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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 47500-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WCEM, Inc., a Washington Corporation,

Appellant

v.

LOST LAKE RESORT, LLC, a Washington Limited Liability
Company,

Respondent

BRIEF OF RESPONDENT

Daniel R. Kyler, WSBA #12905
Michael J. Fisher WSBA #32778
RUSH HANNULA
HARKINS & KYLER, LLP
4701 South 19th Street, Suite 300
Tacoma, WA 98405
253-383-5388
Attorneys for Respondent

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I. INTRODUCTION

The underlying case was pursued on behalf of Christian Gerling, but was filed in the name of WCEM, Inc., a legally non-existent corporation with no legal standing to pursue a lawsuit. CP 1. Over the course of a year and a half the Appellant failed to comply with the Court Ordered Case Schedule and only disclosed its trial witnesses 21-days prior to trial. CP 21-22. The Trial Court excluded Appellant's untimely disclosed witnesses and dismissed the underlying case with prejudice upon the motion of Respondent LLR. CP 54.

Respondent LLR subsequently filed a motion for attorney's fees and costs pursuant to the terms of the claimed promissory note per RCW 4.84.330, the Frivolous Claims Statute, RCW 4.84.185 and Civil Rule 11. CP 57-58. The Appellant did not object to, nor challenge, Respondent LLR's motion for attorney's fees and costs pursuant to the terms of the claimed promissory note or Civil Rule 11 at the Trial Court level and Appellant cannot raise those issues for the first time on appeal. CP 59-61. The Trial Court's award of attorney's fees and costs should be affirmed.

The Trial Court's award of attorney's fees and costs pursuant to the Frivolous Claims Statute, RCW 4.84.185, should also be affirmed.

II. STATEMENT OF THE CASE

A. THE UNDERLYING CLAIM.

The Appellant's complaint herein alleged that Lost Lake Resort, LLC, signed and conveyed a promissory note to WCEM, Inc., on September 1, 2009. CP 2. The Appellant filed the underlying lawsuit claiming that it was owed money on the alleged promissory note signed by Jeff Graham, who at the time of the alleged note was the managing member of Lost Lake Resort, LLC. CP 2.

Appellant WCEM, Inc. is an entity that purports to have done work for Jeff Graham and Lost Lake Resort, LLC while Graham owned Lost Lake Resort, LLC (LLR). Ostensibly, Appellant WCEM, Inc. was providing some type of service to Jeff Graham and/or LLR. CP 38-39. There was no information contained in the record before the Court as to what the nature of that service was, when it was provided, any contractual documents that gave rise to the claim for service, when the service was provided, what the service was and whether in fact there was an exchange of services for any of the claims

herein. CP 1-3.

At the time the claimed promissory note was executed on September 1, 2009, Appellant WCEM, Inc. was not an active corporation in the State of Washington. CP 40, 64. If in fact a promissory note was given to Appellant WCEM, Inc., by LLR, the promissory note fails because as an inactive corporation, WCEM, Inc., did not have the ability to enter into a contract. CP 64.

B. PROCEDURAL HISTORY IN THE TRIAL COURT.

The underlying lawsuit was filed by the Appellant on February 6, 2014. CP 1. On June 6, 2014, the Court issued an Order Setting Case Schedule (CP 21) which included the following deadlines:

| | |
|-------------------------------------|----------|
| Plaintiff's Disclosure of Witnesses | 09/22/14 |
| Defendant's Disclosure of Witnesses | 10/20/14 |
| Witness and Exhibits List | 02/23/15 |
| Trial | 03/30/15 |

The Appellant failed to file any Disclosure of Witnesses and failed to file a Witness and Exhibit List prior to February 23, 2015, as required by the Court's Case Scheduling Order. CP 21-22.

The Respondent filed its Disclosure of Witnesses on October 16, 2014 and filed its Witness and Exhibit list on February 23, 2015, both within the deadlines set forth in the Court's Case Scheduling Order. CP 22.

On February 27, 2015 the parties were present in Court for a hearing on Respondent's Motion to Dismiss this case. CP 9-14. The Court denied the defendant's motion to dismiss. CP 18. In ruling on the motion to dismiss the Court commented that the plaintiff had not disclosed any witnesses to testify at the time of trial and this was likely "to be a very short trial". Despite this colloquy with the Court, the Appellant failed to file a Disclosure of Witnesses, failed to file a Witness and Exhibit List within the deadline set forth in the Case Schedule and failed to ask the Court for any relief. CP 21-22.

On March 9, 2015, only 21-days prior to trial, the Appellant filed a document entitled "Plaintiff's List of Witnesses" which disclosed for the first time that the plaintiff intended to call Jeff Graham and Christian Gerling as witnesses at trial. CP 22.

On March 23, 2015, LLR filed a Motion in Limine to prevent the Appellant from calling any witnesses which were not disclosed in accordance with the Court ordered Case Schedule. On March 30, 2015, the first day of trial, the Court granted Respondent's motion to exclude the untimely disclosed witnesses and entered a written order finding as follows:

1. The plaintiff failed to file a Disclosure of Witnesses and failed to file a Witness and Exhibit List within the deadline

- set forth in the Order Setting Case Schedule;
2. The plaintiff disclosed Jeff Graham and Christian Gerling as trial witnesses in Plaintiff's List of Witnesses filed on March 9, 2015, only 21-days prior to trial;
 3. This untimely disclosure of trial witnesses was willful and without a reasonable excuse or justification;
 4. The plaintiff's untimely disclosure of trial witnesses causes substantial prejudice to the defendant's ability to prepare for trial; and
 5. Lesser sanctions than the exclusion of plaintiff's undisclosed witnesses, such as monetary sanctions, have been considered but would be inadequate.

CP 54.

