# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| WILLIAM SCHEIDLER,<br><br>Appellant,<br><br>v.<br><br>SCOTT ELLERBY,<br><br>Respondent. | No. 42591-2-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Penoyar, J. — William Scheidler asks us to reverse trial court orders dismissing his case both at summary judgment and for discovery violations. He also objects to the large attorney fee award against him.

In 1998, William Scheidler retained Scott Ellerby to represent him in an administrative matter before the Board of Tax Appeals. That same year, Ellerby withdrew from representation. In 2009, Scheidler filed a lawsuit against Ellerby, alleging several tort claims relating to Ellerby's withdrawal.

During discovery, Scheidler violated several trial court orders. Ultimately, as a discovery sanction, the trial court dismissed Scheidler's case with prejudice and awarded Ellerby attorney fees and costs in the amount of $132,427.23. Scheidler appeals, arguing that the trial court erred in (1) granting Ellerby's motion for summary judgment, (2) dismissing Scheidler's case with prejudice, and (3) concluding that $132,427.23 was a reasonable amount to award Ellerby in attorney fees and costs. Scheidler also contends that the trial court erred by not issuing sanctions against Ellerby, committing judicial misconduct, violating his right to due process when it issued sanctions against Scheidler, and denying his motion for a protective order. Finally, he asserts that

the trial court erred in its administration of GR 33.

We hold that the trial court acted properly when it granted Ellerby's motion for summary judgment and dismissed Scheidler's claims, but we reverse the trial court's award of $132,427.23 in attorney fees and costs to Ellerby, as the amount of services Ellerby's counsel provided was not essential to obtaining a successful outcome. We otherwise affirm.

## FACTS

In 1998, Scheidler retained Ellerby to assist him with an administrative matter. Ellerby ultimately withdrew from representation before Scheidler's hearing. Scheidler asserts that Ellerby withdrew after telling Scheidler that opposing counsel had raised an alleged conflict of interest issue. Ellerby maintains that Scheidler asked him not to contest the issue and, instead, decided that it would have been cost prohibitive to have Ellerby represent him at the administrative hearing.

On July 14, 2008, Scheidler sent an e-mail to Ellerby requesting "that the money [he] paid for [Ellerby's] representation be refunded." Clerk's Papers (CP) at 72. Ellerby declined to refund the money. The president of Ellerby's firm, Lawrence Mills, also responded to Scheidler. In his letter, he informed Scheidler:

> As Mr. Ellerby previously advised you by reply e-mail two weeks ago, after he had assisted you in preparing your presentation for your appeal, you and your wife decided not to have Mr. Ellerby represent you at the hearing before the Board of Tax Appeals because you did not want to incur additional attorneys' fees. Mr. Ellerby never declined to represent you and was never disqualified from representing you because of Kitsap County's suggestion that Mr. Ellerby and our firm may have a conflict of interest because we had previously represented another agency of Kitsap County.

CP at 83.

In 2008, Scheidler filed a grievance against Ellerby with the Washington State Bar Association (WSBA). On March 18, 2009, the WSBA dismissed Scheidler's grievance.

On March 18, 2009, Scheidler filed a lawsuit against Ellerby, alleging civil conspiracy, fraud, defamation, "False Light Invasion of Privacy," "Breach of Duty," "Breach of Promise," intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. CP at 11. Scheidler's complaint states that he learned of the alleged fraud in 2008. In his answer, Ellerby counterclaimed for attorney fees and costs under CR 11 and RCW 4.84.185.

During discovery, Scheidler alleged damages in the form of pain and suffering and loss of enjoyment of life and provided the names of several healthcare providers with relevant information. Ellerby's counsel sent Scheidler a stipulation for medical records. Scheidler refused to stipulate to the release of his medical records. Scheidler filed a motion to compel testimony[1] and a motion for a protective order,[2] both of which the trial court denied. The trial

[1] Scheidler requested that the trial court compel Ellerby to re-answer an interrogatory.

[2] Scheidler sought an order denying Ellerby's demand for Scheidler's medical records.

court also awarded Ellerby attorney fees and costs, under CR 37(a)[3] and CR 11,[4] for the costs related to responding to and appearing for Scheidler's motion to compel and motion for a protective order. Scheidler moved for reconsideration and the trial court denied his motion.

Scheidler then filed a motion for discretionary review with this court, which we denied. Subsequently, Scheidler petitioned the Supreme Court for review; the Supreme Court denied Scheidler's petition and awarded Ellerby attorney fees and costs incurred in responding to the petition.

