No. 98277-5
(COA No. 80095-7-I)

SUPREME COURT OF THE STATE OF WASHINGTON

James Robinson; Scott Smith; Michael Mattingly,
Petitioners below,

SCOTT SMITH,

Petitioner,

v.

AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC. and WAYNE ELSTON, COMMANDER,

Respondents.

On appeal from Thurston County Superior Court

SCOTT SMITH'S PETITION FOR REVIEW

JoAnne G. Comins Rick, WSBA #11589

HALSTEAD & COMINS RICK P.S.
P.O. BOX 511
Prosser, WA 99350
(509) 786-2200
Attorneys for Appellant Scott Smith

Gregory M. Miller, WSBA #14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Appellant Scott Smith

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I. INTRODUCTION

In 1899 this Court adopted the majority rule requiring corporations to permit inspection of their records for shareholders as a significant right of ownership. *State ex rel. Weinberg v. Pacific Brewing and Malting Company*, 21 Wash. 451, 58 P. 584 (1899). In 1989 the legislature passed the Business Corporation Act containing RCW 23B.16.040(3). The statute added teeth to this common law right to inspect corporate records by mandating an award of fees to shareholders required to get access by court order:

> "(3) If the court orders inspection and copying of the records demanded, it ***shall*** also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order…" (emphasis added).

The statute continues with a "good faith" defense for the corporate managers, allowing them a limited opportunity to avoid the mandatory payment of the shareholder's fees, but ***not***

> "…unless **the corporation proves** that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." (emphasis added).

However, the statute does ***not*** say: "The corporation shall not be ordered to pay the shareholder's costs, including reasonable counsel fees… **unless the shareholder proves** it requested in good faith to inspect the records" – yet this is precisely what the Decision below held. The Decision flips the burden of proof, undercutting shareholders' long-standing right to inspect corporate records and upsetting the balance crafted by the Court and the Legislature.

This case is the first opportunity for this Court to construe and apply the "good faith" and "reasonable basis for doubt" exception to the mandatory fee provision of RCW 23B.16.040. It needs to take review because the Court of Appeals Decision changes the nature of shareholder inspection rights, contrary to this Court's cases beginning with *Pacific Brewing,* and contrary to the Legislature's intent in passing RCW 23B.16.040(3) as an enforcement mechanism for shareholders and a deterrent to the corporation, which can only be escaped if the corporate operators satisfy a high burden of proof.

Here, Petitioner Scott Smith and his co-petitioners below, Robinson and Mattingly, sought access to the Department ALWA's corporate records to which they each were entitled under both the statute and *Pacific Brewing*. Only Mr. Smith formally retained counsel and it was through Mr. Smith's counsel's efforts that he and his co-petitioners ultimately got full access to the ALWA's financial records. The Court of Appeals Decision unfortunately:

1) Misunderstood the premise of both the statute and its underlying common law, which informs the statute and its provision for fees – a "stick" to encourage disclosure of corporate financial records to shareholders like Smith;
2) Failed to give effect to the trial court's unchallenged findings of fact, *i.e.,* the finding ALWA is a 23B corp., not a 24.20 corp. as the Decision states; and, as a result,
3) Flipped the underlying presumption of both the common law and the statute in favor of shareholders seeking disclosure by viewing the case from the perspective of the corporate managers and operators to give them the benefit of the doubt and deny fees.

II. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Scott Smith, appellant below, asks the Court to grant review of the Court of Appeals' decision terminating review, published at 11 Wn.App.2d 274, 452 P.3d 1254 (2019 ("Decision"). References are to the slip opinion in the Appendix at pages A-1 to A-27. Reconsideration was denied on February 13, 2020. App. A-28. References to the Decision are to the slip opinion.

III. ISSUES PRESENTED FOR REVIEW

1. Review should be granted per RAP 13.4(b)(1) and (4) because the Decision conflicts with the corporate accountability policy stated in *State ex rel. Weinberg v. Pacific Brewing and Malting Company* and fails to give effect to the statutory scheme embodied in RCW 23B.16.040(3) providing for fees to successful requestors that gives meaningful effect to the *Pacific Brewing* decision.
2. Review should be granted per RAP 13.4(b)(1) and/or (4), so this Court can definitively construe RCW 23B.16.040(3)'s mandatory fee provision and determine whether its "reasonable basis for doubt" exemption is viewed subjectively from the perspective of the corporate operators whose refusal to grant shareholder access to corporate financial records required the shareholder to obtain it by court order, or is viewed objectively and with the goal of encouraging disclosure to shareholders?

IV. STATEMENT OF THE CASE

Petitioner Scott Smith and his co-petitioners below, Robinson and Mattingly, sought access to the Department's corporate records to which they each were entitled under both the statute and *Pacific*

Brewing because of long-standing concerns of financial mismanagement and embezzlement, which have since been borne out. Only Mr. Smith retained counsel, and it was through Mr. Smith's counsel's efforts that he and his co-petitioners ultimately got full access to the Department's financial records after strong resistance by the Respondent, ALWA, at the extensive hearing in October 2017 and entry of the trial court's order on December 15, 2017. CP 386-390, App. A-29 to A-33 hereto. That order was not challenged by Respondent ALWA as it did not cross-appeal.

As discussed in the reconsideration briefing at the Court of Appeals, however (*see* App. A-37-39, 41-46), the Court of Appeals adopted ALWA's contention that it had prevailed in 2017, and the burden was on Smith to show he complied with the statute in order to qualify for fees. Thus, it accepted ALWA's continued argument, which it had lost per the trial court's unchallenged December 15 Order, that it was ***not*** really a 23B Corp., and therefore was excused from opening its full corporate financial records to Smith and other members who were concerned about the ongoing embezzlement of hundreds of thousands of dollarsS.

The Court of Appeals mistakenly accepted this "confusion defense," that ALWA it was confused about its own corporate status: how was its operators to know what sort of corporate entity it was? That, ALWA argued, was good enough to excuse it from the long-

standing corporate disclosure obligations dating to the 1800's, bedrock law in this state.

The trial court denied Smith's fees request without making any findings, but implicitly accepting ALWA's argument that it was Smith's burden to establish his right to fees, contrary to the statute. The Court of Appeals affirmed and published the Decision, that mistaken flipping the burden of proof of the parties. It also flipped the underlying statutory presumptions in favor of the requesting shareholder who got a court order for disclosure. The statute presumes the shareholder: 1) proceeded in good faith; and 2) is entitled to recover his fees ***"unless"*** the corporate operators could meet the statutory burden of a reasonable basis for doubt about the right to the records.

Instead of viewing the facts and law objectively, or from the perspective of the shareholders like Petitioner Smith who had to fight and claw with help from counsel to get the disclosure of corporate finances to which he was entitled; and instead of requiring the corporate operators to pay Smith's fees that he was required to expend to get disclosure; the Court of Appeals Decision ignored the unchallenged findings of fact to give the benefit of the doubt to the corporate managers and deny Smith his fees.

In short, the Decision failed to act on the predicate for the fee statute which was the trial court ruling requiring disclosure. Under the plain terms of the statute, the burden then is on the corporate

operators to show good faith due to a reasonable doubt about the shareholder's request. But the Court of Appeals decision, like the trial court, did not follow the statutory script. It placed the burden on Smith to establish that he had properly requested the documents – which he already had done in order to get the December 15 Order.

Both the trial court and the Court of Appeals thus misapplied the statute's presumptions and burdens. As discussed *infra*, understanding the history of required corporate disclosure to shareholders dating to *Pacific Brewing* reinforces why this was a mistake and the statute was misapplied.

The Decision also faulted Smith by asserting, incorrectly, there is no evidence showing what records he requested and were denied by the ALWA managers, so therefore the fee statute doesn't apply, or that he was late in requesting them. This analysis is not in the "Statutory Interpretation" discussion but is at page 17 and footnote 5. App. A-17. In fact, based on the October hearing, the December 15 Order found that Smith and his fellow Petitioners:

> [1] Were members in good standing;
> [2] Made proper requests to inspect records for purposes of investigating corporate management of the affairs and finances of the Department;
> [3] Which records were denied by the Department; and
> [4] After the petition was filed, the Department produced copies of some records, but denied inspection of other records, including records related to employee wages, salaries and benefits.

See CP 388 ¶ 9, App. A-31 hereto.

The December 15 Order and these findings were not appealed by ALWA. They are verities on appeal, as are the trial court's findings as to ALWA's status as a 23B Corp. But as described in Smith's reconsideration motion below, they were not given proper effect by the Decision, which results in an incorrect interpretation and application of the disclosure and fee statute. Since this is the only Washington appellate case addressing these issues, review should be granted to insure correct application of the statute to future cases, and to guide corporate officers in responding to future requests.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Review should be granted per RAP 13.4(b)(1) and (4) to definitively construe the mandatory fee provision of RCW 23B.16.040(3) in the full context of the underlying common law and statutory law, all of which is designed to allow and encourage disclosure of corporate financial records to shareholders.

