NO. 85092-0

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

KURT BENSHOOF,

Petitioner/Plaintiff,

v.

NATHAN CLIBER, JESSICA OWEN, MAGALIE LERMAN, OWEN HERMSEN,

Respondents/Defendants,

ANSWERING BRIEF OF RESPONDENT/DEFENDANT NATHAN CLIBER

Gordon Rees Scully Mansukhani, LLP
Sarah N. Turner, WSBA No. 37748
Michael C. Tracy, WSBA No. 51226
701 Fifth Avenue, Suite 2100
Seattle, Washington 98104-5017
(206) 695-5100
sturner@grsm.com
mtracy@grsm.com
Attorneys for Respondent Nathan Cliber

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I. INTRODUCTION

Respondent Nathan Cliber is one of multiple attorneys, parties, and interested persons who participated in the parentage action involving Respondent Jessica Owen and Appellant Kurt Benshoof and who has since found himself entangled in Mr. Benshoof's relentless abuse of the judicial system. At the time Mr. Cliber and the other Respondents filed their Special Motions for Expedited Relief ("Special Motion") to dismiss Mr. Benshoof's claims under the Uniform Public Expression Protection Act, RCW 4.105 *et seq.* ("UPEPA"), they had been subject to six state and federal actions filed by Mr. Benshoof, all predicated on a similar set of facts arising from their involvement in a parentage action and a domestic violence action.

Mr. Cliber and the other Respondents brought Special Motions under the UPEPA and sought dismissal, as Mr. Benshoof's claims were predicated on communications in judicial proceedings. The trial court agreed, and correctly found that the UPEPA applied to Mr. Benshoof's claims. As is required

by statute, the trial court awarded Mr. Cliber and the other Respondents their attorneys' fees and costs incurred in bringing their respective Special Motions.

Following the dismissal of Mr. Benshoof's claims, on Respondents' joint motion, the trial court entered a vexatious litigant order (the "Order") against Mr. Benshoof, prohibiting him from initiating any new claims against the Respondents, their attorneys, and their friends and families, for a period of five years, without first submitting such claims to the trial court for its review and approval. Unfortunately, Mr. Benshoof's abuse of the judicial system did not end with the trial court's entry of the Order—since then, he has repeatedly failed to comply with the Order and initiated multiple actions against the Respondents. Most recently, Mr. Benshoof has filed additional actions and on December 26, 2023, the day after Christmas and the week before this Answering Brief was due to be filed, attempted to serve the

summons and complaint for those actions on Mr. Cliber at his residence.[1]

The lower court properly dismissed Mr. Benshoof's claims, including the claim against Mr. Cliber, under the UPEPA, as they were predicated upon communications made during judicial proceedings. The lower court followed the UPEPA's constitutional standards for adjudication that mirror CR 12 and 56, was right to disregard Mr. Benshoof's meritless argument that the UPEPA's crime victim exception applied to him, and interpreted and enforced the statutorily mandated stay in accordance with the UPEPA.

Further, the trial court was well within its discretion to find Mr. Benshoof to be a vexatious litigant and enter the Order against him. There was ample evidence of Mr. Benshoof's abuse of the judicial system before the trial court, and Mr. Benshoof's

[1] Mr. Benshoof's further harassing conduct since the entry of the Order is not before the Court, but is added to provide additional background to the proceedings.

harassment of Respondents and abuse of the judicial system continues even as this appeal is before the Court. Mr. Benshoof's "frustration" with the results of the prior actions is no excuse to abuse the judicial system, and the Court's Order was constitutionally tailored to remedy his particular abuses. Finally, Mr. Benshoof has given the Court no cognizable basis to reverse the lower court's award of attorneys' fees and costs.

The Court should affirm the trial court's dismissal of Mr. Benshoof's claims under the UPEPA, it's entry of the Order against Mr. Benshoof, and its award of attorneys' fees and costs to Mr. Cliber and the other Respondents under RCW 4.105.090. Furthermore, Mr. Cliber requests that he be awarded his attorneys' fees and costs incurred in responding to Mr. Benshoof's frivolous appeal.

II. STATEMENT OF ISSUES[2]

1. The trial court properly dismissed Mr. Benshoof's claims and entered judgment against him, as his claims violated the Uniform Public Expression Protection Act, RCW 4.105 *et seq*.

2. The trial court acted within its discretion to enforce the UPEPA's statutorily mandated stay of discovery.

3. The trial court correctly found Mr. Benshoof to be a vexatious litigant.

4. The trial court's Vexatious Litigant Order (the "Order") is constitutional.

5. The trial court properly entered judgment against Mr. Benshoof in favor of Mr. Cliber, and awarded attorney's fees and costs as is statutorily mandated by UPEPA.

[2] The issues presented are only those from Mr. Benshoof's Opening Brief which are relevant to Mr. Cliber.

6. The trial court correctly denied Mr. Benshoof's Motion for Reconsideration.

7. This Court should find that Mr. Benshoof's appeal was frivolous in nature and award Mr. Cliber attorneys' fees and costs pursuant to RAP 18.1, 18.9, and RCW 4.105.090.

III. STATEMENT OF THE CASE

This Appeal arises out of a long line of disputes between Mr. Benshoof and Ms. Owen, who were formerly in a dating relationship and share a child. Opening Brief of Appellant ("Benshoof Brief"), 10. Mr. Cliber is a family law attorney who represented Ms. Owen in a single legal proceeding, a parentage action involving Ms. Owen, Mr. Benshoof, and their child, and has since found himself entangled in Mr. Benshoof's relentless abuse of the judicial system. CP 888, ¶ 4-5. At the time Mr. Cliber filed his Special Motion, Mr. Benshoof had filed six lawsuits against Ms. Owens and others, though that number has grown despite the Trial Court's Vexatious Litigant Order against

Mr. Benshoof.[3] CP 419-22, 888 ¶ 2. Three of those lawsuits named Mr. Cliber as a defendant, and in another proceeding Mr. Benshoof attempted to enter an anti-harassment protection order against Mr. Cliber.[4] *Id*., CP 888, ¶ 2. Mr. Benshoof also filed complaints with the Washington State Bar Association against Mr. Cliber and Ms. Owen's Attorney. CP 888, ¶ 2. All of Mr. Benshoof's litigation efforts arise out of largely the same set of "facts," and have been summarily rejected by the courts in which they were filed. *See* CP 418-26.

