No. 39039-0-III

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

JAMES POWERS,

Appellant,

and

BANNER BANK, a Washington Bank Corporation,

Plaintiff,

v.

REFLECTION LAKE COMMUNITY ASSOCIATION, a Washington nonprofit corporation; and RICK SMITH,

Respondents.

REPLY BRIEF OF RESPONDENTS

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A. INTRODUCTION

Far too much ink has been spilled over this simple case. This Court sanctioned James Powers for his frivolous appeal, ordering him to pay attorney fees. He took no action in this court to stay, reconsider, or otherwise prevent that decision, telling the Court instead to proceed "regardless of settlement status" and gambling that his frivolous appeal would succeed. Only on remand, *after he lost*, did he argue for the first time that his appeal should have been stayed because of a settlement agreement he sought to enforce in a different case under a different cause number, involving third parties. While the trial court correctly ruled that it had no authority but to enter the judgment from this Court awarding fees as a sanction, it incorrectly refused to award additional fees for the baseless, needless fight over entry of this Court's judgment on appeal, a purely ministerial act the trial court had no choice but to enter.

On cross appeal, this Court should award Reflection Lake Community Association ("RLCA") all their fees for having to

continue to litigate the fallout from Powers's first, frivolous appeal. Nothing in his rambling response shows otherwise.

B. REPLY ON STATEMENT OF THE CASE

The facts have been well-addressed in RLCA's previous briefing. Powers continues to misrepresent them in his latest brief, as he did in his previous, frivolous appeal. *Banner Bank v. Reflection Lake Cmty. Ass'n*, 20 Wn. App. 2d 1060, 2022 WL 214604, *7 (2022) ("*Banner Bank I*") (awarding sanctions in part because Powers's arguments "misconstrue the record") (unpublished). Specific instances of his continued misrepresentations will be addressed below.

C. ARGUMENT

(1) The Trial Court Erred by Refusing to Award Attorney Fees Because Powers's Efforts to Prevent this Court's Judgment Were Frivolous

The merits of this case are crystal clear – Powers failed to seek a stay of his appeal in *Banner Bank I* and told this Court that "the parties do not wish to stay the . . . matter, regardless of settlement status." Resp't br. at app. 6. This Court then ruled

against Powers and imposed sanctions because his appeal, which he could have withdrawn at any time, was frivolous. He did not move for reconsideration, petition the Supreme Court for review, or otherwise argue that any settlement agreement prevented a sanction order before a mandate issued and the case was remanded. The trial court then properly found that it lacked any authority to deviate from this Court's sanction order and entered it as a judgment.

Powers's arguments boil down to a contention that the trial court could and should have disregarded a mandate of this Court. For all the reasons discussed in RLCA's responsive brief, he is wrong. The trial court erred by refusing to award additional fees for wasted time spent on remand dealing with Powers's arguments that he did not raise in time and waived the right to assert by his litigation conduct. This Court should affirm in part but reverse the fee decision and award RLCA fees for time spent below and on appeal dealing with Powers's continued intransigence.

(a) Powers Continues to Advance Frivolous Argument that the Civil Rules Somehow Precluded the Trial Court from Entering this Court's Sanction Order as a Judgment

Powers's arguments have been frivolous from the start. He has never provided any authority for his arguments, arguments he raised for the first time on remand, that the settlement agreement prevented this Court from entering sanctions for a frivolous appeal. Even now, he merely points to CR 2A and argues that the parties had a settlement agreement. But he is estopped from arguing this point where he previously told this Court that the appeal should go forward, "regardless of settlement status." Resp. br. at app. 6.

At the very least, if Powers believed that the parties' settlement in a different matter should have prevented his appeal in *Banner Bank I* from moving to a resolution, he had a duty to raise the issue with *this Court*. Instead, Powers sat by and waited for this Court's decision, gambling on a favorable outcome. When instead this Court sanctioned Powers for his frivolous

appeal, Powers attempted to thwart the decision and mandate of this Court by arguing that the trial court should disregard it. Powers's explicit argument to the trial court, and his implicit argument here on his second appeal, is that *this Court* somehow erred by failing to stay its decision in *Banner Bank I*. *See* CP 16.

"An issue argued for the first time only after remand is too late." *State v. Fort*, 190 Wn. App. 202, 228, 360 P.3d 820 (2015). "Washington courts do not permit a party to ignore an issue on the first appeal only to raise the issue on remand when it becomes apparent the initially ignored issue is critical to the party's case." *Id.* As discussed in RLCA's opening brief, Powers's could not be permitted to gamble on a favorable outcome, and then belatedly cry foul after this Court sanctioned him for a frivolous appeal and remanded to the trial court for entry of that judgment. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) ("counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for" relief).