The policy of shareholder disclosure was established no later than 1899 and enhanced with the statutory fee provision. This Court has never addressed the proper test for when fees must be awarded under the mandatory terms of the statute. Nor has this Court addressed whether the statute can be applied from the perspective of the corporate operators and managers who the shareholder seeks to hold accountable, or objectively, or rather, as its text requires, from the subjective perspective of the shareholder holding the right of disclosure.

This Court stated the core concern of corporate disclosure in *Pacific Brewing* which, despite the Court of Appeals dismissive treatment of it as an old, pre-statute case that does not address fees, in fact is highly relevant as noted *infra.* That concern is:

> "….no more frequent or more aggravated species of outrage exists than the refusal of those in possession of the corporate books to disclose to the stockholders the written evidences of their stewardship; and in many cases nothing short of severe pecuniary forfeitures, followed by imprisonment as for crime, will afford an adequate protection to minority stockholders..."

Pacific Brewing, 21 Wash. at 463.

This is the principle that still underlies and animates the corporate disclosure statute and the fee provision in RCW 23B.16.040(3). The Court of Appeals Decision's construction and application of the statute is contrary to its text and to these underlying principles. Review should be granted to insure that the statute is properly and authoritatively construed to give continuing vitality to these principles.

B. Review should be granted per RAP 13.4(b)(1) and/or (4) because the Court of Appeals Decision is fundamentally inconsistent with this Court's decision in *State ex rel. Weinberg v. Pacific Brewing and Malting Company* and later decisions which affirm the primacy of shareholder access to corporate financial records.

The Court of Appeals Decision distinguished older cases because the statute was passed later and so, apparently, the appellate court believed earlier cases no longer had any relevance, nor could they inform the statutory program adopted after those decisions.

That is incorrect and misunderstands how the common law actually operates – as a continuing source of underlying principles that animate the later-adopted statutes.

This Court stated the basic principle in 1940 which is still apt today but, unfortunately, was overlooked by the Court of Appeals decision despite being cited in Smith's reply brief at page 19. The Court's complete statement is:

> But **even if the statute has been repealed, the common law right of a stockholder to examine the books and records of the corporation at proper times and for proper purposes remains**. *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 P. 584, 47 L.R.A. 208 [1899]; *Guthrie v. Harkness*, 199 U.S. 148, 26 S.Ct. 4, 50 L.Ed. 130, 4 Ann.Cas. 433 [1905]. And, under the common law rule, as it prevails in most states, and under statutes similar to the Arizona, statute, **the burden of showing improper motives on the part of the shareholder in demanding an inspection of the books and records of the corporation is upon the defendant. It is presumed, until the contary is shown, that the shareholder seeks the information for a proper purpose**. *Ontjes v. Harrer*, 208 Iowa 1217, 227 N.W. 101 [1929]; *Becker v. LeMars Loan & Trust Co.*, 217 Iowa 17, 250 N.W. 644 [1933]; *Knox v. Coburn*, 117 Me. 409, 104 A. 789 [1918]; *Dines v. Harris*, 88 Colo. 22, 291 P. 1024 [1930]; *William Coale Development Co. v. Kennedy*, 121 Ohio St. 582, 170 N.E. 434 [1930]. **This is the rule that prevails in this state.** *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 P. 584, 47 L.R.A. 208; *State ex rel. Lee v, Goldsmith Dredging Co.,* 150 Wash. 366, 273 P. 196. [1928]

State ex rel. Grismer v. Merger Mines Corp., 3 Wn.2d 417, 420-42, 101 P.2d 308 (1940). *Accord, State v. Guarantee Mfg. Co.,* 103 Wash. 151, 157, 174 P. 459, 461 (1918) ("So the rule in this state is that, to the extent of rights given by statute or the by-laws of a corporation, the right of a stockholder to inspect the books, records, and documents of the corporation may not be abridged or denied, except in protection of necessary trade secrets, or to combat some evil purpose, alleged and proved, such as the theft or destruction of records, or similar improper purpose.").

Not only does the *Grismer* decision show the important interrelationship between the underlying common law and later statutes, it reinforces a second error made by the Decision – essentially flipping the burden to the shareholder Smith to establish that ALWA has no good faith defense. Again, that is wrong – the burden is, and must remain on the corporate operators and managers to show that they had good and proper reasons for stone-walling the shareholder's request for financial records.

As noted at the outset, this Court invoked the settled common law in 1899 to require corporate disclosure to shareholders. As *Grismer* explains, that holding and purpose still underlie and animate the later statutes and case decisions, making it appropriate to revisit the origins in *Pacific Brewing*. In 1899 our Supreme Court affirmed the right of a certain Ms. Weinberg, a stockholder, to have access to the books of the Pacific Brewing Company over its

strenuous objections, invoking the common law as developed in England and in this country. *State Ex Rel. Weinberg v. Pacific Brewing & Malting Co., et al.,* 21 Wash. 451, 58 P. 584 (1899). The decision noted at 21 Wash., 457-458 that:

> The stockholders of a corporation have at common law, for a proper purpose, and at seasonable times, a right to inspect any and all books and records of the corporation… But … the courts disagree as to what is a proper purpose or, rather, as to what facts are sufficient to warrant the court in directing by mandamus permission to inspect, where the stockholder has been refused such by the officers of the corporation.

The Court noted that the many statutes adopted in this country guaranteeing the right of inspection "seem to be generally held not to be innovations in, but declaratory of the common law." 21 Wash. at 460.

This Court then confirmed that rule for Washington State by its decision, explaining:

> Corporations, owing to the ease with which they can be formed under the liberal provisions of the statute, and affording, as they do, a limited liability for investors, have become a favorite means for the combination of capital, and are now engaged in almost every variety and character of business. In fact, they have largely superseded partnerships. Not having behind them the personal responsibility and fortunes of the promoters, or that of those who may have invested in their capital stock, the interests of the public at large require, and especially that part of the public dealing with them, that the courts adopt the rule which will most largely conduce to honesty in their management. We believe that these interests will be better protected by the holding that

> **a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted** and his examination is made in the interests of the corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation, and, when it is charged to be otherwise, **the burden should be on the officers refusing such request or the corporation to establish it.**

Pacific Brewing, 21 Wash. at 463-464 (emphasis added). The later statutory elements are all there: the shareholder's right to inspect; the ***presumption*** that the shareholder's request is in the corporate interest to learn of "the manner and fidelity with which the corporate affairs are being conducted;" and placing the burden of showing the propriety in refusing requests on the corporation. All these elements are to serve the underlying purpose of conducing "honesty in [corporate] management." *See* Smith's Reconsideration Motion, pp. 12-15 App. A-48-51 hereto.

Review should be granted so the correct application of the corporate disclosure laws, both common law and per RCW 23B.16.040(3), are made plain for the Bench, Bar, and Public, with a clear statement of the burdens placed on the corporate operators and managers when faced with shareholder requests, and reinforcing the long-held public policy that disclosure should be granted freely; but

where it is not and court action is required, then the corporation will have to pay the fees for the requesting shareholder.

VI. CONCLUSION

Petitioner Scott Smith asks this Court to grant review and schedule it for argument at the earliest opportunity.

Respectfully submitted this 16th day of March, 2020.

HALSTEAD & COMINS RICK, P.S.

By: */s/ Joanne G. Comins Rick*
Joanne G Comins Rick
WSBA No. 11589

CARNEY BADLEY SPELLMAN, P.S.

By: */s/ Gregory M. Miller*
Gregory M. Miller
WSBA No. 14459

Attorneys for Appellant Scott Smith

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Attorneys for Respondent Trevor Zandell PHILLIPS BURGESS, PLLC 724 Columbia Street NW, #320 Olympia, WA 98501 tzandell@phillipsburgesslaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – Court's e-service system
Co-Counsel for Appellant Smith Joanne G. Comins Rick Halstead & Comins Rick PS P. O. Box 511 Prosser, WA 99350 jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – Court's e-service system

DATED this 16th day of March, 2020.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS
Legal Assistant/Paralegal to Gregory M. Miller

APPENDIX A

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES ROBINSON and MICHAEL MATTINGLY, Petitioners, SCOTT SMITH, Appellant, v. AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC., and WAYNE ELSTON, Commander, Respondents.	No. 80095-7-I DIVISION ONE PUBLISHED OPINION FILED: November 25, 2019

SMITH, J. — Scott Smith is a member of the American Legion Department of Washington Inc. (ALWA). In 2017, Smith and two other ALWA members, who were concerned about potential financial mismanagement at ALWA, obtained an order directing ALWA to produce certain corporate records. Smith appeals the trial court's denial of his motion for an award of attorney fees under RCW 23B.16.040(3), which provides that if a court orders inspection and copying of corporate records demanded by a shareholder, it must also order the corporation to pay the shareholder's attorney fees incurred to obtain the order "unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." Because substantial evidence supports the trial court's

finding that ALWA refused inspection of certain corporate records in good faith as contemplated by the statute, we affirm.