After Respondent's motion in limine to exclude the Appellant's untimely disclosed witnesses was granted by the Trial Court, the Appellant made an oral motion to dismiss its case "without prejudice" pursuant to CR 41(a)(1)(B). CP 56. Respondent argued that the Appellant's case should be dismissed with prejudice due, in part, to the fact that the case had been pending for a year and a half. CP 56. The Court dismissed the Appellant's case with prejudice. CP 56.

C. AWARD OF ATTORNEY'S FEES, COSTS AND CR 11 SANCTIONS

Respondent subsequently filed a motion seeking an award of attorney's fees and costs pursuant to the terms of the claimed promissory note, RCW 4.84.330, and pursuant to the Frivolous Lawsuit Statute, RCW 4.84.185. CP 57-58. Respondent also sought

an award of sanctions pursuant to CR 11. CP 57-58.

In the Trial Court, the Appellant did not object to Respondent's motion for attorney's fees under Civil Rule 11 or under the attorney's fees provision of the note. CP 59-61. Those theories of relief were unopposed for purposes of the hearing on Respondent's motion for an award of attorney's fees and costs before the Trial Court.

Appellant was licensed by the Washington Secretary of State as a Washington for-profit corporation on December 11, 2001 under UBI No. 602166750. CP 64. WCEM, Inc., listed a business and mailing address of P.O. Box 3148, Federal Way, WA 98063-3148 (hereinafter "first WCEM"). CP 64. The President/Chairman of the first WCEM, Inc., was listed as an individual named Christian A. Gerling. CP 39. During the period that the first WCEM, Inc., operated as an active corporation, it also conducted business under the trade name "West Coast Entertainment Marketing." CP 39.

On December 31, 2003, the 2001 WCEM, Inc.'s corporate status expired and on March 22, 2004, the first WCEM, Inc., UBI No. 602166750, was dissolved and declared inactive by the Washington Secretary of State. CP 64. As of May 1, 2015, the first WCEM, Inc., UBI No. 602166750, had not been reinstated by the Washington

Secretary of State and it has not been an active corporation since March 22, 2004. CP 64.

Pursuant to discovery responses provided by the plaintiff, West Coast Entertainment Marketing operated as a business between 2008 and 2010. CP 40. The public records of the Washington State Department of Revenue show that Christian A. Gerling operated a Sole Proprietorship doing business as "West Coast Entertainment Marketing." CP 40.

On March 20, 2012, the public records of the Washington Secretary of State show that a new corporate entity, WCEM, Inc., UBI No. 603191786, was licensed as a Washington for-profit corporation (hereinafter "2012 WCEM"). CP 41. This new 2012 WCEM entity, with a new and different UBI number from the first WCEM entity, is an entirely new and different legal entity despite the fact that the names of both entities are similar. CP 41.

The plaintiff listed in the caption of the underlying lawsuit, WCEM, Inc., UBI No. 602166750, did not have legal standing to pursue this lawsuit for several reasons. CP 64. The first WCEM had not been a legal corporate entity since 2004, and therefore did not exist and had no legal ability to bring a lawsuit. CP 64.

If the plaintiff was arguably the 2012 WCEM, that corporate entity did not legally exist in September of 2009 when the alleged promissory note was created and it could not have had legal standing to bring the underlying lawsuit. CP 41.

Because the first WCEM, Inc., UBI No. 602166750, was not a licensed and operating corporation either at the time the claimed promissory note was created nor at the time the underlying lawsuit was filed, it had no legal standing to bring this litigation and the claims asserted in its name were frivolous in their entirety. CP 64. Respondent was entitled to an award of attorney's fees for defending that frivolous action. CP 66.

The only arguable legal entity that did exist in September of 2009 when the alleged promissory note was created, was the sole proprietorship of Christian A. Gerling doing business as "West Coast Entertainment Marketing." CP 40. However, that business, as a Sole Proprietorship, was a wholly different and separate legal entity/person from either the first WCEM or the 2012 WCEM. CP 40.

Mr. Gerling is subject to legal liability for his actions, including conduct such as filing and pursuing a frivolous lawsuit. In addition, Mr. Gerling signed answers to interrogatories, under oath,

which the Court found to be inaccurate and untruthful, thereby giving rise to liability for sanctions against Mr. Gerling individually pursuant to CR 11. CP 64-65.

On May 1, 2015, the trial court granted Respondent's motion for attorney's fees and costs as well as CR 11 sanctions. CP 67-68. The Court entered Findings of Fact and Conclusions of Law which provide, in part, as follows:

Plaintiff WCEM, Inc., UBI No. 602166750, was a Washington corporation formed on December 11, 2001, listed a business and mailing address of P.O. Box 3148, Federal Way, WA 98063-3148, and was licensed and authorized to do business in the State of Washington until its corporate status expired on December 31, 2003.

On March 22, 2004, WCEM, Inc., UBI No. 602166750, was declared inactive by the Washington Secretary of State.

WCEM, Inc., UBI No. 602166750, did not apply for reinstatement with the Washington Secretary of State by March 22, 2009.

WCEM, Inc., UBI No. 602166750, was not a licensed and active corporation on September 1, 2009, the date the Note was executed.

WCEM, Inc., UBI No. 602166750, was not a licensed and active corporation on February 6, 2014, the date this lawsuit was filed.

The owner and president of WCEM, Inc. is Christian Gerling who answered and signed interrogatories on behalf of the plaintiff.

In answers to interrogatories Mr. Gerling stated under oath that WCEM, Inc., had operated since 2001 and that WCEM, Inc., is the only person or entity who has owned the claimed promissory note.

That the defendant is entitled to an award of its actual attorney's fees and costs incurred in defending this action pursuant to the terms and conditions of the Note.

Pursuant to the terms and conditions of the Note, the defendant is awarded reasonable attorney's fees and costs.

Plaintiff WCEM, Inc., UBI No. 602166750 was not a licensed and active corporation as of March 22, 2009. Plaintiff had no legal standing to enter into the claimed promissory note or to pursue this lawsuit.