A. Procedural History of Mr. Benshoof's Abusive Litigation

Mr. Benshoof filed his original complaint on October 3, 2022, and then filed an amended complaint October 11, 2022.

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[3] Mr. Cliber requests that the Court take judicial notice of the following cases, cited in the trial court's Order: King County Superior Court Case Nos. 22-2-02932-3 SEA; 22-2-03826-8 SEA; 22-2-15745-3 SEA; 22-2-1112-7 SEA. W.D.W.A. Case No. 2:22-cv-01281-LK. Further, Mr. Benshoof has filed and attempted service on Mr. Cliber in W.D.W.A Case No. 2:23-cv-01392-JNW and W.D.W.A. Case No. 2:23-cv-01829-JHC.

[4] W.D.W.A. Case No. 2:22-cv-01281-LK (dismissed); King County Superior Case No. 22-2-1112-7 SEA (dismissed); King County District Court Case No. 22CIV11976KCX.

CP 432-43, 444-58. Mr. Benshoof's operative complaint asserted one cause of action against Mr. Cliber, for abuse of process. CP 452-53, ¶¶ 90-97. Therein, Mr. Benshoof alleged that two prior cases formed the basis for his abuse of process claim: King County Superior Court Case 21-2-1149-8 SEA (the "Domestic Violence Action") and 21-5-00680-6 SEA (the "Parentage Action"). *Id*. Mr. Cliber did not formally or informally represent Ms. Owen in the Domestic Violence Action, and was not otherwise involved in it. CP 888, ¶ 3.

Mr. Cliber was, however, Ms. Owen's attorney of record in the Parentage Action, and it is the only case in which Mr. Cliber represented Ms. Owen. *Id.* at ¶ 4.

B. The Parentage Action Was Necessary for the Court to Enter Orders About Parenting

The purpose of the Parentage Action was two-fold—first, at the time of filing, Mr. Benshoof had recently been prohibiting contact between Ms. Owen and her child; and second, the Parentage Action would result in bringing much needed structure and clear rules as to parental decision-making for the child. *Id.*

at ¶ 5. The matter had to be filed as a parentage proceeding, as opposed to just the establishment of a Parenting Plan, because Mr. Benshoof had not taken the required steps to be legally recognized as the father of Ms. Owen's child. At that point, without a legal determination that Mr. Benshoof was the father, the court would not have jurisdiction to enter orders about parenting, even if he were a presumed parent, as he claimed. *Id.* at ¶ 6; Benshoof Brief, 29.

After more than a year of litigation and a full investigation by a court-appointed Guardian ad Litem, the court entered its final orders on October, 21, 2022, and awarded Ms. Owen sole residential care and decision making authority for their child. CP 888 at ¶ 7. On October 3, 2022, three weeks before the final orders were entered in the Parentage Action, Mr. Benshoof filed his Complaint for the underlying action to this appeal. CP 432-43.[5]

[5] Mr. Benshoof later filed a Motion for Order to Show Cause and Order to Vacate the Judgment of the Parentage Action after

C. Mr. Cliber Filed His Special Motion Because His Communications Occurred in Judicial Proceedings

On December 12, 2022, Mr. Cliber, along with the other Respondents, filed a Special Motion. CP 877-87. Mr. Cliber argued, and the lower court agreed, that Mr. Benshoof's abuse of process claim against him was predicated upon communications that took place in judicial proceedings, and was therefore subject to dismissal under the UPEPA. *Compare id*. *to* CP 264-67. In a series of conclusory statements, Mr. Benshoof responded to the Special Motion, claiming that Mr. Cliber's statements during the Parentage Action were criminal and therefore the UPEPA did not apply to Mr. Benshoof's abuse of process claims. CP 242-51. The lower court disagreed with Mr. Benshoof's arguments and on February 2, 2023, granted Mr. Cliber's Special Motion, and similar motions from the other respondents. CP 264-67.

As a result of the Special Motions and the notice Respondents provided Mr. Benshoof in advance of those Special

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Respondents' Joint Motion for Vexatious Litigant Order was granted, which was denied and found to be "without merit."

Motions, discovery in the matter was stayed pursuant to the protections outlined in RCW 4.105. Mr. Benshoof sought to challenge the statutory stay in a Motion for Limited Discovery that he filed but failed to notice in compliance with King County Local Rule 7. CP 106-112; Benshoof Brief, 14. Since he failed to comply with the local rules, the motion was not considered by the trial court. *Id*. Mr. Benshoof then renewed his requests for limited discovery in his responses to Respondents' Special Motions. CP 239, 246. The trial court declined these requests as well.[6] On January 13, 2023, Mr. Benshoof attempted to amend his Complaint for a second time, also in violation of the UPEPA's stay provisions. CP 185-216. Mr. Benshoof's later filed a Motion to Compel Limited Discovery, seeking the same relief, which he later filed on January 27, 2023, though the

[6] Even if Mr. Benshoof's submissions had complied with the civil rules, they fell well short of RCW 4.105.030(4)'s specificity and availability requirements.

motion was mooted by the trial court's order on the Special Motions. CP 259-63, 264-67.