FACTS

ALWA is a Washington corporation originally incorporated in 1919 under sections 3733 and 3734 of Remington's 1915 Code. In June 2017, Smith and two other ALWA members, James Robinson and Michael Mattingly (collectively petitioners), acting pro se, filed a complaint in Thurston County Superior Court against ALWA and its commander, Wayne Elston.[1] The complaint alleged, among other things, that in February 2017, Elston offered to appoint Smith as chair of ALWA's audit commission beginning in July 2017. The complaint also alleged that Smith accepted the offer and that during a March 2017 meeting with ALWA's financial officer, adjutant,[2] and other staff, Smith "cited several irregularities and said that several of [ALWA]'s practices did not comport with Generally Accepted Accounting Principles." The complaint alleged that Smith "said that he would need additional information and would issue a report" and that Smith "sent a letter to Respondent Elston and all Members of [ALWA]'s Board of Directors, stating inter alia, he was recommending a comprehensive audit, salary comparison studies, and revising budgeting procedures." The complaint also alleged that Elston subsequently rescinded Smith's appointment as chair of ALWA's audit commission, ordered Smith to stop his "'interference'"

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[1] According to ALWA's original articles of incorporation, the "Department Commander" is ALWA's "presiding officer and chief executive."

[2] According to ALWA's original articles of incorporation, the "Adjutant-Finance Officer . . . shall have charge of all records and funds of [the] corporation and shall perform the general duties of a secretary-treasurer of [the] corporation."

with ALWA's business, and threatened revocation of the charter of American Legion Post 67, the post to which Smith belonged.

In their complaint, the petitioners requested that ALWA and Elston appear before the court and show cause as to why an order of mandamus should not issue directing that ALWA's "books and records be open for inspection in accordance with RCW §§ 23B.16.040, 23B.16.200, and 24.06.160." They also filed a motion to show cause, and the superior court entered an ex parte order to show cause.

On June 28, 2017, ALWA and Elston responded to the trial court's show cause order. They argued, among other things, that RCW 23B.16.040, which authorizes shareholders to apply for a court order permitting inspection and copying of certain corporate records, did not apply to ALWA because ALWA is regulated under the Washington Nonprofit Corporation Act (WNCA), chapter 24.03 RCW, not the Washington Business Corporation Act (WBCA), Title 23B RCW. In support of this argument, ALWA provided copies of ALWA's corporate registration detail from the Washington Secretary of State's website showing that ALWA was registered as a public benefit corporation and as a charity. ALWA also provided a copy of its 2016 annual report listing it as a nonprofit corporation. Additionally, Dale Davis, ALWA's adjutant, declared that in 2013, he signed and filed articles of amendment for ALWA "specifically using the form provided by the Washington Secretary of State's Office for nonprofit corporations regulated under chapter 24.03 RCW." The petitioners contested this declaration by submitting a declaration from Paul Whitfield, an ALWA member and former member of its

executive committee, attaching meeting minutes from 2013 purporting to show that no approval was given to amend ALWA's articles as described in Davis's declaration.

Additionally, relying again on Davis's declaration, ALWA and Elston asserted that at the March 2017 meeting with Smith, ALWA provided Smith with copies of all financial reports and records that he was requesting at that time. Smith contested this assertion in a reply declaration, stating, "Do not concur that I was provided all financial reports and records I requested up to and through that meeting."

The trial court held a show cause hearing on June 30, 2017. No report of proceedings was provided for that hearing, but based on the court's comments at a later hearing, it appears that at the June 30 hearing, the court "strongly encouraged" the parties to attempt to come to an agreement regarding the petitioners' records requests and "not to simply re-note this quickly." In the meantime, on June 29, 2017, Smith delivered to ALWA's counsel, Trevor Zandell, a list of corporate records that Smith requested to inspect (the Smith Records Request). The Smith Records Request listed, among other things, a variety of accounting records and reports for multiple fiscal years, including employee timesheets and vacation and sick leave records, employee travel and expense vouchers, bank statements, and cancelled checks. It also listed a variety of corporate records for multiple fiscal years and requested that ALWA provide all of the same records for American Legion Post 110.

Shortly after the court's June 30 hearing, on July 3, 2017, attorney JoAnne

Comins Rick appeared on behalf of Smith (but not Robinson or Mattingly). Three days later, on July 6, the petitioners filed another motion to show cause and obtained an ex parte order setting a show cause hearing for July 14, 2017.

On July 7, 2017, Smith filed a "Memorandum of Authorities in Support of Writ of Mandamus" in which he provided argument as to why ALWA was regulated under the WBCA and not the WNCA. Smith also renewed his disagreement with Davis as to whether at the March 2017 meeting Smith was provided with the reports and records that he had requested at that time. He pointed out that in an April 2017 e-mail to Elston, he asked to "see the evidence" supporting allegations that Elston had raised in an earlier e-mail, along with a 2013 audit report, as well as "[a]ny published court decisions" regarding a 2011 lawsuit. Smith also requested attorney fees under RCW 23B.16.040, arguing, among other things, that ALWA and Elston "have acted in bad faith in denying Petitioners, particularly Scott Smith, access to the records and books of [ALWA] for inspection and copying."

ALWA and Elston also responded to the trial court's second show cause order and filed an accompanying declaration from Zandell. In his declaration, Zandell stated that on July 11, 2017, he e-mailed copies of the following ALWA documents to Smith's attorney:

a. Articles of Incorporation (2009 version);
b. Draft coversheet for Articles of Amendment (2009);
c. Bylaws (current);
d. Employee Policy & Procedure Manual; and,
e. Operating Procedures.

Zandell also declared that on July 12, 2017, Smith picked up the following

documents from Zandell's office after Zandell notified Smith's counsel that they were available:

a. IRS Form 990's (2010 – 2015);
b. Profit & Loss Statements (2010-2011 – 2015-2016);
c. Balance Sheets (2011 – 2016);
d. Department Executive Committee Minutes (2010 – 2015);
e. Finance Commission Minutes (2006 – 2016);
f. Audit Commission Minutes (2006 – 2016); and
g. State Convention Minutes (2006 – 2016).

Zandell further declared that on July 12, 2017, he e-mailed to Smith's attorney all of the documents he received in response to a request to the Washington Secretary of State for all records on file for ALWA. Included in those documents was a copy of ALWA's current articles of incorporation.

In their response to the second show cause order, ALWA and Elston also provided argument that ALWA was regulated under the WNCA and, thus, RCW 23B.16.040, which is part of the WBCA, did not apply to ALWA. They argued that instead, the relevant statute was RCW 24.03.135, which lists corporate records subject to inspection under the WNCA. ALWA and Elston argued further that even if the WBCA *did* apply to ALWA, the petitioners did not have inspection rights under RCW 23B.16.040 because they were not "shareholders" as defined in the WBCA. They also pointed out that the petitioners had requested records for Post 110 but that Post 110 was a separate legal entity distinct from ALWA.

In a reply declaration, Smith asserted, among other things, that according to an internal ALWA subcommittee report, all of ALWA's finances are placed on a disc at the close of each year. Accordingly, Smith asserted, ALWA "can readily make a duplicate copy of the disc."

The court held the second show cause hearing on July 14, 2017. After hearing argument from the parties regarding, among other things, whether the WNCA or the WBCA applied, the court noted that "I do think there are unsettled issues of law here." The court also stated that ALWA was "correct that the court had strongly encouraged the parties not to simply re-note this quickly without giving the ability for communication and the attempt to get the information that you wanted." The court again strongly encouraged the parties to work together. It then entered an order striking the petitioners' motion to show cause and ordering the parties to "cooperate in a good faith attempt to resolve any and all disputes between them with regard to the petitioners' request for access to all corporate documents." It also ordered that "[a]fter 60 days and no sooner, if there are any unresolved matters, [the] parties shall bring what discernible conflicts remain, and for a definite ruling on what statutes govern [ALWA] to the court for hearing."

On September 21, 2017, Smith filed a "Motion for Order re Contempt" (Contempt Motion), in which he argued that ALWA had taken retaliatory action against various legion posts since the July 14 show cause hearing. That same day, the petitioners filed a motion "to Determine Corporate Status, to Compel Production of Corporate Records and to Award Attorney Fees and Costs" (Omnibus Motion). In a supporting declaration, Smith included a chart that he had prepared to track the documents that ALWA had provided in response to his requests and to indicate which requests had not yet been fulfilled. The petitioners also filed, together with the Contempt Motion and the Omnibus

Motion, a "Memorandum of Authorities re the History of Washington State Corporations and the American Legion Department of Washington Inc" and a separate "Memorandum of Authorities in Support of Motions."