There was no rational legal or factual basis to support the claims contained in the Plaintiff's Complaint and the Plaintiff's entire lawsuit was frivolous.

The plaintiff filed an action which it knew or should have known that it lacked legal standing to pursue. The plaintiff's entire lawsuit was frivolous and was advanced without reasonable cause.

There was no legal or factual basis to support the interrogatory answers that Christian Gerling signed under oath. Mr. Gerling's interrogatory answers were frivolous and advanced without reasonable cause.

The defendant is awarded reasonable attorney's fees and costs pursuant to the Frivolous Claims Statute, RCW 4.84.185, and Civil Rule 11.

CP 62-68.

The Trial Court found that Respondent was entitled to an award of attorney's fees and costs on the following bases: (1) pursuant

to the terms and conditions of the note, RCW 4.84.330; (2) pursuant to the Frivolous Claims Statute, RCW 4.84.185; and (3) pursuant to Civil Rule 11, and awarded Respondent attorney's fees and costs in the amount of \$10,185.00. CP 66.

Trial Judge Katherine Stolz acted well within her discretion and authority in dismissing the plaintiff's case with prejudice and in awarding attorney's fees and costs pursuant to all three bases.

III. ARGUMENT

A. DISMISSAL OF PLAINTIFF'S LAWSUIT WITH PREJUDICE IN THE UNDERLYING CASE WAS APPROPRIATE AND SHOULD BE AFFIRMED.

The Appellant's argument appears to be that once a plaintiff requests a dismissal of its case pursuant to CR 41(a)(1)(B), the trial court must instantly and automatically dismiss the action without prejudice. Taken to its logical conclusion, this argument would permit a plaintiff to avoid any sanction or other adverse ruling by the trial court simply by blurting out an oral motion to dismiss under CR 41 immediately before any adverse ruling. Certainly the inherent power of the trial court cannot be overridden by such a literal and narrow reading of the Civil Rules.

It remains unclear, even on appeal, who the true plaintiff was in the underlying case. If the plaintiff was the first WCEM, Inc., then the plaintiff had no legal standing to file or pursue the lawsuit because the first WCEM, Inc., did not exist as a legal entity and dismissal of the underlying case was appropriate.

If the plaintiff was the sole proprietorship of Christian Gerling doing business as West Coast Entertainment Marketing, the only legal WCEM entity in existence at the time the underlying lawsuit was filed and pursued, it did not own the note. Regardless, the sole proprietorship was not properly named as the plaintiff in the underlying lawsuit and dismissal of the case was likewise appropriate.

Regardless of the identity of the actual plaintiff in the underlying case, the plaintiff failed to comply with the Case Scheduling Order issued by the Court on multiple occasions. The Appellant made a motion for voluntary dismissal “without prejudice” pursuant to CR 41(a)(1)(B). In response Respondent made a motion to dismiss the plaintiff’s case “with prejudice” pursuant to CR 41 (b)(1). The Order of Dismissal with Prejudice states, in part, as follows:

. . . the plaintiff thereafter moving for voluntary dismissal pursuant to CR 41 without prejudice, and defendant moving for dismissal with prejudice . . . it is hereby Ordered, Adjudged and Decreed that plaintiff’s claims and causes of action are

dismissed, pursuant to plaintiff's motion pursuant to CR 41, but upon defendant's motion, said dismissal shall be with prejudice.

CP 56.

The Trial Court, acting within its discretion, chose to dismiss the Appellant's case with prejudice in response to the Respondent's motion.

- 1. Washington Trial Courts undisputedly have inherent authority to manage their dockets, and dismiss cases with prejudice and the Trial Court should be affirmed.**

Washington Courts have "such powers as are essential to the existence of the Court and necessary to the orderly and efficient exercise of its jurisdiction." *State v. Gilkinson*, 57 Wn.App. 861, 865, 790 P.2d 1247 (1990). The Courts derive authority to govern court procedures from Article IV s. 6 of the Washington Constitution. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 395, 143 P.3d 776 (2006). Additionally, "inherent power is authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties." *In re Mowery*, 141 Wn. App. 263, 281, 169 P.3d 835 (Div. 1, 2007); quoting *In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).

The Court's power to discretionarily dismiss a case for unacceptable litigation practices is "inherent." *See, Business Services v. Wafer Tech, LLC*, 174 Wn.2d 304, 308, 274 P.3d 1025 (2012) ("The sole question is whether CR 41(b)(1) applies to this case to limit the trial court's inherent discretion to dismiss."); *Snohomish County v. Thorpe Meats*, 110 Wn.2d 163, 166, 750 P.2d 1251 (1988) ("A court of general jurisdiction has inherent power to dismiss actions for lack of prosecution..."); *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997) ("[T]he trial court's inherent discretion [to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made] is not questioned by our interpretation.").

2. The criterion for discretionary dismissal is met under the facts of this case and should be affirmed.

The Trial Court's Order excluding plaintiff's untimely disclosed witnesses expressly concludes that the Appellant willfully and or deliberately disobeyed court orders. CP 54. Dismissal is an appropriate remedy where the record indicates that "(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent and (3) the trial

court explicitly considered whether a lesser sanction would probably have sufficed." *See, Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002).

In its Order excluding Appellant's untimely disclosed witnesses, the Trial Court expressly concludes that the Appellant's disobedience was willful, without reasonable excuse or justification, and prejudiced Respondent's ability to prepare for trial. CP 54.

3. Sanction of dismissal with prejudice was warranted and should be affirmed.

The sanction levied against Appellant is well-supported by and consistent with the lengthy history of Washington Court sanctions for litigant malfeasance, which date back to statehood. A Trial Court's inherent authority to dismiss a case has been upheld for a variety of conduct:

McDaniel v. Pressler, 3 Wn. 636, 638, 29 P. 209 (1892): Courts have authority to dismiss lawsuits for abandonment and also for plaintiff's disobedience of an order concerning the proceedings in an action.