On March 22, 2010, Scheidler requested that, as a reasonable accommodation under GR 33,[5] the trial court stay all proceedings for 90 days. The trial court granted Scheidler's request

---

[3] CR 37(a)(4) addresses the award of reasonable expenses when a motion to compel discovery is denied.

[4] CR 11(a) provides:

> A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. . . . The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

[5] GR 33 governs requests for accommodation by persons with disabilities.

and granted a 90-day stay.

On August 6, 2010, the trial court granted Ellerby's motion to compel and a motion for sanctions. The trial court ordered that Scheidler "do nothing to interfere with defendant's efforts to obtain healthcare records and/or deposition testimony from plaintiff's healthcare, including mental healthcare, providers, including Dr. Curtis Holder and Kim Young-Oak, ARNP" and "appear for his deposition in Kitsap County on an agreed date within 30 days." CP at 978-79. The trial court also ordered, "Mary Scheidler shall appear for her deposition" within 30 days. CP at 979. Scheidler did not appear for his scheduled deposition on September 7. He interfered with Ellerby's attempt to take the deposition of Curtis Holder, M.D., and obstructed the administration of his wife's deposition on November 11.

On November 12, Ellerby moved for summary judgment. On December 3, Ellerby moved for dismissal of Scheidler's claims with prejudice pursuant to CR 37(b)(2)(C).[6] While the motions were scheduled to be heard on December 10, they were ultimately heard on January 28, 2011 because Scheidler requested a 30-day continuance under GR 33.

The trial court found that Scheidler's conduct "substantially prejudices defendant Scott Ellerby's ability to defend against plaintiff's claims." CP at 1270. The trial court then concluded:

> Plaintiff's pattern of conduct shows that a lesser sanction against him would be futile, because he continually files frivolous actions and baseless pleadings in violation of CR 11, makes baseless threats against his adversaries and opposing counsel, and refuses to be deterred from such improper behavior. This conduct wastes the time, money, and resources of adverse litigants. This

[6] CR 37 addresses sanctions when a party fails to make discovery.

> pattern of conduct by Mr. Scheidler makes any lesser sanction than dismissal with prejudice insufficient to cure Mr. Scheidler's repeated misconduct in this case. Mr. Scheidler's ongoing violation of this court's August 6, 2010 discovery order is proof that lesser discovery sanctions against Mr. Scheidler will not suffice.

CP at 1270. The trial court granted Ellerby's motion for sanctions, dismissing Scheidler's complaint with prejudice and awarding Ellerby reasonable attorney fees and litigation expenses. The trial court also granted Ellerby's motion for summary judgment.

The trial court concluded that Ellerby was entitled to attorney fees under CR 11 and the frivolous action statute, RCW 4.84.185.[7] In calculating the attorney fees, the trial court used the "lodestar method:" first, the trial court determined the reasonable hourly rate for counsel; then, it multiplied the hourly rate by the number of hours reasonably expended on the case. The trial court concluded that the hourly rate was reasonable but expressed concerns about the reasonableness of the hours expended, approximately 950 hours.

First, the trial court noted that the declaration submitted by Ellerby's counsel contained "no description of the work performed." Report of Proceedings (RP) (Feb. 25, 2011) at 8. Ellerby's counsel asserted that he "deliberately omitted [a specific narrative description] in this

---

[7] RCW 4.84.185 states:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action. . . . This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

case because Mr. Scheidler, more than our average opponent, will seize upon any piece of information he's provided with. He'll view it in his own perspective, and it will become a breeding ground for more litigation." RP (Feb. 25, 2011) at 9.

The trial court also expressed concern about Ellerby's delay in moving for summary judgment. In response, Ellerby's counsel asserted that he did not file a motion for summary judgment on the claims barred by statutes of limitations because "it wouldn't have saved us a dime; probably would have cost us more because there would be two summary judgment motions instead of one." RP (Feb. 25, 2011) at 14. Ellerby's counsel asserted that he had waited until he could depose Scheidler and Scheidler's physician. Ellerby's counsel asserted that "my preferred procedure to make sure we foreclose avenues of escape from the other side is, obtain the medical records; depose the plaintiff based on those medical records." RP (Feb. 25, 2011) at 15.

The trial court awarded Ellerby $132,427.23 in attorney fees, finding:

> The time expended on this litigation by Mr. Ellerby's attorneys was reasonable and the hourly fees for that work were provided at a considerable discount. The costs and fees were reasonably related to the work performed, which was necessitated by Mr. Scheidler's frivolous litigation and considerably expanded by his refusal to comply with discovery.

CP at 1787. Scheidler appeals.