D. Mr. Cliber and other Respondents Filed a Joint Motion for a Vexatious Litigant Order Against Mr. Benshoof to Stop Mr. Benshoof's Abuse of the Judicial System

On February 17, 2023, the Respondents, including Mr. Cliber, filed their Joint Motion for a Vexatious Litigant Order Against Mr. Benshoof, wherein they laid out Mr. Benshoof's abuses of the judicial system, including his many lawsuits, bar complaints, and disturbing communications to Respondents and their counsel, as well as the fact that all Mr. Benshoof's harassing litigation efforts were based upon the same set of facts. CP 976-90. In response, Mr. Benshoof confirmed the scope of litigation he brought, claiming that he "only petitioned the Courts as a remedy of last resort to address appalling instances of criminal law violation and tortious misconduct." CP 351-99. However, in his response, Mr. Benshoof made clear that all the allegations relating to Mr. Cliber arose in judicial proceedings, arising from the same set of facts regarding the Parentage Action and the

Domestic Violence Action. *Id.* Mr. Benshoof also did not dispute the voluminous nature of his abuse of the judicial system but rather placed blame on the Respondents for his abuse of the judicial system. CP 360 ("Does a liar ***feel*** vexed when an honest person calls out their lie? Most do, but the origin of the vexation is the lies of the liar, not the soothsayer.") (emphasis maintained). The trial court found Mr. Benshoof to be a vexatious litigant, and entered the Order against him, requiring him to file all future litigation against Respondents, their counsel, and their friends and families with the trial court for its review and approval for the next five years. CP 418-26. Despite the trial court's Order, he continues to pursue new litigation against Respondents.

IV. ARGUMENT

Pursuant to the UPEPA, the trial court properly dismissed Mr. Benshoof's claims against Mr. Cliber, as they were predicated upon communications made during judicial proceedings. The lower court followed the UPEPA's constitutional standards for adjudication that mirror CR 12 and

56, was right to disregard Mr. Benshoof's meritless argument that the UPEPA's crime victim exception applied to him, and interpreted and enforced the statutorily mandated stay in accordance with the UPEPA.

Further, the trial court was well within its discretion to find Mr. Benshoof to be a vexatious litigant and enter the Order against him. Mr. Benshoof's "frustration" with the results of the prior actions is no excuse to the abuse the judicial system, and the trial court's Order was constitutionally tailored to remedy his particular abuses. Likewise, Mr. Benshoof has given the Court no cognizable basis to reverse the lower court's award of attorneys' fees and costs, and fails to cite any authority in support.

Each of Mr. Benshoof's assignments of error that relate to Mr. Cliber are addressed below and none provide the Court with a basis to reverse the trial court's determinations and orders. However, Mr. Benshoof's failure to identify the standards of review for his assignments of error or provide authority and

record citation for his arguments gives the Court sufficient bases to affirm the lower court outright. Regardless of which path the Court takes, the result is the same—the trial court's determinations and orders should be affirmed.

A. Standards of Review

The following standards of review apply to Mr. Benshoof's challenges of the trial court's determinations and orders under the UPEPA. This Court reviews issues of statutory interpretation *de novo*. *Jha v. Kahn*, 24 Wn. App.2d 377, 389, 520 P.3d 470 (2022) (citing *Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc.*, 8 Wn. App. 2d 418, 449, 438 P.3d 1212 (2019)). Similarly, it reviews summary-judgment-like orders de novo, viewing all evidence in favor of the nonmoving party. *Jha*, 24 Wn. App. at 389 (citing *Boyd v. Sunflower Props. LLC*, 197 Wn. App. 137, 142, 389 P.3d 626 (2016)). The trial court's decision to reject a party's request to lift the UPEPA's statutorily-required stay is reviewed for abuse of discretion. RCW 4.105.030(4) (the trial court "*may* allow limited discovery

if a party shows that *specific* information is necessary to establish whether a party has satisfied or failed to satisfy a burden under RCW 4.105.060(1) and the information is not reasonably available unless discovery is allowed." (emphasis added)).

For Mr. Benshoof's challenge of the trial court's Vexatious Litigant Order, this Court "review[s] a trial court's order limiting a party's access to the court for an abuse of discretion." *Bay v. Jensen*, 147 Wn. App. 641, 657, 196 P.3d 753 (2008). Likewise, the standard of review for an award of attorney's fees is abuse of discretion. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 524, 280 P.3d 1133. *review denied*, 175 Wn.2d 1028, 291 P.3d 254 (2012).

B. The Trial Court Correctly Found that Mr. Benshoof's Claim Against Mr. Cliber Violated the UPEPA

The UPEPA applies to a complaint or cause of action when it is asserted against a person based on the person's "[c]ommunication in a legislative, executive, ***judicial***, administrative, or other governmental proceeding." RCW 4.105.010(2)(a). (Emphasis added). In ruling on a motion under

the UPEPA, the trial court "shall dismiss with prejudice a cause of action, or part of a cause of action, if: (a) the moving party establishes under RCW 4.105.010(2) that this chapter applies; (b) the responding party fails to establish under RCW 4.105.010(3) that this chapter does not apply;" and (c) either the responding party fails to establish a prima facie case as to each essential element or the moving party establishes the responding party failed to do so or that there is no genuine issue as to any material fact and is entitled to judgment as a matter of law. RCW 5.105.060(1).

Mr. Benshoof provides no basis—or even an argument specific to Mr. Cliber—for reversal of the trial court's dismissal of the claim under the UPEPA.

1. The UPEPA's standards for adjudication provides a constitutional limit on Mr. Benshoof's right of trial by jury.

Mr. Benshoof misunderstands, misconstrues, and frankly, misrepresents the Washington Supreme Court's holding in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), and the

Legislature's intent behind enacting the UPEPA. Despite his position, "[t]he right of trial by jury is not limitless," as summary judgment proceedings, which are mirrored in the UPEPA, "'do not infringe upon a litigant's constitutional right to a jury trial.'" *Davis*, 183 Wn.2d at 288 (abrogated on other grounds by *Maytown Sand and Gravel, LLC v. Thurston County*, 191 Wn.2d 392, 423 P.3d 223 (2018)) (quoting *LaMon v. Butler*, 112 Wn.2d 193, 200 n. 5, 770 P.2d 1027 (1989)).