Plummer v. Weill, 15 Wn. 427, 430-431, 46 P. 648 (1896): Where the character of the attorneys and parties are not of issue, party's brief that refers to the opposing party in language that is grossly improper and unseemly [as here] warrants discretionary dismissal effectuated through the striking of the offensive brief.

Jackson v. Standard Oil of California, 8 Wn. App. 83, 505 P.2d 139 (1972); *Rev. denied*: Plaintiff expresses dissatisfaction with court order, leaves courtroom, dismissal with prejudice granted.

State ex rel. Clark v. Hogan, 49 Wn.2d 457, 464, 303 P.2d 290 (1956): Inherent dismissal due to refusal to plead further an incoherent complaint.

State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County, 41 Wn.2d 484, 494, 250 P.2d 536 (1953): Court's inherent dismissal powers upheld despite stipulation to waive CR 41-governed dismissal among the parties.

National City Bank of Seattle v. International Trading co. of America, 167 Wn. 311, 316-317, 9 P.2d 81 (1932): Court holds in dicta that CR 41 precursor does not forbid exercise of the inherent power of a court to dismiss an action "whenever in the interests of justice he may deem that the proper course to pursue."

Stickney v. Port of Olympia, 35 Wn.2d 239, 241, 212 P.2d 821 (1950): Parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of [CR 41 predecessor Rule] because plaintiff failed to continue making filings in the case for a protracted period, then noted a trial to escape operation of CR 41-predecessor.

In *Stickney*, the Supreme Court of Washington affirmed dismissal in favor of the Port of Olympia. The *Stickney* court held that the Port of Olympia was entitled to a discretionary dismissal for lack of diligent prosecution regardless of whether the language in CR 41 was satisfied - because the lack of a noted trial date served to preserve

all of the Court's discretion to dismiss the case. *Stickney*, 35 Wn.2d at 241. ("The parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of Rule 3").

4. The Trial Court's action is evaluated by this Court under the abuse of discretion standard and the Trial Court should be affirmed.

Trial Courts have broad discretion to manage their courtrooms and conduct trials in order to achieve the orderly and expeditious disposition of cases. *In re Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 815, 226 P.3d 202 (2010); *citing, State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). When reviewing a dismissal due to unacceptable litigation practices, also referred to interchangeably as a "discretionary dismissal " or "inherent dismissals" throughout Washington case law, the standard of review is abuse of discretion: "When the Court's inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard." *Stickney*, 35 Wn.2d at 241. The sole dispositive issue in this appeal is whether the Trial Court abused its discretion in dismissing this case, with prejudice, due to Appellant's failure to comply with the Court Ordered Case Schedule.

Assessing abuse of discretion in this case for unacceptable litigation practices is limited to when the Trial Court's decision to dismiss is "manifestly unreasonable" or "based on untenable grounds." *v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 131, 896 P.2d 66 (1995); *citing Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

A Trial Court's exercise of discretion is manifestly unreasonable if no reasonable person would concur with the Court's view when the Court applies the correct legal standard to supported facts. *Mayer v. Sto Indu., Inc.*, 156 Wn.2d 677, 684 (2006); *quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A Trial Court's exercise of discretion rests upon untenable grounds if the trial court relies upon unsupported facts or applies the wrong legal standard. *Id.*

"We do not reverse a discretionary decision absent a clear showing that the Trial Court's exercise of its discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *City of Puyallup v. Hogan*, 168 Wn. App. 406, 423, 277 P.3d 49 (2012).

A discretionary dismissal will be reviewed for an abuse of discretion. *Rivers*, 145 Wn.2d at 684-85; *see also, Woodhead*, 78 Wn. App. at 129 (a court has the discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Appellate courts are loath to substitute their judgment for that of the trial court. *A.G. v. Corporation of Catholic Archbishop of Seattle*, 162 Wn. App. 16, 25, 271 P.3d 249 (2011), and cases cited therein. ("An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court's exercise of discretion was manifestly unreasonable, or made for untenable reasons.") *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), *overruled on other grounds by Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 263 661 P.2d 964 (1983); RCW 71.05.390. *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336, (2012)

Prior courts have "allowed discretionary dismissals for failures to appear, filing late briefs, and similarly egregious sorts of behavior." *Business Services, Id.*, 174 Wn.2d at 311. "Such dilatoriness also

occurs, for example, when there is a failure to appear at a pretrial conference in combination with general dilatoriness." *Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).

The Trial Court in the case at bar, properly exercised its discretion and dismissed Appellant's complaint with prejudice and should be affirmed.

5. A Court may dismiss a case with prejudice for violation of a case schedule order or other Court order.

The Court Rules provide: "for failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her." CR 41(b). "Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules." *E.g., Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002).

The sanction of dismissal with prejudice pursuant to CR 41(b) "is justified when a party acts in willful and deliberate disregard of reasonable and necessary court orders, the other party is prejudiced as a result, and the efficient administration of justice is impaired." *See Apostolis v. City of Seattle*, 101 Wn. App. 300, 303-5, 3 P.3d 198

(2000) (trial court's dismissal of an action with prejudice for violation of case schedule and court orders affirmed on appeal); *accord Woodhead*, 78 Wn. App. at 129-131 (trial court's dismissal of an action with prejudice for conduct including violation of case schedule order affirmed on appeal). "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Rivers*, 145 Wn.2d at 686-87.

However, before dismissing a case as a sanction, a trial court must consider whether a lesser sanction would suffice. *See Woodhead*, 78 Wn. App. at 132. Thus, a trial court in Washington may dismiss a case with prejudice if a party violates an order of the court, including a case schedule order, if 1) the violation is willful and deliberate; 2) the violation prejudiced the other party; and 3) the court considered lesser sanctions. *See Rivers*, 145 Wn.2d at 686.