And as discussed in RLCA's response brief, it has been well-settled for over a century in Washington that a trial court lacks the authority to deviate from a judgment directed by an appellate Court. Resp. at 13-19 (citing, *e.g.*, *State v. Superior Ct. of Spokane County*, 8 Wash. 591, 593, 36 P. 443 (1894); *Gudmundson v. Com. Bank & Tr. Co.*, 160 Wash. 489, 496, 295 P. 167 (1931); *State ex rel. Schock v. Barnett*, 42 Wn.2d 929, 932, 259 P.2d 404 (1953); *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). Entry of a judgment from an appellate court on remand is a "purely ministerial" act, affording the trial court no authority to deviate from this Court's rulings. *In re Ellern*, 29 Wn.2d 527, 529-30, 188 P.2d 146 (1947). The trial court erred by refusing to order sanctions to compensate RLCA for having to respond to Powers's bad faith and frivolous attempt to thwart this Court's mandate in *Banner Bank I*.

Powers continues his frivolous arguments in his reply, arguing that some of these cases predate the adoption of the Civil

Rules and implying (without support) that they are no longer valid. Appellant's reply at 41-43. Not true. None of the cases cited in RLCA's brief have been overturned or questioned for their explicit holdings that trial courts must obey an appellate mandate. Powers has never provided even a hint of case law supporting his view that a trial court can overrule a Court of Appeals on remand. Powers has not even meaningfully engaged with RLCA's argument that his failure to raise the stay before this Court constituted a waiver.

Powers's scattershot briefing further fails to identify what civil rule permits a trial court to disregard a mandate and overrule a sanction order entered by an appellate court. He cites only CR 2A, but that rule grants no such power. CR 2A merely states that settlement agreements must be in writing or otherwise sworn.[1]

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[1] CR 2A states in its entirety:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and

Nothing in that rule allows a trial court to disregard an appellate court's mandate due to a purported agreement between the parties – especially where the purported agreement is a disputed *conditional* stay provision which the parties took no action to enforce prior to the issuance of the appellate mandate.

To the contrary, the issue here is squarely addressed by RAP 12.2 which provides:

> After the mandate has issued, the trial court may…hear and decide postjudgment motions otherwise authorized by statute or court rule *so long as those motions do not challenge issues already decided by the appellate court*.

(emphasis added). This rule merely codifies the longstanding holdings of the cases RLCA cited to this Court – a trial court lacks the authority to depart from an order or judgment entered by this Court. Here, this Court already decided that Powers's appeal was frivolous and ordered attorney fees as a sanction. The

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> assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

trial court had no authority to deviate from that order in this Court's mandate, and therefore Powers had no reasonable basis in fact or law to ask the trial court to do so. The trial court should have awarded fees for Powers's baseless conduct on remand.

Modern courts continue to apply the rule that a trial court cannot deviate from an appellate order on remand, long after the adoption of the RAPs and Civil Rules, a point Powers intentionally obscures in his briefing. For example, in *Yurtis v. Phipps*, 143 Wn. App. 680, 690-91, 181 P.3d 849 (2008), this Court plainly stated that "[a] trial court has no authority to review a ruling of the Court of Appeals."

In *Yurtis*, this Court ruled that an appeal was frivolous and awarded sanctions. *Id.* at 686. The losing party filed subsequent motions to recall this Court's mandate, which were denied and prompted additional sanctions orders. She then filed CR 60 motions in trial court, arguing that the prior "orders, judgments, and proceedings" were based on "fallacious" facts. *Id.* at 687. The trial court recognized it lacked any authority to depart from

this Court's decision, denied the motion, and imposed sanctions for her continued frivolous arguments. *Id.* Unsurprisingly, this Court affirmed on appeal, awarded additional sanctions, and prevented the vexatious appellant from filing any more challenges to the Court's final rulings. *Id.* at 696-97.

Yurtis highlights that Powers's arguments are baseless. By adopting the RAPs and the Civil Rules our Supreme Court did not somehow change the fundamental notion that appellate court rulings are binding on trial courts. *Yurtis* also shows that the trial court erred by failing to award sanctions necessary to prevent vexatious litigation, deter future misconduct, and compensate RLCA for having to respond to Powers's baseless arguments.