First, citing *Davis*, Mr. Benshoof claims that the "entire point" of the Legislature enacting a new anti-SLAPP statute was "to correct the problem that the prior statute did not allow for a full hearing, by a jury, while forcing the complaint [sic] to prove their case." Benshoof Brief, 16-17. There is no support for this position whatsoever, in either *Davis*, the UPEPA, or the opinions interpreting it. Contrary to Mr. Benshoof's assertion, and as this Court explained in *Jha v. Khan*, the

> UPEPA provides for early adjudication of baseless claims aimed at preventing an individual from exercising the constitutional right of free speech.

> Unlike its predecessor, however, UPEPA incorporates standards for adjudication that mirror those utilized in Civil Rules 12 and 56.

24 Wn. App.2d 377, 387, 520 P.3d 470 (2022).

Though the Washington Supreme Court found the prior version of the anti-SLAPP statute to be unconstitutional, it was because the former statute "requires the trial judge to weigh the evidence and dismiss a claim unless it makes a factual finding that the plaintiff has established by clear and convincing evidence a probability of prevailing at trial," not because the right to a jury trial is absolute. *Davis*, 183 Wn.2d at 288. The *Davis* Court found the fact-finding aspect of the former statute unconstitutional as written, but in an invitation the Legislature later accepted when it enacted the UPEPA, noted that "it is well established that '[w]hen there is no genuine issue of material fact, … summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial.'" *Davis*, 183 Wn.2d at 289 (quoting *LaMon v. Butler*, 112 Wn.2d 193, 200 n. 5, 770 P.2d 1027 (1989)).

Despite Mr. Benshoof's unsupported assertion, the "entire point" of the Legislature enacting UPEPA was to ameliorate and replace the unconstitutional fact finding procedure of the former anti-SLAPP statute with constitutional "standards for adjudication that mirror those utilized in Civil Rules 12 and 56," *Id*. at 387. Not, as he claims, to give litigants a limitless right of trial by jury. The "full hearing, by jury" sought by Mr. Benshoof is explicitly contrary to the Legislature's intent—"[d]elaying assessment of the movant's constitutional right until *after* the jury finds facts entirely defeats the legislature's intent in enacting UPEPA." *Jha*, 24 Wn. App.2d at 399 (emphasis maintained) (citing RCW 4.105.901). The Legislature enacted UPEPA to maintain the protection of communications made as part of judicial proceedings, like those made by Mr. Cliber during the Parentage Action. RCW 4.105.010(2)(a).

Second, Mr. Benshoof claims that "there is virtually no difference between the procedural posture in this matter and the unconstitutional posture under the prior Anti-Slapp statute."

Benshoof Brief, 17. To the contrary, there is a *world* of difference between the constitutional procedure in this matter, wherein the trial court followed the UPEPA's standards for adjudication that mirror CR 12 and 56, and the unconstitutional procedure in the former anti-SLAPP statute.

In each of their respective Special Motions, Respondents laid out the proper standards for adjudication under the UPEPA, which mirror CR 12 and 56. CP 938 (Cliber); CP 495 (Owen); CP 895 (Joinder of Lerman and Hermsen). The trial court issued its order based on those standards, and there is no mention or application of the unconstitutional fact-finding and weighing probabilities from the former anti-SLAPP statute by the trial court. *Compare* CP 264-67 to *Davis*, 183 Wn.2d at 280 (quoting RCW 4.24.525(4)(b) (the former anti-SLAPP statute "requires the trial court to weight the evidence and make a factual determination of plaintiffs' 'probability of prevailing on the claim.'").

CR 12 and 56, by their very nature, provide courts with a mechanism to dispose of claims as a matter of law *without* obtaining further discovery or permitting amendment of the complaint. Furthermore, and as discussed in more detail *infra*, the UPEPA expressly prohibits conducting discovery or moving to amend the complaint after the Special Motion is filed. RCW 4.105.030. That Mr. Benshoof was not permitted to continue in his campaign of harassment against Respondents through discovery and further litigation does not mean there is virtually no difference between the standards for adjudication of the former anti-SLAPP statute and the UPEPA. Rather, it shows that the trial court properly interpreted the statutory mandate of RCW 4.105.030.

2. The trial court rightly rejected Mr. Benshoof's assertions that he was a victim of a crime, and he failed to raise or argue the issue as to Mr. Cliber.

In the proceedings below, Mr. Benshoof's primary argument in response to Respondents' Special Motions was that the UPEPA did not apply because he was allegedly the victim of

various crimes perpetrated by Respondents. CP 246; CP 236-37; CP 253-55. In fact, it was the only argument presented in response to Mr. Cliber's Special Motion, though Mr. Benshoof did spend a significant portion of his response arguing the unrelated issue that the family court's jurisdiction was improperly asserted in the Parentage Action, which only supports Respondents' assertion that he was attempting to relitigate common issues and facts. CP 246 ("III. STATEMENT OF ISSUE[:] Rekofke was informed by Plaintiff that RCW 4.105.(3)(a)(iv) [sic] is an applicable exception to Cliber's claim of protection under UPEPA."); *see* CP 939.

On appeal, he claims the trial court erred in ignoring those arguments as to crimes allegedly perpetrated by the other Respondents. Benshoof Brief, 17. Fatally absent from Mr. Benshoof's Brief, however, is any mention of Mr. Cliber, or how the trial court erred in ignoring those arguments as to Mr. Cliber. *See* Benshoof Brief, 17-19. By failing to argue that Mr. Cliber committed criminal acts and that the trial court ignored such acts,

Mr. Benshoof has waived his right to present such argument before this Court at a later time. *Lewis v. City of Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991) (citing *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) and RAP 10.3(c)) (There is a "long standing Washington rule that appellate courts will not consider contentions raised for the first time in reply briefs…").

Regardless of Mr. Benshoof's appearance before this Court as pro se, he is held to the same standard as attorneys and must comply with all procedural rules on appeal. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments that are not supported by references to the record, meaningful analysis, or citation to pertinent authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). "It is not the responsibility of this court to attempt to discern what it is

appellant may have intended to assert that might somehow have merit." *Port Susan Chapel of the Woods v. Port Susan Camping Club*, 50 Wn. App. 176, 188, 746 P.2d 816 (1987). The trial court properly dismissed Mr. Benshoof's abuse of process claim against Mr. Cliber, and Mr. Benshoof has failed to provide the Court with any basis or argument for reversal.