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**B. APPELLANT'S DISCOVERY CONDUCT
REPEATEDLY IGNORED THE COURT'S ORDERS
AND STATEMENTS AND DISMISSAL WITH
PREJUDICE WAS APPROPRIATE AND SHOULD BE
AFFIRMED.**

**1. The Plaintiff's failure to disclose a testifying witness
at trial was willful or deliberate as a matter of law.**

Willful violation of a court order is grounds for excluding witnesses. *Hutchinson Cancer Research v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 972 (1987). The court does not abuse its discretion when it excludes witnesses for the willful violation of a discovery order. *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994).

In *Allied Financial Services v. Mangum*, 72 Wn. App. 164, 864 P.2d 1, 871 P.2d 1075 (1993), the court held that a violation of a court order without reasonable excuse will be deemed "willful." *Allied*, 72 Wn. App. at 168, citing *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). The violation of a court order without a reasonable excuse will be deemed willful. When no reason is given for the failure to disclose, the court must conclude that the actions constitute a willful failure to comply with the discovery rules. *Lampard*, 38 Wn. App. at 202. Therefore, absent a reasonable excuse, the plaintiff's failure to timely disclose any witnesses who would testify at trial of this case

constituted a willful violation of the discovery rules, and a willful violation of the Court Rules.

Significantly, the plaintiff had no reasonable excuse or justification for its decision to change course in the eleventh hour and decide to try and call two previously undisclosed witnesses to testify in this matter after discovery had been completed. In fact, the plaintiff did not even argue that it had a reasonable excuse. CP 34-35.

It is utterly inconceivable that the plaintiff could not have decided that it needed to call these witnesses to testify until the eve of trial. The plaintiff did not offer any explanation much less any reasonable excuse why it failed to disclose any witnesses. CP 34-35. In light of this, the plaintiff's conduct appeared to be an intentional, tactical one.

In the case of *Scott v. Grader*, 105 Wn. App. 136, 18 P.3d 1150 (2001), the Court noted that the trial Court can exclude a witness because of late disclosure. The Court held as follows:

Grader had no reasonable excuse for waiting until the last minute to obtain an expert witness. A party's untimely designation of a witness without reasonable excuse will justify an order excluding the witness. *See Dempere v. Nelson* (expert witness excluded when party failed to disclose the witness until 13 days before trial); *Allied Fin. Services, Inc. v. Magnum* (witnesses excluded due to party's failure to submit a witness list as required by pretrial order). The trial court

could have simply disallowed the testimony of Dr. Murphy altogether. Indeed, a King County local rule provides that a witness not disclosed in compliance with witness disclosure deadlines “may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires. KCLR 26(e). When a witness is allowed to testify despite an untimely designation, justice may well require the imposition of more stringent conditions than would otherwise be warranted.

Scott v. Grader, supra at 140-41 (interior citations omitted).

In the absence of a reasonable excuse, the plaintiff’s failure to disclose any witnesses until less than 30-days prior to trial, and after discovery had been completed, must be treated as a failure to answer. CR 37(d). “Fair and reasoned resistance to discovery is not sanctionable.’ *Wash. State Physicians Ins. Ex. v. Fisons*, 122 Wash.2d 299, 346, 858 P.2d 1054 (1993). A party’s disregard of a court order without reasonable excuse or justification is deemed willful.” *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009).

Pursuant to the case law cited above, and specifically because the plaintiff offered no justification for its failure to disclose witnesses, the trial Court reasonably concluded the plaintiff’s conduct was willful and deliberate as a matter of law.

2. The Appellant's failure to disclose any trial witnesses caused substantial prejudice for the Respondent and no lesser sanction other than exclusion could ensure that the plaintiff did not profit from its wrongful conduct.

The Appellant's willful discovery violation in the underlying case caused substantial prejudice to Respondent's ability to prepare for trial. The Appellant did not disclose its trial witnesses until 21-days before trial, and well after the discovery cutoff. CP 22.

In *Allied Financial Services v. Mangum, supra.*, the defendants failed to disclose witnesses as required by a pretrial discovery order. The trial court subsequently ruled that they would not be allowed to call any witnesses at trial, including those disclosed by the plaintiff. In affirming the trial court's ruling, the Court of Appeals stated:

The Mangum's position is contrary to the plain language of LR 16(a)(3) and the official comment to LR 16(a)(3), which states: "*All* witnesses must be listed, including those whom a party plans to call as a rebuttal witness." (Italics ours). Thus, we hold that, in order to call witnesses at trial, LR 16(a)(3) requires a party to list "any" and *all* witnesses, including those listed by the opposing party, unless the court orders otherwise for good cause.

Allied, 72 Wn. App. at 167-68 (italics original, emphasis added).

In a second case decided after *Allied*, the Court of Appeals again upheld a trial court's exclusion of witnesses. In *Dempere v.*

Nelson, supra, the plaintiff attempted to name a witness that was not disclosed in accordance with the case schedule. The trial court excluded the witness. The Court of Appeals rejected defendant's argument that there must also be a showing of intentional or tactical non-disclosure. The Court of Appeals, in affirming the trial court, held as follows:

[Plaintiff] failed to disclose Reich as required by the case schedule and the pretrial order. A trial court does not abuse its discretion when it excludes witnesses for a willful violation of a discovery order. [citing *Allied*].

... We therefore find no abuse of the trial court's discretion in its decision to exclude a witness who was not timely disclosed as required by the case schedule.

Dempere, 76 Wn. App. at 406.

The state of the law regarding the exclusion of untimely disclosed witnesses was well settled until the 1997 case of *Burnet v. Spokane Ambulance, supra*, where the Washington Supreme Court reversed a trial court decision to exclude expert witnesses because the trial court had not considered less severe sanctions on the record. The *Burnet* case does not stand for the proposition that a trial court cannot exclude witnesses for discovery violations. Despite the actual facts of *Burnet*, dilatory litigants continue to cite to *Burnet* as a sort of get-out-

of-jail free card to overcome the failure to identify or disclose witnesses.