In response, ALWA and Elston asserted that since the July 14 show cause hearing, ALWA "has worked diligently in an effort to fully respond to Mr. Smith's request." To that end, Zandell provided his own tracking chart showing what ALWA had produced in response to the Smith Records Request and declared that the only records not provided were those that "have yet to be created, do not exist or cannot be found and documents to which [ALWA] objects to producing because they contain confidential employee payroll data." ALWA and Elston also moved to continue the hearing on the Contempt Motion and the Omnibus Motion, arguing that the petitioners had not timely served the motions and that they did not comply with the local court rules regarding page limits. The court granted the motion to continue, and Smith filed an updated notice of hearing to reflect the continuance. In that notice, Smith withdrew the Contempt Motion.

ALWA and Elston filed a supplemental response to the Omnibus Motion on October 10, 2017. They renewed their argument that ALWA was governed by the WNCA. They also addressed each category of requested records that ALWA had not yet provided and stated their reasons for not providing them. Finally, ALWA and Elston argued that the petitioners were not entitled to fees under RCW 23B.16.040(3), not only because the WBCA did not apply, but also because none of the petitioners made a request for records that was denied prior to their filing suit.

The court held a hearing on October 18, 2017, after the petitioners made additional written submissions—including declarations from Mattingly and Smith in which they disagreed, among other things, with ALWA's characterization of the completeness of its records productions to date. At the hearing, the trial court ruled that ALWA is governed by the WBCA and not the WNCA, while "fully acknowledging that this is not a particularly clear set of statutes." It also concluded that the petitioners were entitled to inspect ALWA's books and records under chapter 23B.16 RCW, and that the records subject to inspection under RCW 23B.16.020 included "all records related to the income and expenses of [ALWA]" but not "employee complaints" or "records of lawsuits." It clarified further that ALWA would be required only to disclose its side of any financial records of interactions with Post 110. It also found it appropriate "to impose reasonable restrictions on the distribution of the accounting records that are provided by [ALWA] to the Petitioners and their counsel" and ordered that "[i]f there is a request for the petitioners to provide duplicate copies of those records to anyone else, they will need to come back to court and ask for permission."

Before hearing argument with regard to the petitioners' request for attorney fees, the court stated:

> I will tell you that based upon my ruling I think it's obvious I think there was a legitimate legal dispute in this case as to whether RCW 24.03 applied or whether RCW 23B applied, and so what I would ask is the parties to keep that in mind as they make their argument about whether costs and counsel fees should be ordered by the court.

The trial court ultimately denied the petitioners' request for attorney fees, without prejudice. It explained during the hearing:

> The court going through this record again in preparation of today's hearing does not find a basis to award attorney's fees, and that's for a number of reasons. So what the court will do today is deny without prejudice that request. If petitioners want to make a request based upon the court's rulings, and again going back carefully through the requests what was provided and what disputes ultimately were ruled on, then that could be set by a future motion, but I think hopefully both of you can at least understand the court's rationale up to this point.

After additional motions practice and a two-part presentation hearing, the court entered an order on December 15, 2017, regarding the Omnibus Motion. That order was not appealed.[3]

In January 2018, the petitioners renewed their request for an award of costs and attorney fees under RCW 23B.16.040(3). The trial court denied the motion, finding that ALWA "has proved it refused inspection of certain corporate records in good faith because it had a reasonable basis for doubt about the right of the Petitioners to inspect the records demanded." During the hearing on the motion, the court explained its ruling:

> The issue is whether attorney fees should be ordered under RCW 23B.16.040 to the petitioners, and if so, in what amount. The court looking at 23B.16.040(3) – and I've read it into the record, but I'll read it again. "If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded."
>
> I am finding that the corporation has so proved, and I know that this is a huge point of contention for the parties, but when I review everything in this case, and also I reviewed a number of the

[3] Accordingly, the trial court's decisions that ALWA is governed by the WBCA and that the petitioners are entitled to inspect ALWA's books and records under the WBCA is not before us in this appeal, and we express no opinion as to the correctness of those decisions.

> transcripts of hearings along the way, the court is convinced that is the right legal answer.
>
> Now, I will tell you that I looked long and hard because from an equity standpoint I think many of the arguments [Smith's attorney] makes have an appeal to them, have a logical appeal to them, but I have to go by the statute, and that has been the guiding point for the court in this discussion, and that will be the court's ruling, and I'd sign an order to that effect.

When Smith's attorney requested clarification, the court stood by its ruling:

> [M]y decision is based upon the entirety of this record because, as I said, I went back through, and it's based upon the entirety of that record, and it's based upon the statute as this court reads that statute. And so I'm not going to answer the question for clarification.

Smith (but not the other petitioners) appeals the trial court's order denying the motion for an award of fees and costs under RCW 23B.16.040(3).

ANALYSIS

Denial of Motion for Attorney Fees

Smith argues that the trial court erred by denying his motion for attorney fees under RCW 23B.16.040(3). We disagree.

Standard of Review

As an initial matter, the parties disagree as to the applicable standard of review. Smith argues that the standard of review is de novo because "[t]he central issue to this appeal regards the statutory interpretation of RCW 23B.16.040(3)." Meanwhile, ALWA contends that "[t]his appeal does not present an issue of statutory interpretation, however, it presents an issue of the application of a statute to a particular set of facts." Therefore, ALWA argues, the standard of review is abuse of discretion. Neither party is entirely correct.

On the one hand, Smith is correct that issues of statutory interpretation

are questions of law reviewed de novo. Accordingly, de novo review applies to the extent that the parties disagree about how to interpret RCW 23B.16.040(3). To that end, the parties *do* disagree as to how to interpret the statute: Specifically, Smith argues—and ALWA disagrees—that to prove that it refused inspection in good faith as contemplated by the statute, ALWA was required to prove that it had a reasonable basis for doubt as to whether Smith's demand for records was made with a proper purpose.

De novo review does not apply, however, to this court's review of the trial court's finding that ALWA satisfied its burden to prove that it refused inspection in good faith. Whether a person acted in good faith is an inherently factual issue. See Morris v. Swedish Health Servs., 148 Wn. App. 771, 778, 200 P.3d 261 (2009) (good faith usually a question of fact). And "[w]here the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact, and if so, whether the findings in turn support the trial court's conclusions of law." In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007).[4]

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[4] We acknowledge that where the record at trial consists entirely of written documents and the trial court was not required to assess witness credibility, the appellate court ordinarily applies de novo review. Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011). But substantial evidence review is nonetheless appropriate where, as here, competing documentary evidence had to be weighed and conflicts resolved. In re Marriage of Rideout, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003); see also Dolan, 172 Wn.2d at 311 ("[S]ubstantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases . . . where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings.").

ALWA disagrees, contending that this court must apply an abuse of discretion standard. It chiefly relies on Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 191 P.3d 900 (2008), the only reported Washington case regarding a motion for attorney fees under RCW 23B.16.040(3). In Nakata, Division Three stated, without discussion, that "'[w]e review a trial court's denial of attorney fees for an abuse of discretion.'" Nakata, 146 Wn. App. at 276 (quoting Emmerson v. Weilep, 126 Wn. App. 930, 940, 110 P.3d 214 (2005)). But the standard of review was not strictly at issue in Nakata. Furthermore, the case from which Nakata quoted, Emmerson, involved a request for an *equitable* fee award. Emmerson, 126 Wn. App. at 940. But here, RCW 23B.16.040(3) *mandates* a fee award in the shareholder's favor unless the corporation refused inspection in good faith under the statute. In other words, under RCW 23B.16.040(3), the decision whether to award fees is not a discretionary decision. Therefore, Nakata is unpersuasive here and so are the other cases that ALWA cites to argue that "several other Washington decisions have held that appellate courts review a *discretionary* decision to award or deny attorneys' fees . . . for an abuse of discretion." (Emphasis added.)

In short, we apply de novo review to resolve the parties' disagreement over how to interpret RCW 23B.16.040(3), and we apply substantial evidence review to determine whether the trial court erred by finding that ALWA proved that it refused inspection in good faith under that statute. We discuss each of these issues in turn below.

Interpretation of RCW 23B.16.040(3)

Smith contends that under RCW 23B.16.040(3), "the 'good faith' analysis is limited to whether [ALWA] had a reasonable basis to doubt that Petitioners' **purposes** in requesting inspection were [ ]proper." We disagree.

As discussed, "[t]he meaning of a statute is a question of law reviewed de novo." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Campbell & Gwinn, 146 Wn.2d at 9-10. To discern a statute's plain meaning, this court considers the text of the provision in question, taking into account the statutory scheme as a whole. Campbell & Gwinn, 146 Wn.2d at 11.

Here, the text of RCW 23B.16.040(3) is clear on its face: If the court orders inspection and copying of the records demanded by a shareholder, it must also order the corporation to pay costs and fees incurred to obtain the order, "unless the corporation proves that it refused inspection *in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.*" RCW 23B.16.040(3) (emphasis added). Smith points to nothing in the statute's text or the statutory scheme that suggests that the only way for a corporation to prove good faith under RCW 23B.16.040(3) is to prove that it had a reasonable basis to doubt that the shareholder's purposes were proper. Therefore, Smith's argument fails.