3. The trial court was within its discretion to disallow discovery after RCW 4.105.030(1)'s mandatory stay went into effect.

"When interpreting a statutory provision, courts must give meaning to every word in a statute." *Jha*, 24 Wn. App.2d at 405 (quoting *Smith v. Dep't of Labor & Indus.*, 22 Wn. App.2d 500, 511, 512 P.3d 566 (2022) (internal quotation omittied)). Here, RCW 4.105.030(1) provides that on the earlier of a party giving notice of intent to file or the filing of a Special Motion, "[a]ll other proceedings between the moving party and responding party, including discovery and pending hearing or motion, are stayed." The trial court "*may* allow limited discovery if a party shows that *specific* information is necessary to establish whether

a party has satisfied or failed to satisfy a burden under RCW 4.105.060(1) and the information is not reasonably available unless discovery is allowed." RCW 4.105.030(4) (emphasis added). Mr. Benshoof's burdens under .060(1) are to: (1) establish that RCW 4.105 does not apply; and, (2) establish a prima facie case as to each essential element of his causes of action. The second burden only comes into play if the party moving under the UPEPA does not establish that either: Mr. Benshoof failed to state a cause of action upon which relief can be granted or that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Unlike the initial stay of proceedings under .030(1), which is mandatory, whether limited discovery is allowed is left to the discretion of the trial court. *Jha*, 24 Wn. App.2d at 404-06 (once the stay of proceedings under RCW 4.105.030 in effect, a trial court's power to entertain discovery or other motions is limited by statute). This discretion remains *even if* the non-moving party shows that specific information is necessary to establish his

burdens and that information is not reasonably available without discovery. RCW 4.105.030(4).

a. Mr. Benshoof fails to show that the trial court abused its discretion.

In a series of unsupported and conclusory statements, Mr. Benshoof conflates the mandatory nature of RCW 4.105.030(1)'s stay with the trial court's discretionary ability to grant limited discovery under subsection (4). Benshoof Brief, 20 ("Benshoof fulfilled those obligations [of (4)] in each Response he filed."), 21 ("Judge Ferguson should not have entered an Order on UPEPA without providing the opportunity for Benshoof to seek discovery, or at least be fully heard on this matter."), 22 ("Permission for discovery should have been allowed, even if there were hiccups as to noting the hearing date."). Ostensibly, Mr. Benshoof argues that because he tried to bring a motion for limited discovery and he raised the same request in his responses to Respondent's Special Motions, "[p]ermission for discovery should have been allowed" by the trial court. But merely asking for discovery does not meet the

standard under RCW 4.105.030(4), and Mr. Benshoof fails to provide any authority for the proposition that a trial court declining to forgive a party's "hiccup" in complying with the court's rules is an abuse of discretion. *See* King County Local Rule 7(b)(5) ("A Notice of Court Date *shall* be filed with the motion.").

Likewise, Mr. Benshoof raises straw-man issues such as a lack of prejudice to Respondents given that they had notice of his deficiently-noted motion for limited discovery, that Respondents were "treated better" in filing an unrelated motion, and that Judge Ferguson had knowledge of Mr. Benshoof's deficiently-noted motion and ignored it. But none of these complaints fulfill the standard of RCW 4.105.030(4) either.

b. None of Mr. Benshoof's filings meet the requirements of RCW 4.105.030(4).

Mr. Benshoof fails to argue why the requests within his Responses to Respondents' Special Motions meet the standard of RCW 4.105.030(4) or why the trial court abused its discretion in not granting him limited discovery. Even if the Court were

inclined to comb through the uncited record to find support for Mr. Benshoof's arguments, none exists.

In his filed but unnoted Motion for Limited Discovery, Mr. Benshoof requested discovery on what amounts to every allegation in his complaint, via voluminous depositions and document production. He stated:

> Plaintiff wishes to thoroughly established [sic] to the court that: 1) Misters Russ and Rekofke failed to establish that RCW 4.105.010(2) could grant Defendants Owen and Cliber litigation privilege, and 2) that Plaintiff has established that RCW 4.105.010(3) does indeed preclude Defendants Owen and Cliber from hiding their lies under the ***good-faith*** umbrella of litigation privilege.

CP 107 (emphasis maintained). Mr. Benshoof concludes the motion with a threat, stating that he "strongly suggests that Mr. Russ and Mr. Rekofke avoid further allegations of misconduct by immediately withdrawing their meritless Notices and striking their requested hearing."[7] CP 111.

[7] Mr. Russ was Ms. Owen's counsel in the underlying matter, and remains so on appeal. Mr. Rekofke was Mr. Cliber's counsel in the underlying matter, but was substituted for Ms. Turner and Mr. Tracy appeal.

Mr. Benshoof's Responses to Respondents' Special Motions echo his motion for limited discovery's conclusory and insufficient assertions. CP 239 ("Specific information from Owen includes documents and depositions further evincing Owen's alleged crimes, her plans to perpetrate them, and her attempts to cover them up."); CP 246 ("While Plaintiff has extensively detailed criminal law violations by Cliber, Plaintiff is entitled to limited discovery, at a minimum, to ensure his full rebuttal of opposing counsels' claims of litigation privilege, and RCW 4.105.030(4) affords that.").

Furthermore, Mr. Benshoof's subpoenas to Respondents, served after the stay was in effect, show that Mr. Benshoof was seeking not limited discovery, but discovery for the whole case. *See e.g.*, CP 114 (commanding Mr. Cliber to produce: "[a]ll documents…evidencing a communication which directly involves…criminal conduct perpetrated by any of the Defendants against Plaintiff…" and "[a]ll documents…which involves or includes any of Defendants' criminal culpability, in

relation to Plaintiff's civil claims or criminal allegations against Defendants named herein."). Even if Mr. Benshoof's submissions had complied with the civil rules, they fall well short of RCW 4.105.030(4)'s specificity and availability requirements.

c. Mr. Benshoof's repeated Davis argument still fails.