Significantly, the facts of *Burnet* are distinguishable from the facts in *Allied* and *Dempere*, above, and are also distinguishable from the facts in the case at bar. In *Allied* the defendant disclosed expert witnesses on the eve of trial. In *Dempere* the defendant's expert witnesses were first identified 13-days prior to trial. In *Burnet*, the trial court's order excluding the witnesses was entered in December of 1990. However, the trial date in *Burnet* was set for January of 1993. At the time the Court ordered that witnesses be excluded in *Burnet* the litigants still had over two years until trial to prepare. In *Burnet* the Court held as follows:

Furthermore, the circumstances of this case are far different than those which the Court of Appeals faced in the two above-cited cases. One major difference is that although several years had transpired from the initiation of the Burnets' claim until their expert witnesses were named, deposed, and their opinions was clearly identified, a significant amount of time yet remained before trial. That being the case, Sacred Heart could not be said to have been as greatly prejudiced as the non-wrongdoing parties in *Allied* and *Dempere*, who engaged in the sanctionable conduct on the eve of trial.

Burnet, 131 Wn.2d at 496 (emphasis added).

In deciding whether to exclude plaintiff's untimely disclosed witnesses in the underlying case, the Court was required to consider

whether “a less severe sanction could... [advance] the purposes of discovery and yet [compensate the defendant] for the effects of the [plaintiff’s] discovery failings.” *Burnet*, 131 Wn.2d at 497.

Monetary sanctions against Appellant and/or its counsel in this case would have been insufficient to advance the purposes of discovery and compensate Respondent for the consequences of the Appellant’s failures to disclose trial witnesses. Issuing a monetary fine to the Appellant was unlikely to change its future behavior vis á vis the disclosure of testifying witnesses.

As discussed above, this discovery violation was willful or deliberate and substantially prejudiced Respondent and its ability to prepare for trial. Lesser sanctions were insufficient to advance the purposes of discovery and compensate Respondent for the effects of the Appellant’s failure to disclose trial witnesses. CP 54.

The Appellant argues that the trial Court should be reversed because it did not make findings regarding the *Burnet* factors orally during argument¹. This is an incorrect statement of Washington law. Findings regarding the *Burnet* factors must be made on the record. A trial court may make the *Burnet* findings on the record orally or in

¹ Appellant’s Brief, Page 9.

writing. *See Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348-49, 254 P.3d 797 (2011) (noting that the trial court did not make *Burnet* findings on the record where it did not engage in a colloquy with counsel or hear oral argument and did not include the findings in the written order). Thus, where an order excluding a witness is entered without oral argument or a colloquy on the record, findings on the *Burnet* factors must be made in the order itself or in some contemporaneous recorded finding. *Id.* at 349

In the underlying case the trial Court entered an Order setting forth its findings as to the *Burnet* factors:

The plaintiff failed to file a Disclosure of Witnesses and failed to file a Witness and Exhibit List within the deadline set forth in the Order Setting Case Schedule;

The plaintiff disclosed Jeff Graham and Christian Gerling as trial witnesses in Plaintiff's List of Witnesses filed on March 9, 2015, only 21-days prior to trial;

This untimely disclosure of trial witnesses was willful and without a reasonable excuse or justification;

The plaintiff's untimely disclosure of trial witnesses causes substantial prejudice to the defendant's ability to prepare for trial; and

Lesser sanctions than the exclusion of plaintiff's undisclosed witnesses, such as monetary sanctions, have been considered but would be inadequate.

CP 54.

The Trial Court entered specific written findings that the Appellant's failure to timely disclose witnesses was willful and without reasonable excuse, prejudiced the Respondent's ability to prepare for trial, and that lesser sanctions other than exclusion of the witnesses would have been inadequate. CP 54.

C. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES AND COSTS WAS APPROPRIATE AND SHOULD BE AFFIRMED BY THIS COURT.

The Appellant has appealed the Trial Court's award of attorney's fees and costs pursuant to the claimed promissory note and pursuant to Civil Rule 11 against Christian Gerling, the owner of the various WCEM entities. However, the Appellant did not challenge or oppose Respondent's motion for an award of attorney's fees and costs pursuant to the claimed promissory note or Civil Rule 11 before the Trial Court. CP 59-61.

1. Issues cannot be raised for the first time on appeal.

A trial court's award of attorney fees will not be overturned absent an abuse of discretion. *Progressive Animal Welfare Soc. v. University of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). A trial court abuses its discretion when "the exercise of its discretion is

manifestly unreasonable or based upon untenable grounds or reasons.”

Id. at 688-89.

The Appellant did not contest Respondent’s motion for attorney’s fees and costs, against WCEM, Inc., and Christian Gerling, pursuant to the terms of the claimed promissory note and pursuant to Civil Rule 11, at the trial court level. CP 59-61. The Appellant only opposed Respondent’s motion for attorney’s fees and costs pursuant to the Frivolous Claims Statute, RCW 4.84.185. CP 59-61.

This Court has consistently held that it will not consider arguments that are raised for the first time on appeal. *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012); *see also* RAP 2.5(a); *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983) (refusing to consider for first time on appeal whether trial court improperly determined amount of attorney fees awarded). Nor does the Appellant explain why it raises these objections for the first time on appeal.

Any claimed errors in the award of attorney’s fees and costs against WCEM and Christian Gerling pursuant to the terms of the claimed promissory note and Civil Rule 11 were waived by the Appellant’s failure to oppose them at the trial court level. The

Appellant's argument regarding these issues on appeal should not be considered by this Court.

2. The Trial Court's award of attorney's fees and costs pursuant to the Frivolous Claims Statute, RCW 4.84.185 was appropriate and should be affirmed.

"The frivolous lawsuit statute has a very particular purpose: that purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992).

RCW 4.84.185 authorizes a trial court to award a prevailing party its reasonable expenses, including attorney's fees.