At the risk of overcomplicating the matter, another way to conceptualize a trial court's lack of authority to stray from a Court of Appeals decision is the "law of the case" doctrine. A legal decision of an appellate court establishes the law of the case and must be followed on remand. *Pac. Coast Shredding, L.L.C. v. Port of Vancouver, USA*, 14 Wn. App. 2d 484, 507, 471 P.3d

934 (2020) (citing *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 58, 366 P.3d 1246 (2015)). "This rule forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case." *Id.* (quotation omitted). A trial court may have some discretion where legal issues are expressly left open on appeal, "[b]ut the trial court must adhere to the appellate court's instructions and cannot ignore specific holdings and directions on remand." *Id.*

The same principles are stated clearly in *Bank of America NA v. Owens*:

> An appellate court's mandate is binding on the lower court and must be strictly followed. While a remand "for further proceedings" signals this court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case, the trial court cannot ignore the appellate court's specific holdings and directions on remand. Also, RAP 12.2 . . . embod[ies] the law of the case doctrine. Under that doctrine, once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation. The law of the case doctrine binds the parties, the trial court, and subsequent appellate

> courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled.

177 Wn. App. at 189-90 (internal citations omitted).

Here, nothing was left open by the prior appeal as to sanctions. This Court ruled that Powers's appeal was frivolous and awarded RLCA all the attorney fees it requested. Powers did not challenge the amount or entitlement to fees. He did not object to the fee request under RAP 18.1(e). He did not move for reconsideration. He did not petition for Supreme Court review. He did not move to recall this Court's mandate under RAP 12.9. Because the lower court was "forbid[den]" from "relitigating issues that were decided by [this] higher court" Powers had no reasonable basis in fact or law to argue that the lower court had such authority. The trial court should have awarded sanctions, and this Court should reverse that portion of the trial court's decision.

(b) <u>Powers Continues to Engage in Frivolous, Oppressive Briefing</u>

Powers continues his intransigence in his latest filings as shown in several of his improper tactics.

For one, he devotes most of his briefing to the enforcement of the parties' settlement agreement in an ancillary case, but he failed to provide the briefing from that ancillary case and objected when RLCA tried to provide it in an appendix to its brief. *See* various motions over appendices and extrarecord materials filed in this appeal. Powers is the appellant and thus has the burden of providing a sufficient record for review, RAP 9.2, 9.6, but he has fought to keep those materials out of the case so he can misrepresent facts to this Court.[2]

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[2] As just one example, Powers repeatedly argues that "to avoid enforcement of a written, signed settlement agreement, [RLCA] must present evidence in the form of affidavits" and "cannot rely on the oral assertions of counsel which are unsworn . . ." Appellant's reply at 14, 22. Powers then represents to this Court that "[RLCA] submitted no admissible evidence to the trial court" which met this standard. *Id.*

But RLCA did in fact submit sworn declarations at the trial court and attempted to include those declarations on appeal, but Powers objected to RLCA's appendix, even though these declarations were incorporated by reference, CP 12, in Powers's

Powers's briefing puts RLCA in an awkward position: RLCA must either allow Powers's multitude of irrelevant and spurious arguments to go unchallenged and allow this Court to proceed with an incomplete and skewed presentation of the record, or else RLCA must repeatedly engage with Powers on a host of ancillary arguments which risk distracting this Court from the key issues before it. Let it suffice to say that RLCA has litigated in good faith, while Powers has played fast and loose with the facts—including in his representations to this Court.[3]

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own motion that is now on appeal. *See* attachment to RLCA's Conditional Opposition to Motion to Permit Appendix to Reply/Cross Brief of Appellant at 130-61. Powers's purpose in presenting an incomplete and skewed record is to hide evidence that would otherwise rebut his misrepresentations to this Court.

[3] As discussed in RLCA's response brief, a key point of dispute between Powers and RLCA since Nov. 2021 has been the enforceability of the CR 2A, which turns primarily on whether the CR 2A was a fully-executed bilateral agreement or a partially-executed multilateral agreement—the Reflection Water Association ("RWA") being the unsigned third party.

Powers told this Court that the CR 2A "involves the transfer of interests in real property between two (2) of the responsible non-profit community associations which serve the

Powers similarly has adopted contradictory legal positions, saying whatever serves his interests at any given moment. This includes his demand that the trial court ignore this Court's mandate due to the parties' settlement, when he had previously told this Court his appeal should go forward "regardless of settlement status." Powers should not be allowed to gamble on a favorable outcome and then evade this Court's sanctions for his frivolous appeal. He should not be permitted to invert the judicial system by asking a trial court to set aside an appellate mandate. He should not be permitted to waste judicial resources or to continue harassing his community with endless abusive litigation.