Smith relies on two pre-WBCA cases, State ex rel. Weinberg v. Pacific

Brewing & Malting Co., 21 Wash. 451, 58 P. 584 (1899), and State ex rel. Grismer v. Merger Mines Corp., 3 Wn.2d 417, 101 P.2d 308 (1940), to support his interpretation of RCW 23B.16.040(3). But Weinberg and Grismer addressed only a shareholder's common law *right of inspection*. See Weinberg, 21 Wash. at 458-59; Grismer, 3 Wn.2d at 420. Neither of these cases addressed a shareholder's right to *fees*—much less the circumstances under which attorney fees may be denied under RCW 23B.16.040(3), which was enacted long after these cases were decided. See LAWS OF 1989, ch. 165. Therefore, Smith's reliance on Weinberg and Grismer is misplaced.

Smith's reliance on Nakata is also misplaced. In Nakata, a cooperative association denied Elsie Nakata's request for documents. Nakata, 146 Wn. App. at 275. It claimed that it did so because Nakata "was not a member of the cooperative and held a position that was contrary to [the cooperative's] purposes." Nakata, 146 Wn. App. at 276. The trial court found these reasons reasonable, and although it ordered the cooperative to produce certain records, it denied Nakata's request for fees. Nakata, 146 Wn. App. 275-76. Nothing in Nakata suggests that a shareholder's improper purpose is the *only* basis on which a corporation can demonstrate good faith under RCW 23B.16.040(3). Therefore, Nakata does not support Smith's argument that ALWA was required to show it reasonably believed that Smith's purposes were improper.

Finally, Smith cites to a handful of cases from other states, arguing that they also support his proffered interpretation of RCW 23B.16.040(3). But because those cases are not binding and because the plain meaning of the

statute is clear, we decline to consider those out-of-state cases.

In short, we are not persuaded by Smith's argument that to demonstrate its good faith under RCW 23B.16.040(3), ALWA was required to show it had a reasonable basis for doubt about whether Smith's purposes were proper. Instead, under the statute's plain language, the relevant inquiry on review is whether substantial evidence supports the trial court's finding that ALWA refused inspection in good faith because it had a reasonable basis for doubt about Smith's right to inspect the records demanded. As discussed below, substantial evidence does support this finding.

Substantial Evidence for the Trial Court's Finding

The trial court's finding is supported by substantial evidence if it is supported by evidence "sufficient 'to persuade a fair-minded person of the truth of the declared premises.'" Ames v. Dep't of Health, Med. Quality Assur. Comm'n, 166 Wn.2d 255, 261, 208 P.3d 549 (2009) (internal quotation marks omitted) (quoting Heinmiller v. Dep't of Health, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995)). "The substantial evidence standard 'is deferential and requires the court to view the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.'" Mansour v. King County, 131 Wn. App. 255, 262-63, 128 P.3d 1241 (2006) (quoting Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995)). We conclude that substantial evidence exists here.

As an initial matter, attorney fees are warranted under RCW

23B.16.040(3) only if the court orders inspection and copying "*of the records demanded.*" RCW 23B.16.040(3) (emphasis added). To this end, when viewed in the light most favorable to ALWA, the record reflects that prior to filing suit, Smith did not request any records for which the court ultimately ordered inspection.[5] Specifically, Davis declared that at the March 2017 meeting between Smith and ALWA staff, ALWA provided Smith with copies of all financial reports and records that he was requesting at that time. Smith disputed Davis's assertion, but he did not specify what records he alleges were not produced at that meeting. Cf. Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002) ("So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it."). Later, in April 2017, Smith requested Post 110's 2016 Form 990, a 2013 audit report, and the records from a 2011 lawsuit. With regard to the audit report, Elston referred Smith to Whitfield, a member of ALWA's executive committee. And because the audit report was not listed in the Smith Records Request, a reasonable inference is that Smith either obtained the report from Whitfield or abandoned that request. With regard to Post 110's Form 990 and the 2011 lawsuit records, ALWA maintained below, and the trial court ultimately agreed, that Smith did not have a right to inspect those records. In

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[5] During oral argument, Smith's counsel suggested that Smith should be allowed to benefit from earlier records requests that allegedly were made by the other petitioners. But RCW 23B.16.040(3) directs the court to "order the corporation to pay *the shareholder's* costs," referring to the shareholder who made a WBCA-compliant request for inspection and copying and was denied. RCW 23B.16.040(3); see also RCW 23B.16.040(2). And Smith has cited no authority supporting the proposition that Smith should be allowed to "piggy back" on the other petitioners' records requests for purposes of recovering his attorney fees under RCW 23B.16.040. Therefore, we reject this proposition.

short, Smith is not entitled to fees under RCW 23B.16.040(3) for ALWA's refusal to produce the limited records that Smith requested prior to filing suit because the court did not order inspection of those records.

To that end, when viewed in the light most favorable to ALWA, the record reflects that Smith did not make a statutorily compliant request for specific records until he provided the Smith Records Request to ALWA, through counsel, on June 29, 2017, i.e., after the petitioners filed their complaint. See RCW 23B.16.020(3)(b) (providing that a shareholder must describe "with reasonable particularity" the records he desires to inspect); see also RCW 23B.16.040(2) (authorizing a shareholder who complies with RCW 23B.16.020(2) and (3) to apply to the superior court for an order permitting inspection). Although Smith asserted in a declaration that he made a particularized request prior to June 29, 2017, the request to which he points is not a request for specific records, but rather a request for "full and unfettered access to the books and records," including read-only access to ALWA's accounting system so Smith could "download . . . the detail of the accounts I need to review." The timing of the Smith Records Request is noteworthy here because, due to the fact that Smith did not make a particularized request until the parties were already in litigation before a trial court that was actively involved in encouraging the parties to cooperate, the trial court in this case was particularly well positioned to determine whether ALWA's later refusals to produce certain records were made in good faith. To this end, the trial court's ultimate finding of good faith is supported by substantial evidence for a number of reasons.

First, the trial court itself acknowledged, with regard to the dispute about the governing statutes, that "there are unsettled issues of law here" and that "this is not a particularly clear set of statutes." It also remarked that it believed "there was a legitimate legal dispute in this case as to whether RCW 24.03 applied or whether RCW 23B applied." Although the trial court's decision that ALWA is governed by the WBCA is not before us on review, the trial court's characterization of the dispute as a "legitimate" one does not appear unwarranted. For example, ALWA was originally incorporated as a fraternal society under sections 3733 and 3734 of Remington's 1915 Code, which was enacted by Laws of 1903, ch. 80. See REM. 1915 CODE §§ 3733-3734. Those sections are now codified in chapter 24.20 RCW, which is found under Title 24 RCW, entitled "Corporations and Associations (Nonprofit)." See RCW 24.20.010., .020. This is the same title in which the WNCA appears, whereas the WBCA is codified in an entirely separate title. Additionally, although the WNCA's "Applicability" provision states that it applies to "[a]ll not for profit corporations *heretofore organized under any act hereby repealed*," RCW 24.03.010(2) (emphasis added), another WNCA provision states that it applies prospectively "to all existing corporations organized under any general act of the territory or the state of Washington providing for the organization of corporations for a purpose or purposes for which a corporation *might* be organized under this chapter." RCW 24.03.905 (emphasis added). Furthermore, after ALWA was reinstated following an administrative dissolution in 1996, the certificate of reinstatement issued by the Secretary of State states that ALWA

was reinstated as "a Washington Non Profit corporation." In short, the trial court's characterization of the governing law dispute as a "legitimate legal dispute" is a reasonable one and supports the trial court's finding of good faith.

Second, the record contains substantial evidence that ALWA's officers reasonably believed that the WNCA governed their affairs. For example, the record includes evidence that ALWA obtained 501(c)(3) status as early as 1946 and that it used nonprofit corporation forms for filings with the Secretary of State as early as 1969. The record also contains evidence that in 1990, ALWA applied for and obtained status as a public benefit nonprofit corporation, and this type of corporation is regulated under the WNCA. RCW 24.03.490. And, the record contains evidence that ALWA filed multiple annual reports, including its 2016 report, in which it indicated that it was regulated under chapter 24.03 RCW. In short, although the trial court ultimately concluded that ALWA was subject to the WBCA, ALWA's history, which the trial court noted was "interesting," further supports the trial court's finding of good faith.

Third, and although the trial court ultimately disagreed with ALWA with regard to the scope of the accounting records subject to inspection under the WBCA, the fact that the term "accounting records" is not defined by statute or case law supports a finding that ALWA reasonably believed that many of the records Smith was requesting were not rightfully subject to his inspection. See RCW 23B.16.020(2) (providing that shareholders who comply with the statute are entitled to inspect certain minutes and records of corporate actions, "[a]ccounting records of the corporation," and the "record of shareholders"). Indeed, the

reasonableness of ALWA's belief is further bolstered by the trial court's ultimate conclusion that the accounting records subject to Smith's inspection under the WBCA included only "records related to the income and expenses" of ALWA and did not include employee complaints, records of lawsuits, or Post 110's side of records relating to its financial relations with ALWA. Similarly, and although the trial court's conclusion that ALWA's members are "shareholders" for purposes of the WBCA is not before us in this appeal, we note that "shareholder" is defined in the relevant part as "the person in whose name shares are registered in the records of a corporation." RCW 23B.01.400(34). As such, it was not unreasonable for ALWA, which undisputedly has not issued shares, to believe that Smith was not a "shareholder" entitled to inspect records under the WBCA—even if the trial court ultimately disagreed. This, too, supports the trial court's ultimate finding of good faith.