Lastly, Mr. Benshoof recycles his misconstruction of *Davis*, which, as addressed *supra*, does not entitle him "to bring full facts before the court," "guarantee[] the right to trial by jury to decide facts," or permit him seek discovery during the UPEPA stay. Furthermore, Mr. Benshoof does not acknowledge that his attempts to conduct discovery without the trial court's approval violate RCW 4.105.030, instead only providing the Court with a rhetorical question. Benshoof Brief, 23 ("How can these circular rules NOT violate the constitutional right to trial by jury, or the right to seek redress for harm?"). He concludes by wading further into the nonsensical—paradoxically asserting that *Davis* found the prior anti-SLAPP statute violated the constitution *and* RCW 4.24.525, and that trial court likewise violated the

constitution. But the prior anti-SLAPP statute *is* RCW 4.24.525, and neither CR 12 nor CR 56 require additional discovery or amendment of pleadings to be allowed.

Mr. Benshoof has given this Court no basis to find that the trial court abused its discretion as to his unnoted request to allow limited discovery and his conclusory statements in his responses to Respondents' Special Motions, or that his requests fulfilled RCW 4.105.030(4) specificity and availability requirements.

C. The Trial Court Correctly Found Mr. Benshoof to Be a Vexatious Litigant

"In Washington, every court of justice has inherent power to control the conduct of litigants who impede the orderly conduct of proceedings." *Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849 (2008), *review denied*, 164 Wn.2d 1037, 197 P.3d 1186 (2008). Under RCW 2.28.010(3), a trial court has the authority to "provide for the orderly conduct of proceedings before it." Therefore, a court may "place reasonable restrictions on any litigant who abuses the judicial process." *Yurtis*, 143 Wn. App. at 693. This Court "review[s] a trial court's order limiting

a party's access to the court for an abuse of discretion." *Bay*, 147 Wn. App. at 657.

That Mr. Benshoof "had no other choice" and experienced "frustration" with the results of the prior actions is no excuse to abuse the judicial system, and the Court's Order was constitutionally tailored to remedy his particular abuses. The Court should affirm the trial court's determination and Order.

1. Mr. Benshoof's actions were not justified, run afoul of *res judicata*, and were clearly vexatious with an improper purpose.

"[T]rial courts have the authority to enjoin a party from engaging in litigation upon a 'specific and detailed showing of a pattern of abusive and frivolous litigation.'" *Yurtis*, 143 Wn. App. at 693 (quoting *Whatcom County v. Kane*, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981)). Mr. Benshoof claims that he "had no other choice but to proceed with legal action on a number of issues which were not of his creation." Benshoof Brief, 28. However, the "examples" he gives—the Parentage Action and his vehicle—both of which have been the subject of repeated

litigation attempts by Mr. Benshoof, only evidence his abusive and frivolous litigation, which continues to this day.

Preliminarily, and though not the basis for his claims being dismissed below[8], Mr. Benshoof's claim that he "had no other choice but to proceed with legal action" runs afoul of *res judicata*. Both of his examples are predicated on already-litigated issues, both of which he failed to timely appeal. *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949) ("The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent

[8] The trial court's determinations under the UPEPA and its finding that Mr. Benshoof was a vexatious litigant were based, in part, on Mr. Benshoof's repeated filings concerning the same issues and facts. As discussed above, Mr. Benshoof's claims were dismissed pursuant to UPEPA, due to the protection afforded communications made during prior judicial proceedings. RCW 4.105.010(2)(a). Likewise, Respondents argued below that Mr. Benshoof has "filed several, overlapping lawsuits against [Respondents] in the last year" that "aris[e] from the same or very similar set of facts…" CP 987.

jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.").

In Mr. Benshoof's first example, he cites the Parentage Action, which was filed on September 23, 2021, and came to a close on October 21, 2022, when the court entered its final orders, after more than a year of litigation and a full investigation by a court-appointed Guardian ad Litem. CP 889-90; CP 436, ¶ 31. Mr. Benshoof now complains that "a different form of action could have been taken," that he should have been a "presumptive parent," and that he was "tarred [] as having engaged in terrible behavior, due to the parentage action," all of which justify his re-litigation of the matter. Benshoof Brief, 28-29. But Mr. Benshoof cites no authority to support his claimed justification in attempting to re-litigate these issues, nor does he assert that the trial court abused its discretion in finding that his multiple attempts at re-litigation constituted a "pattern of abusive and

frivolous litigation.'" *Yurtis*, 143 Wn. App. at 693 (quoting *Whatcom Cty*, 31 Wn. App. at 253).

In Mr. Benshoof's second example, he cites the prior lawsuit he filed "in the form of a Writ of Replevin, against Ms. Owen, for the theft of an FJ Cruiser." Benshoof Brief, 29-30. Though Mr. Benshoof had the right to bring that initial lawsuit, like the Parentage Action (or any lawsuit, for that matter), he does not have the right to bring additional lawsuits based on the same underlying facts and issues. *See Marino Prop. Co*, 97 Wn.2d at 312. Furthermore, Mr. Benshoof misunderstands the nature of his replevin action, pursuant to which he claims—again with citation to no authority—that "[i]ssues relating to damages, criminal activity, extortion and other claims could still be asserted…" Benshoof Brief, 30. But "the essence of a replevin action is to recover specific property; damages are only incidental." *Selland v. Douglas County*, 4 Wn. App. 387, 390, 481 P.2d 573 (1971); *compare* RCW 7.64.010 ("The plaintiff in an action to recover the possession of personal property may

claim and obtain the immediate delivery of such property, after a hearing…").

Finally, in what is Mr. Benshoof's only citation to authority in this section, he asserts that "[o]ther cases in which the court issued findings of pre-trial constraints or other rules relating to a vexatious litigation have been based on far more than [his] actions." He then gives a single example, the unpublished decision in *Li v. Ma*. Benshoof Brief, 31 (citing 2023 WL 4863262 (2023)). However, the standard for a trial court to enter a vexatious litigant order is not whether or not there have been other vexatious litigants with more egregious abuses of the judicial system—rather, "trial courts have the authority to enjoin a party from engaging in litigation upon a 'specific and detailed showing of a pattern of abusive and frivolous litigation.'" *Whatcom Cty*, 31 Wn. App. at 253.