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense 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, counterclaim, cross-claim, third party claim, or defense. 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. The provisions of this section apply unless otherwise specifically provided by statute.

RCW 4.84.185.

Prior to 1991, RCW 4.84.185 explicitly required that trial court judges "consider the action, counterclaim, cross-claim, third party claim, or defense as a whole" in determining whether a party's claim was frivolous. However, in 1991, the Legislature eliminated the "as a whole" requirement, which seemed to indicate that courts were thereafter free to proceed on a claim by claim basis in adjudging frivolousness. *Compare* Laws of 1987, ch. 212, § 201 *with* Laws of 1991, ch. 70, § 1.

In 1992, the Supreme Court held that, under the 1987 version of the statute, if any cause of action between the plaintiff and the defendant was non-frivolous, then fees could not be awarded. *Biggs*, 119 Wn.2d at 136-37. In doing so, the Court also suggested in dicta that the Legislature's later elimination of the words "as a whole" from the statute in 1991 would not change that result. *Biggs*, 119 Wn.2d at 136; *see also State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998); *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698 (2001) (both continuing to apply "as a whole" requirement to 1991 version of statute).

"The decision to award frivolous litigation attorney fees is within the discretion of the trial court and will not be disturbed absent a clear showing of abuse." *Reid v. Dalton*, 124 Wn. App. 113, 125, 100 P.3d 349 (2005). Moreover, "[n]othing in the statute requires a court to find that the action was brought in bad faith or for purposes of delay or harassment." *Highland Sch. Dist. v. Racy*, 149 Wn. App. 307, 311, 202 P.3d 1024 (2009).

"A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts." *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.2d 83 (1989) (citing *Legal Foundation v. TESC*, 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986)). Sanctions are appropriate if a party's Complaint lacks a factual or legal basis, and the person signing the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258 (1992).

3. Neither the first WCEM, Inc., nor the 2012 WCEM, Inc., had legal standing to pursue a lawsuit on the claimed promissory note and this litigation was patently frivolous.

Before a court will entertain a civil action for damages, a plaintiff must establish the requisite standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149, 154, 110 S. Ct. 1717 (1990). Standing is an

issue of law for the court to resolve. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1454 (9th Cir. 1995).

In order to have legal standing to pursue the underlying case, the alleged promissory note was required to have been created and entered into by the plaintiff prior to the effective date of its corporate dissolution in March of 2009. In *Ballard Square v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006), the Washington Supreme Court held as follows:

RCW 23B.14.340 is not ambiguous as it clearly applies only to claims existing before a corporation dissolved given that the “claim existing prior to such dissolution” language was clear; the legislature’s failure to eliminate the “prior to such dissolution” language of the statute compelled the conclusion that the survival statute applies only to claims existing before the corporation dissolved.

Ballard Square, 158 Wn.2d at 610.

The principles of standing apply in the context of actions brought by shareholders or officers of corporations versus actions brought by a corporation itself. Corporations are distinct legal entities, separate from their shareholders or members. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 784 P.2d 949 (1987); *Abraham & Sons Enterprises v. Equilon Enterprises, LLC*, 292 F.3d 958, 962 (9th Cir. 2002). Generally, a shareholder or officer has no standing to sue for

wrongs done to a corporation, because the corporation is a separate legal entity. Even if a shareholder or officer owns all or most of the stock of the company, but suffers damages only indirectly, she cannot sue as an individual. *Erllich v. Glasner*, 418 F.2d 226 (9th Cir. 1969); *EMI Ltd. v. Bennett*, 738 F.2d 994, 997 (9th Cir. 1984); *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 352, 186 P.3d 1107 (2008), *aff'd*, 169 Wn.2d 199 (2010).

In evaluating whether or not a valid and enforceable contract exists, courts consider several elements, including the capacity of the parties to enter into a contract. *Williston on Contracts*, §§ 450, 677A, 1487A, 1578A, 1602, 1617 (3d ed. W. Jaeger 1960). Washington has long recognized that a corporation is an entity distinct from the identity of its shareholders, directors and officers. "A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person." *State v. Tacoma Railway and Power Company*, 61 Wash. 507, 513, 112 P. 506 (1911). "A corporation must sue in its own name to protect its corporate rights." *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 777, 496 P.2d 343, 350 (1972) (emphasis added). "A shareholder who owns all or practically

all of a corporation's stock is not entitled to sue as an individual because the shareholder cannot employ the corporate form to his advantage in the business world and then choose to ignore its separate entity when he gets to the courthouse." *Zimmerman v. Kyte*, 53 Wn. App. 11, 18, 765 P.2d 905, 909 (1988), quoting 12B W. Fletcher, *Private Corporations* § 5910 (1984) (*internal quotations omitted*).

Since the alleged promissory note at issue herein was not ostensibly entered into until September of 2009, it is not a claim that existed before the first WCEM, Inc., was effectively dissolved and the first WCEM had no legal standing to pursue the underlying case. CP 64.

Any action pursued on behalf of the first WCEM was frivolous and the Trial Court's award of attorney's fees and costs pursuant to the Frivolous Claims Statute should be affirmed. CP 66.

The 2012 WCEM, Inc., certainly could not be argued to have been the plaintiff herein, or to have had legal standing to pursue the underlying case, because the 2012 WCEM was not legally born, and did not legally exist, until 2012, three-years after the claimed promissory note was ostensibly entered into with Lost Lake Resort, LLC. CP 64.

Any action pursued on behalf of the 2012 WCEM was frivolous and the Trial Court's award of attorney's fees and costs pursuant to the Frivolous Claims Statute should be affirmed.

4. The sole proprietorship WCEM was the real party in interest and the only entity with legal standing to pursue the underlying case over the claimed promissory note.

CR 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest." The real party in interest is the party "who possesses the right sought to be enforced." *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 180, n. 2, 982 P.2d 1202, (1999), citing 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1552 (2d ed.1990).