## ANALYSIS

### I. Motion for Summary Judgment

First, Scheidler asserts that the trial court erred by granting Ellerby's motion for summary judgment.[8] We disagree.

#### A. Standard of Review

On review of an order for summary judgment, we perform the same inquiry as the trial court. *Jones v. Allstate Ins. Co*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The standard of review is de novo. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain*, 159 Wn.2d at 708.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party cannot merely claim contrary facts and may not rely on speculation, argumentative assertions that unresolved factual issues remain, or affidavits considered at face value. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

[8] Ellerby claims that Scheidler argues he was denied his constitutional right to a jury trial; however, the argument cited by Ellerby appears to be related to Scheidler's contention that the trial court improperly granted the motion for summary judgment.

B. Statute of Limitations

A three-year statute of limitation applies to an action "for any . . . injury to the person or rights of another" and to an "action for relief upon the ground of fraud." RCW 4.16.080(2), (4). Accordingly, to the extent Scheidler bases his negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, "breach of duty," "breach of promise," and fraud claims on the events surrounding Ellerby's withdrawal from representation, those claims are barred by the statute of limitations. Further, Scheidler's civil conspiracy claim is also subject to a three-year statute of limitations. RCW 4.16.080(2).

In his reply brief, Scheidler asserts that his claims arose from Mills's 2008 email; "[p]rior to Ellerby's 2008 excuse, and Mr. Mills' emails and what Mills stated in those emails, Scheidler had been under the belief that [the prosecutor] required Ellerby to withdraw from Scheidler's case." Appellant's Reply Br. at 18 (emphasis omitted). This is not sufficient to invoke the discovery rule and toll the statute of limitations. *See Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (under the discovery rule, a cause of action accrues when the plaintiff should have known the essential elements of the cause of action).

C. Defamation

Scheidler's complaint alleges that Ellerby committed the tort of defamation in 2008 when he "communicated untrue statements to Larry Mills about the reasons Ellerby withdrew his representation of Plaintiff on the eve of a scheduled BTA hearing." CP at 9. The required elements for a defamation claim are (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). Liability for defamation requires that the defamation be communicated to someone other than the defamed

person; there must be a "publication" of the defamation. *Pate v. Tyee Motor Inn, Inc.*, 77 Wn.2d 819, 821, 467 P.2d 301 (1970). Intracorporate communications, made in the ordinary course of business, are not published for the purposes of defamation. *Pate*, 77 Wn.2d at 821; *Prins v. Holland-N. Am. Mortg. Co.*, 107 Wash. 206, 208, 181 P. 680 (1919). Because Ellerby made the comment to Mills within the ordinary course of business, in response to Scheidler's demand for a refund, their intracorporate communication cannot serve as a basis for Scheidler's defamation claim. We conclude that the trial court properly granted summary judgment on this basis.

D. Invasion of Privacy

Scheidler also argues that Ellerby's communication with Mills and the WSBA constituted an invasion of privacy. An invasion of privacy occurs if one gives publicity to a matter concerning the private life of another and the matter publicized is of a kind that (1) would be highly offensive to a reasonable person and (2) is not of legitimate concern to the public. *Reid v. Pierce County*, 136 Wn.2d 195, 205, 961 P.2d 333 (1998). Publicity for the purposes of invasion of privacy means "communication to the public at large so that the matter is substantially certain to become public knowledge." . . . "[C]ommunication to a single person or a small group does not qualify." *Fisher v. State ex rel. Dep't of Health*, 125 Wn. App. 869, 879, 106 P.3d 836 (2005). Accordingly, because the communication was not made to the public at large, and thus there was no publication, the trial court properly concluded that Ellerby was entitled to judgment as a matter of law.

II. Discovery Sanction

Scheidler next contends that the trial court erred by dismissing his case under CR 37, asserting that by sanctioning him, the trial court acted arbitrarily and capriciously. We disagree.

A. Standard of Review

We review a trial court's discovery sanctions by determining whether the trial court's order is manifestly unreasonable or based on untenable grounds. *Maga• a v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A decision rests on untenable grounds when the trial court relies on unsupported facts or applies the wrong legal standard; a decision is manifestly unreasonable if the court applies the correct legal standard to supported facts but adopts a view that no reasonable person would take. *Maga• a*, 167 Wn.2d at 583 (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)). Since the trial court is in the best position to decide an issue, we give deference to the trial court's decision and "[a]n appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record." *Maga• a*, 167 Wn.2d at 583.

B. Dismissal with Prejudice

Discovery sanctions should be proportional to the discovery violation and circumstances of the case. *Maga• a*, 167 Wn.2d at 590. The purpose of a sanction order is "to deter, to punish, to compensate and to educate." *Fisons*, 122 Wn.2d at 356.