The *Li* appeal is instructive here, not because of the underlying facts, but because of this Court's disposition with that similar vexatious litigant appeal. There, this Court had no issue

affirming the vexatious litigant order without reaching the merits of the appeal, as, like here, the appellant's "briefing lacks any reasoned argument in support of his assignments of error and fails to provide any relevant legal basis for challenging the vexatious litigation order…" *Li*, *5. This Court should do likewise and deny Mr. Benshoof's appeal as it contains unsupported justifications for his abusive and frivolous litigation.

2. The trial court's Vexatious Litigant Order was constitutional.

Mr. Benshoof argues that the trial court's Vexatious Litigant Order is unconstitutional because it is not narrowly tailored and fails to set forth terms upon which he can comply. But Mr. Benshoof's "naked castings into the constitutional sea" lack any merit. *See Fria v. Washington State Dept. of Labor and Indus.*, 125 Wn. App. 531, 533, 105 P.3d 33 (2004) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

First, Mr. Benshoof looks to *De Long v. Hennessey*, a Ninth Circuit case. Benshoof Brief, 32 (citing *De Long v.*

Hennessey, 912 F.2d 1144 (9th Cir. 1990)). In Washington, *De Long* has only been cited in one footnote in a single unreported appellate decision. *See Bennett v. Harmon*, 107 Wn. App. 1018, n. 9, 2000 WL 33399252 (2001) (unpublished) (citing *De Long* as example of an opinion wherein courts generally require findings or reasons when a litigant is prohibited from filing any pleadings with the court). However, even if the Court were to look to *De Long*, the underlying facts are inapposite. There, the court found a vexatious litigant order was not narrowly tailored because it had "no boundaries," applied to all future actions in perpetuity and did not "closely fit the specific vice encountered." 912 F.2d at 1148. Here, the trial court's order is for a specific amount of time (5 years), and only applies to new litigation by Mr. Benshoof against Respondents and those connected to his voluminous, repetitive litigation. CP 422.

Second, Mr. Benshoof complains that "[t]he language referring to 'any other person related or connected to Defendants' is not narrowly tailored," and that the Vexatious

Litigant Order "fails to set forth terms upon which [he] can comply." Benshoof Brief, 33. But whether a term is narrowly tailored is not a question of exact specificity—or in this case, the identity of all the persons to which it applies—rather, it is a question of whether an order is not more comprehensive "than is necessary to remedy proven abuses." *Whatcom Cty*, 31 Wn. App. at 253.[9] Mr. Benshoof also cites to *In re Det. Of Lee*, and selectively quotes the beginning of that case's analysis of the due process vagueness doctrine. Benshoof Brief, 33-34. However, he omits the court's specific considerations. As the *Lee* court described:

> When determining if a term is unconstitutionally vague, courts do not consider the term in a vacuum, but instead consider it in the context in which it is

[9] Mr. Benshoof's citation to *De Long* and his three requirements for a vexatious litigant order appears to copy verbatim Respondents' Motion for Vexatious Litigant Order Against Plaintiff. CP 985-86. However, Mr. Benshoof omits the numbering on the fourth requirement, and the case citation, which is *Marks v. United States*, C07-5679 FDB, 2008 WL 803150, at *7 (W.D. Wash. Mar. 24, 2008) (citing *James Cello-Whitney v. Robert Hoover*, 769 F.Supp. 1155, 1158 (W.D. Wash. 1991)).

> used. "'[I]mpossible standards of specificity' or 'mathematical certainty' are not required because some degree of vagueness is inherent in the use of language." Rather, if a person "of ordinary intelligence can understand what the [condition] proscribes, notwithstanding some possible areas of disagreement, the [condition] is sufficiently definite."

14 Wn. App.2d at 287-88 (internal citations omitted).

The "context in which [the Vexatious Litigant Order] is used" is against the backdrop of Mr. Benshoof's voluminous and repetitive litigation against Respondents. At that time, Mr. Benshoof's litigation targets had expanded from Ms. Owens to her friends and attorneys who played a role in that litigation. *See* CP 419-21 (Vexatious Litigant Order's summary of prior litigation, which began with multiple complaints against Ms. Owen, then petitions against Mr. Cliber, Ms. Owen, and Ms. Lerman, then federal actions against all Respondents, then the underlying action to this appeal). Clearly, the Vexatious Litigant Order applies to only those persons with ties to Mr. Benshoof's litigation. Furthermore, the Vexatious Litigant Order's review mechanism ameliorates any claims of confusion by Mr.

Benshoof. If he truly were confused about the scope of the application of the Order, he is not outright precluded from filing the litigation, he first must only seek from the Court the advanced approval described in the Vexatious Litigant Order. *See* CP 422. As this Court noted in *Maynard v. Estate of Maynard*, when it affirmed a trial court's similar vexatious litigant order,

> …the court's vexatious litigant order does not bar [appellant] from accessing the courts. Rather, [appellant] must first seek court approval and the defendants must be given notice and an opportunity to respond, thereby allowing [appellant] to advance potentially meritorious claims.

26 Wn. App.2d 1029, *7, 2023 WL 3167466 (2023) (unpublished, cited under GR 14.1).

The Vexatious Litigant Order is constitutional as written, as it is for a specific amount of time (5 years), and only applies to new litigation by Mr. Benshoof against Respondents and those connected to his voluminous, repetitive litigation. CP 422. The review mechanism of the Vexatious Litigant Order provides Mr. Benshoof with the ability to bring potentially meritorious claims and for the trial court to determine if a party to his new action is

within the scope of the order. *Id*. For all of the reasons stated above, the Court should affirm the trial court's Vexatious Litigant Order.