The only arguable legal entity that did exist in September of 2009 when the alleged promissory note was created was Christian A. Gerling doing business as "West Coast Entertainment Marketing." CP 40. However, that business is merely a Sole Proprietorship, a wholly different and separate legal entity/person from a corporation. As a sole proprietorship, Mr. Gerling is personally liable for any claims against WCEM as a sole proprietorship.

An award of attorney's fees and costs pursuant to the Frivolous Claim Statute, RCW 4.84.185, similar to fees under CR 11, is left to

the sound discretion of the trial court and will only be overturned based on a finding of an abuse of discretion. *Zink v. City of Mesa*, 137 Wn. App. 271, 276, 152 P.3d 1044 (2007); *Tiger Oil v. Dep't of Licensing*, 88 Wn. App. 925, 937-39, 946 P.2d 1235 (1997).

In the present case the Respondent propounded interrogatories and requests for production to the Appellant. The responses to Respondent's discovery requests were signed by Christian Gerling, the owner and president of WCEM, Inc. Respondent's discovery requests and Mr. Gerling's responses were as follows:

INTERROGATORIES

1. Identify any and all names used for the subject company at any time.

Answer: WCEM, Inc., since 2001 and West Coast Entertainment Marketing from 1998 to 2003.

12. Identify each person who has prepared or supplied information in answering these questions, giving each person's name, address, job classification, residence and business telephone number, and describe the individual's relationship to you.

Answer: Christian Gerling.

14. Identify every person or entity who owns or has owned an interest in the subject note, the consideration provided for each such ownership, the time period of ownership and the percentage owned.

Answer: Only WCEM, Inc.

Mr. Gerling signed a Verification that the interrogatory answers were true under penalty of perjury. CP 64-65.

Mr. Gerling asserted under oath in answers to interrogatories that WCEM, Inc., was an active corporation since 2001 and that the only person or entity who owned the claimed promissory note at any time was WCEM, Inc. These statements cannot be true because WCEM, Inc., did not exist after March 22, 2009. CP 64-65.

Both RCW 4.84.185 and CR 11 were violated because the present action was wholly unsupported by fact or law, and WCEM's owner Mr. Gerling failed to conduct a reasonable inquiry into the factual or legal basis for its claims. CP 66. The reasonableness of such an inquiry is evaluated by an objective standard. *See, e.g., Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

The underlying lawsuit was frivolous because it cannot be supported by any rational argument on the law or facts. Neither the first WCEM nor the 2012 WCEM had legal standing to pursue the underlying lawsuit. The record is clear that the underlying lawsuit was being pursued by Christian Gerling and that Mr. Gerling signed false interrogatory answers under penalty of perjury.

Sanctions are appropriate if a party's Complaint lacks a factual or legal basis.

D. RESPONDENT SHOULD BE AWARDED ITS ATTORNEY'S FEES AND COSTS ON APPEAL.

Respondent requests attorney's fees on appeal pursuant to RAP 18.1, based on the terms of the claimed promissory note, RCW 4.84.330 and the Frivolous Claims Statute, RCW 4.84.185 as the prevailing party and pursuant to Civil Rule 11. This Court should award fees on appeal to Respondent LLR.

IV. CONCLUSION

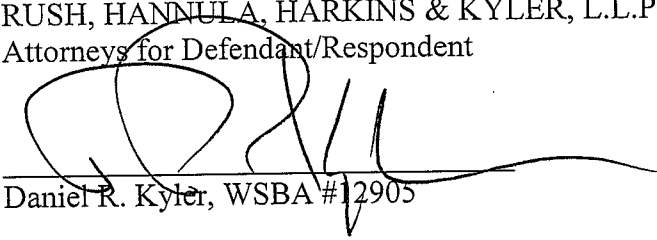
The underlying case was pursued by Christian Gerling, but was filed in the name of the first WCEM, Inc., a legally non-existent corporation with no legal standing to pursue a lawsuit. Over the course of a year and a half the Appellant failed to comply with the Court Ordered Case Schedule and only disclosed witnesses 21-days prior to trial.

The Trial Court's exclusion of untimely disclosed witnesses, dismissal of the case with prejudice and unchallenged award of attorney's fees and costs pursuant to RCW 4.84.330 and Civil Rule 11 should be affirmed. The Trial Court's award of attorney's fees and

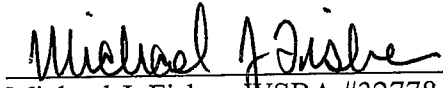
costs pursuant to the Frivolous Claims Statute, RCW 4.84.185, should also be affirmed. Respondent requests leave to file its requests for fees after a decision of this tribunal on the merits, pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 13th day of November, 2015.

RUSH, HANNULA, HARKINS & KYLER, L.L.P.
Attorneys for Defendant/Respondent



Daniel R. Kyler, WSBA #12905



Michael J. Fisher, WSBA #32778

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DIVISION II

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STATE OF WASHINGTON

Certificate of Service

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served with this Certificate of Service the following documents in the manner indicated:

• **BRIEF OF RESPONDENT**

| <u>Counsel for WCEM, Inc.</u> | <u>Counsel for Lost Lake Resort:</u> |
|---|--|
| Thomas T. Osinski, WSBA #34154 Osinski Law Offices, PLLC 535 Dock Street, Suite 108 Tacoma, WA 98402-4614 Phone: 253-383-4433 tto@osinskilaw.com dkeister@osinskilaw.com Via E-mail and Legal Messenger | Barton L. Adams, WSBA #11297 Adams & Adams Law, P.S. 2626 North Pearl Street, #13 Tacoma, WA 98407 Phone: 253-761-0141 bartonladams1@msn.com Via E-Mail |

SIGNED this 13 day of November, 2015, at Tacoma, Washington.



Vea Steppan, Legal Assistant
Rush, Hannula, Harkins & Kyler, LLP
vsteppan@rhhk.com