The trial court had no right to deviate from the mandate and sanction order, especially because Powers did nothing to

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lake and its residents," resp't br. at app. 2, a reference to a *multilateral* agreement among Powers, RLCA, and RWA. Powers later argued the opposite to Judge Clark and as a result obtained the order finding the CR 2A enforceable. Powers then reversed himself again before Judge Hazel, arguing that the CR 2A had not been fulfilled because RWA had not yet performed.

enforce the disputed conditional stay provision until *after* he lost and *after* the case was remanded. The trial court should have awarded fees where Powers needlessly caused RLCA to expend time and resources on his frivolous arguments.

Second, Powers's latest brief is shockingly devoid of legal analysis. As stated above, he handwaves aside holdings in case law either by arguing those cases predated the civil rules or do not encapsulate the precise subject matter underlying this dispute. *See* appellant's reply at 42 (arguing that *Snyder v. Tompkins*, 20 Wn. App. 167, 174, 579 P.2d 994 (1978), is irrelevant because it concerns probate law when RLCA cited that case for the fact that oppressive conduct can warrant fees as a matter of equity).

At times, Powers's briefing is so off point it casts doubt on his grasp on the issues at hand. For example, he takes time to distinguish *Martin v. Wilbert*, 162 Wn. App. 90, 253 P.3d 108 (2011), by arguing that it had to do with probate and is thus not relevant. Appellant's reply at 33. But RLCA merely cited

Martin in a footnote for the notion that courts rely on facts established by unpublished opinions, and therefore RLCA cited this Court's prior opinion in its fact section. Resp. at 3 n.1. It is impossible to say why Powers feels the need to distinguish this case based on its facts when it is offered for a limited, uncontested purpose. But it is par for the course, showing his need to litigate every matter to an oppressive degree.

It gets worse. One of the most glaring examples of Powers's frivolous briefing is his treatment of *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731, *review denied*, 188 Wn.2d 1009 (2017), a case RLCA cites in footnotes as required by this Court to disclose any unpublished cases and highlight they are not binding authority under GR 14.1. Again, even though this case is cited for this limited purpose, Powers needlessly argues that it has no relevance, distinguishing its facts. Appellant's reply at 26. This is improper. Rather than genuinely engaging with the legal arguments RLCA advances, Powers waives aside each case cited

in RLCA's brief with a conclusory assertion that they involve different facts and are therefore irrelevant.

RLCA – a volunteer association serving a modest rural community – is tired of dealing with this sort of abusive litigation from Powers. This Court has already determined that he is a frivolous litigant.[4] He did nothing to contest that ruling and sanction award until *after* the case was remanded. For all the reasons previously discussed, the trial court should have awarded fees to RLCA for having to deal with Powers's waived, estopped, frivolous arguments and oppressive litigation tactics that he continues to this day. This Court should reverse the trial court's ruling denying RLCA fees and order additional fees on appeal.

[4] The facts of *Banner Bank I* should not be lost on this Court. Powers sought to avoid turning over power to a properly elected homeowners' board, despite the "overwhelming" evidence that he had no right to maintain board power. *Banner Bank I* at *4. This Court sanctioned him for advancing spurious arguments and "misconstrue[ing] the record" in a wrongful attempt to maintain his grip on power over the community. *Id.* at *7. Through this never-ending litigation, he continues to drain RLCA's resources. RLCA should have been compensated, and reversal on cross appeal is warranted.

(2) The Court Should Award Fees on Appeal and Enjoin Powers from Further Litigation

For the reasons stated in RLCA's response, this Court should also award fees on appeal. Resp. at 27-30. Powers offers no direct response to this request. Nor does he offer a response to RLCA's request that he be enjoined from litigating this case further. Resp. br. at 29-30 (citing *Yurtis*, 143 Wn. App. at 693 ("the need for judicial finality and the potential for abuse of this revered system by those who would flood the courts with repetitive, frivolous claims which already have been adjudicated at least once" can override an individual's right to appeal). Powers's actions have been frivolous from the start, and enough time and resources have been wasted on his latest efforts to avoid this Court's mandate. As this Court's prior award of RLCA's attorney's fees proved inadequate to deter further frivolous litigation by Powers's, RLCA respectfully submits that more stringent sanctions are both necessary and merited.

This Court should levy additional fees and sanctions,

including a bar on further claims by Powers against RLCA, in order to finally stop Powers's continued misconduct.

D. CONCLUSION

For these reasons, on cross appeal, this Court should reverse in part, ordering that RLCA's fees for additional time spent in trial court be added to the judgment. It should also award RLCA its fees on appeal and impose additional sanctions under RAP 18.9 or other applicable law for Powers's latest frivolous appeal and continued intransigence.

This document contains 3,641 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of June, 2023.

Respectfully submitted,

/s/ Aaron P. Orheim

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Reply Brief of Respondents*** in Court of Appeals, Division III Cause No. 39039-0-III to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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