Finally, the record reflects that after Smith made the Smith Records Request, ALWA voluntarily produced a significant number of requested records, including records that ALWA would not have been required to produce under the WNCA.[6] A reasonable inference from ALWA's production of these documents is

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[6] Under the WNCA, the only records required to be made available for inspection are

> (1) Current articles and bylaws;
>
> (2) A list of members, including names, addresses, and classes of membership, if any;
>
> (3) Correct and adequate statements of accounts and finances;
>
> (4) A list of officers' and directors' names and addresses;
>
> (5) Minutes of the proceedings of members, if any, the board, and any minutes which may be maintained by committees of the board.

that ALWA withheld in good faith only those records it reasonably believed that Smith did not have a right to inspect. The reasonableness of ALWA's belief—particularly as it relates to ALWA's concerns about privacy—is also bolstered by the fact that (1) during the proceedings below, Smith filed sensitive financial documents without redacting them—which even the court found "troubling"—and (2) the trial court ultimately found it appropriate to prohibit the petitioners from further disclosing any records without the court's permission.

In short, substantial evidence supports the trial court's finding that the records withheld by ALWA were withheld in good faith based on a reasonable doubt as to Smith's right to inspect them.

Smith argues that ALWA's "self-asserted belief to privacy" was rejected by the court and therefore privacy concerns were not a reasonable basis for denying inspection of records containing employee payroll information. But the trial court did not reject ALWA's privacy concerns, which were based on concerns about disclosure to third parties. Instead, it gave credence to them by prohibiting the petitioners from further disclosing records without permission of the court. Therefore, Smith's argument is unpersuasive.

Smith next contends that ALWA's concerns about privacy were spurious because "there is no expectation of privacy between an employee and its employer." But this argument misses the mark because ALWA's concerns were based on potential information sharing with *third parties*, not information sharing between an employee and an employer. Therefore, we reject Smith's contention.

RCW 24.03.135.

Smith next argues that because the trial court ultimately concluded that the WBCA applies to ALWA, ALWA's "confusion" as to its own corporate form "does not pass the proverbial 'straight-face test'" and cannot serve as a reasonable basis to doubt Smith's right of inspection. Because it is not unreasonable to expect corporate officers to know what statutes govern their corporation, Smith's argument has some merit. Nevertheless, the fact that the trial court ultimately disagreed with ALWA does not mean that ALWA did not advance its argument in good faith based on a reasonable belief that the WNCA governed and that Smith was not entitled to records under the WBCA. To this end, and as discussed, the trial court itself acknowledged that the statutes were not clear and that characterization was not unwarranted. Also as discussed, the record contains substantial evidence that ALWA's officers reasonably believed that the WNCA governed their affairs. In other words, this is not a case of a corporation consistently operating as if it were governed by the WBCA and then suddenly asserting that it is governed by the WNCA simply to avoid producing records to a shareholder. Thus, Smith's suggestion that ALWA was simply making "mischief" in asserting that it was subject to the WNCA lacks merit.[7]

Smith next argues that public policy supports an award of fees. He relies on Brand v. Department of Labor & Industries, 139 Wn.2d 659, 989 P.2d 1111

[7] During oral argument, Smith's counsel suggested that ALWA's claimed confusion about which statute governed its affairs is a "red herring" because ALWA indicated that it would not provide certain records regardless of which statute applied. But the parts of the record on which counsel relied indicate only that ALWA did not believe that certain records were subject to disclosure under *either* the WBCA or the WNCA. ALWA's refusals do not negate a finding that it refused inspection in good faith.

(1999), and Guillen v. Contreras, 169 Wn.2d 769, 238 P.3d 1168 (2010), to support his argument, but his reliance is misplaced. In Brand, the plaintiff's *entitlement* to fees under the Industrial Insurance Act, Title 51 RCW, was undisputed; the issue before the court was whether the *amount* of the fee award should be reduced on account of the plaintiff's relatively small recovery. Brand, 139 Wn.2d at 669. In analyzing that issue, our Supreme Court looked to the relevant fee statute's underlying purpose after observing that "the statute does not address the situation at issue here, where the [Board of Insurance Appeals'] decision was only partially reversed on appeal." Brand, 139 Wn.2d at 666-67. But here, unlike in Brand, the issue is Smith's *entitlement* to fees, and that issue has been expressly addressed by the legislature in RCW 23B.16.040(3). Therefore, Brand is distinguishable and does not control.

Guillen is also distinguishable. There, the issue was the meaning of the attorney fee provision of the forfeiture statute. Guillen, 169 Wn.2d at 774. More specifically, the court was tasked with interpreting the meaning of "substantially prevails" in a statute that mandates an award of fees to a claimant who "substantially prevails" against a state agency in a forfeiture proceeding. Guillen, 169 Wn.2d at 775. In construing the statute liberally, the court observed that the purpose of the fee provision "was to provide greater protection to people whose property is seized." Guillen, 169 Wn.2d at 777. Specifically, the court looked to the governor's partial veto note, in which the governor wrote, "'[W]e must not sacrifice citizens' rights in our efforts to fight drug trafficking.'" Guillen, 169 Wn.2d at 777 n.3 (emphasis omitted) (quoting LAWS OF 2001, ch. 168 at 752-53).

Here, Smith points to no such clear statement of intent that RCW 23B.16.040(3) be construed liberally in favor of awarding fees. Therefore, Guillen is not persuasive.

Finally, Smith argues that remand is required because the trial court's order denying fees "made no findings, much less detailed ones, which specified a good faith basis for [ALWA]'s refusal to provide the financial records required by statute." This argument is unpersuasive for three reasons. First, the trial court *did* make the ultimate finding required under RCW 23B.16.040(3), i.e., that ALWA "refused inspection of certain corporate records in good faith because it had a reasonable basis for doubt about the right of the Petitioners to inspect the records demanded." Second, the trial court's decision denying an award of fees under RCW 23B.16.040(3) is not a type of decision for which findings are specifically required under CR 52(a)(2). Third and finally, the lack of more specific factual findings does not preclude meaningful appellate review here. See In re Dependency of K.R., 128 Wn.2d 129, 143, 904 P.2d 1132 (1995) (observing that findings that parrot statutory requirements are not invalid if they are specific enough to permit meaningful review). This is particularly so because the trial court's colloquy with counsel makes clear that the "legitimate" dispute about the governing statutes and the "interesting" way in which ALWA had historically viewed itself under a "not . . . particularly clear set of statutes" played significant roles in the court's decision. Remand is not necessary.

Fees on Appeal

Both Smith and ALWA request an award of fees under RAP 18.1. We

deny both requests.

A party requesting fees under RAP 18.1 must provide argument and citation to authority "to advise the court of the appropriate grounds for an award of attorney fees as costs." Stiles v. Kearney, 168 Wn. App. 250, 267, 277 P.3d 9 (2012).

Here, Smith argues that he is entitled to fees on appeal under RCW 23B.16.040(3), i.e., the same statute under which the trial court denied an award of fees. But because Smith is not the prevailing party on appeal, we deny his request.

ALWA argues that it is entitled to attorney fees under RCW 4.84.185, which authorizes an award of fees to the prevailing party if the nonprevailing party's position was frivolous and advanced without reasonable cause.

But assuming without deciding that RCW 4.84.185 authorizes an award of fees on appeal, Smith's appeal was not frivolous. "An 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 success." In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (internal quotation marks omitted) (quoting Millers Cas. Ins. Co. of Texas v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). Here, Smith provided a debatable issue with regard to the applicable standard of review. And given the complete absence of binding authority with regard to RCW 23B.16.040(3), it cannot be said that Smith's appeal was devoid of merit or that there was no reasonable possibility of success. Therefore, we deny ALWA's request for an award of fees on appeal.

ALWA argues that Smith's appeal is frivolous because "the standard of review is abuse of discretion and . . . the Superior Court had several different tenable grounds on which it based its order." But as discussed, the standard of review is *not* abuse of discretion. And even if it were, reasonable minds might differ—again because of the lack of relevant binding authority—about the tenability of each potential ground for the trial court's denial of fees. ALWA's argument is unpersuasive.

We affirm.

WE CONCUR:

FILED
2/13/2020
Court of Appeals
Division I
State of Washington

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

JAMES ROBINSON and MICHAEL MATTINGLY, Petitioners, SCOTT SMITH, Appellant, v. AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC., and WAYNE ELSTON, Commander, Respondents.	No. 80095-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Scott Smith has filed a motion for reconsideration of the opinion filed on November 25, 2019. Respondent American Legion Department of Washington Inc. has filed an answer to appellant's motion for reconsideration. The panel has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration of the opinion filed on November 25, 2019, is denied.