When a party fails to comply with a court order, CR 37(b)(2)(C) authorizes the trial court to impose sanctions, including dismissal. When a trial court imposes one of the harsher remedies under CR 37(b), the record must clearly show that (1) one party willfully or deliberately violated the discovery rules and orders, (2) the violation substantially prejudiced the opposing party's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Maga• a*, 167 Wn.2d at 584.

The record shows that Scheidler repeatedly violated the trial court's discovery order. Further, Scheidler's refusal to attend depositions and his interference with Ellerby's attempt to depose Scheidler's wife and physician substantially prejudiced Ellerby's ability to prepare for trial. Finally, the trial court explicitly determined that a lesser sanction would not have sufficed:

> Plaintiff's pattern of conduct shows that a lesser sanction against him would be futile, because he continually files frivolous actions and baseless pleadings in violation of CR 11, makes baseless threats against his adversaries and opposing counsel, and refuses to be deterred from such improper behavior. This conduct wastes the time, money, and resources of adverse litigants. This pattern of conduct by Mr. Scheidler makes any lesser sanction than dismissal with prejudice insufficient to cure Mr. Scheidler's repeated misconduct in this case. Mr. Scheidler's ongoing violation of this court's August 6, 2010 discovery order is proof that lesser discovery sanctions against Mr. Scheidler will not suffice.

CP at 1270.

Scheidler contends that the sanction was erroneous because "the substantive issues centered upon privileged communication." Appellant's Br. at 16. Scheidler cites former RCW 5.60.060 (2009)[9] as authority for his argument. But, because Scheidler filed an action for personal injuries, he waived the physician-patient privilege under former RCW 5.60.060(4)(b)

[9] Former RCW 5.60.060(4) states:

> Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:
>
> (a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and
>
> (b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

("Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege."). Further, as Ellerby's counsel pointed out during the hearing on Scheidler's motion for a protective order, "Scheidler's interrogatory answers directly place in issue his physician's testimony." RP (Aug. 21, 2009) at 9. Scheidler's interrogatory listed his doctors as "individuals who have knowledge" of the damages incurred by him as a result of the events alleged in his complaint. CP at 260. We conclude that the trial court properly dismissed Scheidler's case with prejudice.

III. Attorney Fees and Expenses

Scheidler also argues that the trial court erred by awarding $132,427.23 in attorney fees to Ellerby. He contends that if his claims were, as Ellerby alleged, frivolous, without merit, and/or barred by the applicable statutes of limitations, then Ellerby should have sought dismissal of the case earlier and avoided incurring such high attorney fees. We agree.

Under RCW 4.84.185, the trial court may require the nonprevailing party to pay the prevailing party's attorney fees and expenses incurred in opposing an action that is "frivolous and advanced without reasonable cause." CR 11 provides that the trial court may impose sanctions for legal filings not well grounded in fact and warranted by law. *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992).

We review an award of attorney fees to determine whether the trial court's order is manifestly unreasonable or based on untenable grounds. *Maga•a*, 167 Wn.2d at 583, 593. A trial court must enter findings of fact and conclusions of law supporting an attorney fees award so that the reviewing court can determine if the attorney's services were reasonable or essential to the successful outcome. *Maga•a*, 167 Wn.2d at 593.

The trial court dismissed all of Scheidler's claims at summary judgment and found them to be frivolous. We see no fault in these conclusions and join the trial court in its concern that dismissal was not sought earlier. But unlike the trial court, we are not persuaded that Ellerby's attorney's explanation for the delay justifies the bulk of his attorney fees. As indicated earlier, most of Scheidler's claims were obviously subject to dismissal on the face of the complaint under the three-year statute of limitations. The tolling arguments Scheidler made are not supported by the record and neither are his remaining claims for defamation and invasion of privacy. We do not see the relevance of Scheidler's medical records.

While Ellerby's attorneys provided their services at a considerable discount, as reflected by the low rate of their hourly fees, the time sheets Ellerby's counsel submitted did not contain specific narrative descriptions to explain how, under these facts, approximately 950 hours of legal services were essential to the successful outcome. While Scheidler continuously refused to comply with discovery, Ellerby's counsel did not need to obtain Scheidler's medical records and to depose Scheidler in order to attain dismissal of Scheidler's claims. We conclude that the trial court's order, awarding $132,427.23 in attorney fees to Ellerby, is manifestly unreasonable and remand to the trial court for a determination of reasonable fees. The trial court should require Ellerby's counsel to set forth a specific narrative description of the attorneys' work and the fees that were reasonably necessary to shepherd the case promptly to summary judgment and award fees and costs on that basis.