D. RCW 4.105.090 Requires that Attorney Fees, Costs, and Statutory Costs Be Awarded to the Prevailing Party to a Special Motion for Expedited Relief

When it comes to awarding attorneys' fees under RCW 4.105.090, trial courts are bound by statutory edict—a trial court "shall award court costs, reasonable attorneys' fees, and reasonable litigation expenses related to the motion…to the moving party if the moving party prevails on the motion…" RCW 4.105.090. The standard of review for an award of attorney's fees is abuse of discretion. *Greenbank*, 168 Wn. App. at 524. The Trial Court properly granted Mr. Cliber's Special Motion for expedited relief and was therefore required under the statute to grant Mr. Cliber his attorneys' fees. CP 263-67, 427-29; RCW 4.105.090.

Mr. Benshoof provides no authority whatsoever for his challenge of the awarded attorneys' fees and costs, only re-

stating his baseless arguments that the trial court should not have ruled on the UPEPA Special Motions without allowing discovery and that the statute "could not be allowed to interfere with the right to jury trial…" Accordingly, should the Court affirm the lower court's order on the UPEPA Special Motions, it should also affirm the award of attorney's fees and costs that are mandated by RCW 4.105.090.

Furthermore, though Mr. Benshoof challenges the grant of attorneys' fees and costs, he does not challenge the reasonableness of the amount awarded, $16,051.50. Accordingly, if the Court affirms the trial court's determinations as to the UPEPA Special Motions, Mr. Benshoof has waived his opportunity to challenge the amount of attorneys' fees granted Mr. Cliber and the other Respondents. *Lewis,* 63 Wn. App. at 31 (citing *Sacco,* 114 Wn.2d at 5 and RAP 10.3(c)). Thus, the Court should affirm the amount of the trial court's award of attorneys' fees and costs to Mr. Cliber under RCW 4.105.090.

E. The Trial Court Properly Denied Mr. Benshoof's Motion for Reconsideration and Mr. Benshoof Failed to Present Argument on the Issue

Though Mr. Benshoof identifies the trial court's denial of his motion for consideration in his assignment of error and his conclusion, his brief contains no argument regarding the trial court's denial of the motion. *See* Benshoof Brief, 9, 35. Accordingly, the Court need not consider the issue. *See McQueen v. Suburban Propane, L.P.*, 23 Wn. App.2d 1038, n. 1, 2022 WL 4951509 (2022) (unpublished, cited under GR 14.1) (citing RAP 10.3(a)(4), (a)(6)).

F. The Court Should Award Mr. Cliber His Attorneys' Fees and Costs Incurred As a Result of Mr. Benshoof's Frivolous Appeal

This court has the discretion to award attorney fees on appeal under RAP 18.1(a) where authorized by applicable law. The same mechanism for attorneys' fees and costs under RCW 4.105.090(1) at the trial court level is available on appeal. *Jha*, 24 Wn. App.2d at 406 ("As the prevailing party, Khan is entitled

to an award of fees pursuant to RAP 18.1 and RCW 4.105.090(1).").

Further, the Court may award attorneys' fees and costs under RAP 18.9(a), which authorizes the Court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." RAP 18.9(a). "Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." *Yurtis*, 143 Wn. App. at 696, 181 P.3d 849 (citing *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)). "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ" and that the appeal is so devoid of merit that "there is no possibility of reversal." *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009) (quoting *Lutz*

Title, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007) *review denied*, 162 Wn.2d 1009, 175 P.3d 1092 (2008)).

Accordingly, Mr. Cliber requests that this Court award his attorneys' fees and costs incurred in responding to Mr. Benshoof's frivolous appeal, under either RCW 4.105.090(1) or RAP 18.9.

V. CONCLUSION

For the forgoing reasons, Mr. Cliber requests that this Court affirm the trial court's: dismissal of Mr. Benshoof's claims pursuant to UPEPA; enforcement of the UPEPA's statutorily mandated stay; finding that Mr. Benshoof is a vexatious litigant; constitutional vexatious litigant order entered against Mr. Benshoof; award of Mr. Cliber's attorneys' fees and costs; and denial of Mr. Benshoof's Motion for Reconsideration. Further, pursuant to RCW 4.105.090(1) and RAP 18.9, Mr. Cliber requests that the Court award him his attorneys' fees and costs incurred in responding to Mr. Benshoof's frivolous appeal.

The undersigned certifies that this Answering Brief contains 8,059 words, in compliance with RAP 18.17(c)(2).

DATED this 4th day of January, 2024.

GORDON REES SCULLY
MANSUKHANI, LLP

Sarah N. Turner, WSBA No. 37748
Michael C. Tracy, WSBA No. 51226
701 Fifth Avenue, Suite 2100
Seattle, Washington 98104-5017
(206) 695-5100
sturner@grsm.com
mtracy@grsm.com
Attorneys for Respondent Nathan Cliber

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 4, 2024, I caused a copy of the foregoing to be delivered by e-service to counsel, addressed as follows:

Kurt Benshoof
1716 N 128th St
Seattle, WA 98133
Phone: (206) 460-4202
Email: kurtbenshoof@gmail.com

Paige V. Gagliardi, WSBA #60816
Blair M. Russ, WSBA #40374
Tomlinson Bomsztyk Russ
1000 Second Ave, Suite 3660
Seattle, WA 98104-1046
Phone: (206) 621-1871
Email: bmr@tbr-law.com; pvg@tbr-law.com

Moshe Y. Admon, WSBA #50235
Admon Law Firm, PLLC
300 Lenora St, #4008
Seattle, WA 98121
Phone: (206) 729-8383
Email: jeff@admonlaw.com

DATED this 4th day of January, 2024.

s/ Francine M. Artero
Francine M. Artero, Legal Assistant
Email: fartero@grsm.com

GORDON REES SCULLY MANSUKHANI, LLP

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- sturner@gordonrees.com

Comments:

Respondent / Defendant Nathan Cliber's Answering Brief

Sender Name: Sarah Turner - Email: sturner@grsm.com
Address:
701 5TH AVE STE 2100
SEATTLE, WA, 98104-7084
Phone: 206-695-5100

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