derivative from the underlying claim that gives rise to the bad faith claim. 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).

This case should be no different, and Mr. Stevens should not be punished for bringing these claims now, just like an insured is not punished for filing a bad faith claim before the underlying litigation is resolved. As noted above, there is not a single case in Washington upholding a trial court's refusal to bifurcate under these compelling circumstances. The trial court is duty bound to protect the rights of parties, and if they conflict, to *balance* their rights. The trial court erred because it made no effort to do so, and instead concluded that Mr. Stevens would have to live with the "consequences" of his decision to exercise his legal rights.

VI. CONCLUSION

Mr. Stevens respectfully requests the Court (1) reverse the trial court's conclusion that Mr. Stevens' attorney's fees and costs are "damages" for the jury to decide, rather than "costs" for the trial court to decide, (2) reverse the trial court's order compelling Mr. Stevens to produce privileged information, and (3) reverse the trial court's refusal to bifurcate and/or stay Counterclaims 12 and 13 until the other claims and counterclaims are resolved.

Mr. Stevens 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 Counterclaims 12 and 13 shall be bifurcated and stayed until the other claims and counterclaims are resolved.

Dated: March 14, 2016.

Presented by:

PFAU COCHRAN VERTETIS AMALA PLLC

By: 

Darrell L. Cochran, WSBA No. 22851

Jason P. Amala, WSBA No. 37054

Beth A. Davis, WSBA No. 45674

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Thea Marriott, 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:

Clerk of the Court
Court of Appeals, Division 1
One Union Square, 600 University St.
Seattle, WA 98101

James H. Clark
OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.
10900 NE Fourth Street, #1430
Bellevue, WA 98004
jclark@ohswlaw.com
lflasch@ohswlaw.com

William W. Simmons
Justin Boland
Emmelyn Hart
LEWIS BRISBOIS BISGAARD & SMITH
2101 Fourth Avenue, Suite 700
Seattle, WA 98121
William.Simmons@lewisbrisbois.com
Justin.Boland@lewisbrisbois.com
Emmelyn.Hart@lewisbrisbois.com
Marlisa.Lochrie@lewisbrisbois.com
Lisa.Blakeney@lewisbrisbois.com

Christopher I. Brain
Chase Alvord
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2016 MAR 14 PM 3:42

calvord@tousley.com
cbrain@tousley.com
jmrozek@tousley.com

Rhys M. Farren
DAVIS WRIGHT TREMAINE, LLP
777 108th Avenue NE
Bellevue, WA 98004-5149
rhysfarren@dwt.com
SusanBright@dwt.com

DATED this 14th day of March 2016.



Thea Marriott
Legal Assistant