## IV. Additional Arguments

Scheidler also raises several additional arguments in his brief. These arguments include: the trial court erroneously failed to issue sanctions against Ellerby, the trial court committed judicial misconduct, the trial court violated his right to due process by issuing sanctions against him, and the trial court improperly denied his accommodation requests under GR 33. We disagree.

### A. Failure to Issue Sanctions

Scheidler repeatedly asserts that Ellerby lied about the reasons for withdrawing from Ellerby's case and, thus, the trial court should have issued sanctions against him. Ellerby's position amounted to a factual dispute between Ellerby and Scheidler, not a basis for issuing sanctions. Scheidler's claim fails.

### B. Judicial Misconduct

Scheidler also argues that the trial court committed judicial misconduct. He argues that the trial court erroneously found that he had waived the physician-patient privilege, modified a court order to allow Ellerby to invade Scheidler's privacy, erroneously denied his motion for sanctions against Ellerby, acted maliciously toward Scheidler, exercised bias against Scheidler, and protected Ellerby from his misconduct. There is nothing in the record to support these claims.

### C. Due Process Violation

Scheidler also asserts that the trial court violated his right to due process by issuing sanctions against him. Due process requires the trial court to conclude, before dismissing a claim, that there was "'a willful or deliberate refusal to obey a discovery order, which refusal

substantially prejudices the opponent's ability to prepare for trial.'" *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 330, 54 P.3d 665 (2002) (internal quotation marks omitted) (quoting *White v. Kent Med. Ctr. Inc.*, 61 Wn. App. 163, 176, 810 P.2d 4 (1991). "'A party's disregard of a court order without reasonable excuse or justification is deemed willful.'" *Maga•a*, 167 Wn.2d at 584 (quoting *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002)). Here, the trial court properly concluded that Scheidler's repeated disregard of the August 6 court order constituted a willful refusal that substantially prejudiced Ellerby's ability to prepare for trial. We conclude that the trial court did not violate Scheidler's right to due process.

D. Protective Order

Scheidler also contends that the trial court erred by denying his motion for a protective order and issuing sanctions against Scheidler for filing the motion to protect his medical records under CR 11. As discussed above, Scheidler's motion was meritless because when Scheidler filed an action for personal injuries, he waived the physician-patient privilege under former RCW 5.60.060(4)(b). Scheidler's claim fails.

E. General Rule 33

Finally, Scheidler contends that the trial court "erred in its arbitrary and capricious administration of the disability accommodation—General Rule (GR) 33." Appellant's Br. at 21. GR 33 governs requests for accommodation by persons with disabilities. The trial court did grant two of Scheidler's applications for accommodation under GR 33. Under GR 33(b)(3), the

trial court "may require the applicant to provide additional information about the qualifying disability to help assess the appropriate accommodation." As Ellerby points out, the trial court stayed the proceedings on two occasions to accommodate Scheidler; "[t]he only accommodation requests the superior court denied outright were the requests Mr. Scheidler made after he defied its order that he provide current medical information regarding the nature of his claimed disability and the accommodation being sought."[10] Scheidler's claim fails.

V. Attorney Fees

Ellerby requests fees and costs under RAP 18.9(a) "for having to defend against this frivolous lawsuit and appeal." Resp't's Br. at 1. Scheidler also requests attorney fees.

Under RAP 18.9(a), we may order a party who files a frivolous appeal to pay compensatory damages to another party. "[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). Scheidler's appeal of the trial court's $132,427.23 award in sanctions was not devoid of merit. We deny Ellerby's request.

Citing only RAP 18.1[11], Scheidler requests costs. But, Scheidler does not brief this request, cites no authority authorizing the award, and presents no argument in support of his request. Accordingly, we deny Scheidler's request for costs on appeal.

[10] On December 16, 2010, the trial court ordered that it would "require independent supporting medical information before considering any future accommodation requests." CP at 1122.

[11] Scheidler also cites RAP 18.8, which allows us to waive or alter the provisions of any of the Rules of Appellate Procedure in order to serve the ends of justice. This rule is not on point with regard to Scheidler's request.

We affirm the trial court's order granting summary judgment to Ellerby and the trial court's order dismissing Scheidler's claims with prejudice, reverse the trial court's award of $132,427.23 in attorney fees and costs to Ellerby, and remand to the trial court for a determination of reasonable attorney fees.

Penoyar, J.

We concur:

Armstrong, J.

Johanson, A.C.J.