FOR THE COURT:

Smith, J.

Judge

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA
2017 DEC 15 PM 1:08
Linda Myhre Enlow
Thurston County Clerk

X EXPEDITE/SPECIAL SETTING
X HEARING IS SET HAVING BEEN
PREVIOUSLY CONTINUED BY THE COURT
DATE: **FRIDAY, DECEMBER 15, 2017**
TIME: **9AM**
JUDGE/CALENDAR: **SKINDER/CIVIL**

17-2-03285-34
ORGMT 105
Order Granting Motion Petition
2272143

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF THURSTON

JAMES ROBINSON, SCOTT SMITH and MICHAEL MATTINGLY, *Petitioners*, vs THE AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC., and WAYNE ELSTON, COMMANDER, *Respondents*.	**NO. 17-2-03285-34** **ORDER GRANTING PETITIONERS' MOTIONS**

THIS MATTER, having come before the Court on special set hearing on Petitioners' Motions to Determine Respondent Department's Corporate Status, to Compel Inspection of Respondent's Corporate Records, and for an Award of Petitioners' Attorney Fees and Costs[1]; and the Petitioners Robinson and Mattingly appearing in person, *pro se*, and Petitioner Smith appearing in person and by and through his attorney of record, JoAnne G Comins Rick of Halstead & Comins Rick, PS, and the Respondents American Legion Department of Washington, Inc., and Wayne Elston, appearing in person and by and through their attorney of record, Trevor Zandell of Phillips Burgess PLLC, and the Court, having heard and considered the oral arguments, and the Court, having further reviewed all of the pleadings and materials comprising the significant factual background, and being refamiliarized with the records since the beginning of the case, and having reviewed all of the materials submitted by the petitioners/respondents earlier regarding these points, and having reviewed everything that parties filed within the past couple of weeks

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-220

prior to the date of this hearing and having examined the case law and the historical accounting of the statutes in this case, and being fully advised in the premises, NOW THEREFORE

FINDS AND CONCLUDES as follows:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. RESPONDENT DEPARTMENT'S CORPORATE STATUS:

1. The court was asked to determine whether RCW 23B, the Washington Business Corporations Act, or whether RCW 24.03, the chapter dealing with Washington NonProfit Corporations Act, governs the Department of Washington corporation. The Court finds that Title 23B, the Washington Business Corporation Act, governs the Department.
2. The Court fully acknowledges that this is not a particularly clear set of statutes.
3. The American Legion Department of Washington, Inc., is a Fraternal Association incorporated under Title XXV Corporations, Chapter III, §§ 3733 and 3734 of Remington's 1915 Code as stated in ¶1 of its Articles of Incorporation filed with the Washington State Secretary of State on December 10, 1919.
4. Sections 3733 and 3734 of Remington's 1915 Code are contained within Chapter III, *Educational, Religious Social and Charitable Corporations and Associations*; these corporations are separate and distinct from those formed under Chapter IV, *Corporations Not Formed For Profit.*
5. The Department corporation was administratively dissolved by the Washington Secretary of State on April 1, 1996;
6. On June 12, 1996 the Department corporation filed an *Application for Reinstatement of a Domestic [Washington] NonProfit Corporation RCW 23B.14.220.* The Washington Secretary of State, Ralph Munro, approved the *Application* pursuant to RCW 23B.14.220 and signed and issued a **Certificate of Reinstatement** to the American Legion Department of Washington as a Non Profit Business Corporation.

[1] Petitioners' previously filed/served their Notice To Strike the October 18, 2017 hearing on their Motion for Contempt .

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(509) 786-220

7. The way the Department viewed itself is interesting. The American Legion Department of Washington corporation is not governed by the statutory provisions of RCW 24.03. Sections 3733 and 3734 of Remington's 1915 Code have not been repealed.
8. The American Legion Department of WA has members. Consistent with RCW 23.86.360, the terms "*shareholder*" or "*shareholders*" as used in Title 23B RCW are deemed to refer to "*member*" or "*members*" and the terms "*share*" or "*shares*" are deemed to refer to "*vote*" or "*votes*" entitled to be cast by a member or members.

B. PETITIONERS' RIGHTS TO INSPECT CORPORATE DOCUMENTS:

9. The Petitioners are members in good standing; and made proper requests to inspect records for purposes of investigating corporate management of the affairs and finances of the Department, which requests were denied. After Petitioners filed this Petition for Mandamus, the Department produced copies of some corporate records, but denied inspection of other records, including records related to employee wages, salaries and benefits.
10. The Court is devising a ruling that the parties can implement, so as to minimize having unanswered questions that require the parties to simply continue coming back to court.
11. The Court finds, in looking at RCW 23B.16.020, that the accounting records of the corporation refers to ~~all financial documentation of any type and in any form~~, and would include, but is not limited to:

- Records that are related to moneys that are paid to individual employees. That should answer much of the dispute that remains between the parties on that issue;
- Expenditure of legal fees in a prior dispute fall within the accounting records of a corporation as those are moneys expended by the corporation for legal defense or legal action;
- Financial relations between the Department and the American Legion Auxiliary: The moneys that are shared between the Auxiliary and the Department. The Department's side of the financial records of those interactions are ordered by the court to be disclosed;
- Post 110 records: the court takes a similar tack as it did with the Auxiliary. The Department's side of those records will be disclosed; and

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- The General Ledgers are accounting records of the Department.

C. REASONABLE RESTRICTIONS ON RECORDS:

12. Under RCW 23B.16.040(4) the Court finds it appropriate to impose reasonable restrictions on the distribution of the accounting records that are provided by the Department to the Petitioners and counsel. If there is a request for the petitioners to provide duplicate copies of those records to anyone else, they will need to come back to court and ask for permission.

D. ATTORNEY FEES AND COSTS:

13. The Court notes that Ms. Comins Rick filed, as part of her affidavit, an estimated amount of attorney fees; but no break-down. The Court, in going through this record again in preparation of today's hearing does not find a basis to award attorney fees. The court will today deny *without prejudice* that request, and allow petitioners to renew that request by future motion.

Based upon the foregoing Findings Of Fact And Conclusions Of Law,

NOW THEREFORE,

II. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

14. The American Legion Department of Washington, Inc., is organized as a Fraternal Association under Remington's Code of 1915 §§ 3733 and 3734 and is governed by the provisions of Title 23B RCW as a Non Profit Business Corporation. Department corporation has members [members/shareholders as described in RCW 23.86.360] and can operate For Profit businesses. The Department is not governed by the provisions of Chapter 24.03 RCW, the Washington State Non-Profit Corporations Act.

15. Under RCW 23B.16 Petitioners are entitled and shall be permitted to inspect and copy ~~all~~ any of the books and records of the Department corporation, including those records Petitioners previously requested and were denied inspecting. Under RCW 23B.16.020 the accounting records of the corporation refers to ~~all financial documentation of any type and in any form~~ all records related to the income and expenses of the Department corporation, which includes, but is not limited to: records that relate to moneys paid to individual employees; legal fees paid by the Department; the

* but not employee contracts

* but not records of lawsuits

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(509) 786-220

Department-side of accounting records of its financial dealings with the Auxiliary; the Department-side of accounting records of the Department's financial dealings with Post 110; and the General Ledgers.

16. ~~Copying of records requested by Petitioners shall be done at the Department expense. Under RCW 23B.16.050(2), petitioners may request that records, which are normally kept in electronic format medium by the Department, such as the General Ledgers and other like reports in Quickbooks or other similar accounting software program reports, should be copied and provided in electronic format medium [CDs, thumb drives, etc.] in lieu of or in addition to hard paper copy.~~

17. The Court denies *without prejudice* Petitioners' requests for an award of attorney fees and costs; petitioners may renew that request on future motion with additional pleadings.

REASONABLE RESTRICTIONS:

18. Under RCW 23B.16.040(4) the Court reasonably restricts the distribution of the accounting records provided by the Department to the Petitioners and their counsel. If there is a request for the petitioners to distribute copies of those records to anyone else, they will need to come back to court and ask for permission.

IT IS SO ORDERED.

DATED ON THIS 15th DAY OF DECEMBER 2017.

THE HON. JOHN C. SKINDER, JUDGE

PRESENTED BY:
HALSTEAD & COMINS RICK PS

JOANNE G COMINS RICK #11589
ATTORNEY FOR PETITIONER SMITH

JAMES ROBINSON, PETITIONER PRO SE

MICHAEL MATTINGLY, PETITIONER PRO SE

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:
PHILLIPS & BURGESS PLLC

TREVOR ZANDELL # 37210
ATTORNEY FOR RESPONDENTS

HALSTEAD & COMINS RICK PS
PO BOX 511
PROSSER, WA 99350
(509) 786-220

No. 80095-7-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

JAMES ROBINSON; SCOTT SMITH, and MICHAEL MATTINGLY,

Appellants,

v.

AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC. and WAYNE ELSTON, COMMANDER,

Respondents.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

SCOTT SMITH'S MOTION FOR RECONSIDERATION

JoAnne G. Comins Rick, WSBA #11589

HALSTEAD & COMINS RICK P.S.
P.O. BOX 511
Prosser, WA 99350
(509) 786-2200
Attorneys for Appellant Scott Smith

Gregory M. Miller, WSBA #14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Appellant Scott Smith

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APPENDIX A

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I. MOVING PARTY AND RELIEF REQUESTED

Appellant Scott Smith asks the Court to reconsider its November 25, 2019, published opinion ("Decision", App. 1-27 hereto), per RAP 12.4, and reverse the trial court.

II. SUMMARY OF THE BASIS FOR RELIEF.

First, the Decision does not give effect to the trial court's findings below, which were not challenged on the appeal. There was no cross-appeal, so those findings are verities. In particular, the Decision did not give effect to the trial court's unchallenged finding that the American Legion Department of Washington, Inc., ("ALWA") is a 23B Corporation; that Appellant Smith, along with his fellow *pro se* petitioners below, made proper requests at proper times and for proper purposes, pursuant to RCW 23B.16; that ALWA produced copies of some records, but denied inspection of others; and that Smith and his fellow *pro se* petitioners were entitled to inspect ALWA's books and records under the WBCA. CP 388-90, ¶¶ 9, 14-15, App. 28-32 (Dec. 15, 2017 Order).

This is particularly puzzling given footnote 3 at p. 10 of the Decision, which noted that the matters decided in the trial court's

December 15, 2017 order were not appealed and that the "WBCA" governs. Nevertheless, although the footnote states "we express no opinion as to the correctness of those decisions," the Decision's later discussion entitled "Substantial Evidence For The Trial Court's Finding" in fact ignores "those decisions" to reach different conclusions on issues not before the Court. The Decision does its own historical statutory analysis and, even though the issue was not before it, nevertheless effectively concludes that ALWA was governed by RCW 24.20 under the WNCA for purposes of the good faith analysis." *See Slip Op.* at 19-22.

For instance, the Decision states that "ALWA obtained 501(c)(3) status as early as 1946", used Secretary of State nonprofit forms, and "in 1990 ALWA applied for and obtained status as a public benefit nonprofit corporation, and this type of corporation is regulated under the WNCA. *Slip Op.* at 20.

This discussion is factually inaccurate. It misapprehends the position ALWA took in the trial court, as well as the trial court's colloquy and rulings at the October 18th hearing. It overlooks the written findings entered in the December 15, 2017 Order. It also is contrary to the law governing Secretary of State filings, particularly

RCW 23.95.225(5) and the Secretary of State's website on filings, discussed *infra*.

Critically, it ignores the context. This means the Decision undoes the fundamental, underlying policy of the fee provision and its strengthening of the codification of the common law right of inspection: Appellant Smith and his fellow Petitioners complained that the managers of the corporation were improperly taking funds for themselves – embezzling – and needed to be stopped, claims which have proven out once the records which were resisted so vigorously were finally obtained. There can be no good faith refusal to allow inspection of corporate records from the company's shareholder/owners when done to hide such misconduct.

Second, the Decision changed the focus of the matter from one about the rights of the shareholder/owner, to the corporation's rights by analyzing the good faith issue from the corporate perspective. That change was error for several reasons, including that it reverses the presumption in favor of granting fees to shareholders stated in the statute, RCW 23B 16.040(3). Because the Decision is published, it will not only allow, but foster, mischief on behalf of recalcitrant managers of corporations in future cases.

III. FACTS RELEVANT TO ARGUMENT.

The panel is familiar with the basic facts of the case, so the pertinent facts are incorporated into the argument.[1]

IV. GROUNDS FOR RELIEF & ARGUMENT

A. Reconsideration Should Be Granted Per RAP 12.4(c) Where An Appellate Decision Overlooks Or Misapprehends Applicable Law Or Operative Facts.

RAP 12.4(c) instructs that motions for reconsideration should focus on the "points of law or fact which the moving party contends the court has overlooked or misapprehended" and thus states the standard for modifying or changing the initial decision. Our appellate courts grant reconsideration where warranted, both the

[1] In addition, the Decision mistakenly conflates the actions of Appellant Scott Smith, who was represented by counsel and who is seeking to recoup his fees, with the actions of his fellow Petitioners below, James Robinson and Michael Mattingly. All three were joint petitioners acting *pro se* (CP 4-5, Application For Court Ordered Inspection of Corporate Records Under RCW 23B.16.040 – Complaint; CP 73-74, Motion to Show Cause on expedited basis). While all three had identical positions on the merits, only Mr. Smith later hired counsel, and only Mr. Smith later sought fees below. *See* CP 111-112 (notice of appearance); CP 416-424 (Smith's motion for fees). Only Mr. Smith is an appellant. Nevertheless, the Decision mistakenly states repeatedly that the "petitioners" made fee requests below. *Slip Op*., at. 8, 9, 10, App. A-8-10. Then, on page 11, the Decision makes the point that Smith appealed the order denying fees, "but not the other petitioners", as though their failure to appeal cast doubt on the validity of Smith's appeal. In fact, they had no standing to make any such appeal since they acted *pro se* in the trial court and thus had not incurred fees, though they benefitted from the representation.

Court of Appeals,[2] and the Supreme Court,[3] recognizing the underlying goal of the appellate courts stated in RAP 1.2, and the underlying civil rules, to get the legally correct and just decision. *See Keck v. Collins,* 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (referencing CR 1). With respect, that applies here.

B. ALWA's corporate name is "The American Legion, Department of Washington, Inc.," a name that under Washington law cannot be used by a non-profit entity, removing any "doubt" or "confusion" as to the nature of ALWA and whether there was a reasonable dispute over its status, particularly in light of the unchallenged findings in the December 15 Order.

The Decision erred in pursuing an inquiry as to whether "substantial evidence" could be found in the record to show that Smith met the criteria under RCW 23B.16 as a shareholder/owner, which entitled him to an award of mandatory attorney fees. The oral ruling of October 18, 2017, and the December 15 Order's findings resolved that issue. Since those findings have not been challenged,

---

[2] *See, e.g., Behnke v. Ahrens,* 172 Wn.App. 281, 294 ¶¶30-31, 294 P.3d 729 (2012) (discussing grant of reconsideration to consider facts brought to the panel's attention on reconsideration); *State v. Rainey,* 180 Wn.App. 830, 327 P.3d 56 (2014), as noted at 319 P.3d 86 (2014); *State v. Bowen,* 157 Wn.App. 821, 239 P.3d 1114 (2010) (noting the decision was "on reconsideration" and that the prior decision published in the Pacific Reporter was superseded).

[3] *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough,* 151 Wn.2d 470, 474, 90 P.3d 42 (2004) (*reversing* prior decision at 148 Wn.2d 403, 61 P.3d 309 (2003), after granting reconsideration and re-argument).

they are verities on appeal. *Seattle Housing Authority v. City of Seattle,* 3 Wn.App.2d. 532, 538, 416 P.3d 1280 (2018).

1. ALWA cannot run away from the legal effect of its own name to claim confusion about its status.

By statute, a non-profit corporation cannot designate itself using the abbreviation "Inc." in its name. The current WA Secretary of State's website of forms states:

> **(2) Entity Name.** In accordance with RCW 23.95.305, a Nonprofit corporation **may not contain *any of the following designations or abbreviations of: Corporation***, Company, ***Incorporated***, Limited, Limited Partnership, Nonprofit Articles of Incorporation, or Limited Liability Partnership, but may use club, league, association, services, committee, fund, society, foundation, a nonprofit corporation, or any name of like import. A nonprofit corporate name must be distinguishable upon the records of the Secretary of State from any other entity already registered with the Secretary of State's office.

INSTRUCTIONS – NONPROFIT ARTICLES OF INCORPORATION RCW 24.03, at https://www.sos.wa.gov/_assets/corps/11.2019---articles-of-incorporation-24.03---washington-nonprofit-corporation.pdf (last viewed 12/16/19) (bold and bold underlining in original; bolded italics added).

ALWA was adamant when the December 15 Order was entered that its corporate name should include the abbreviated designation of "Inc." in its name. ALWA's argument that it was

"confused" about its corporate identity when insisting on using the corporate designation cannot meet the standard of "good faith" as used in RCW 23B.16.040(3). The statute excuses a corporation, ***if*** it acted in "good faith," from the ***requirement*** of paying the attorney fees incurred by shareholder owners who, as Appellant Smith did here along with his fellow Petitioners, had to obtain a court order directing the corporate managers to allow the shareholder owners to inspect the records to confirm embezzlement or other misconduct or mismanagement by the corporation's managers and operators.

The Decision's reliance upon ALWA's filings with the Secretary of State's office and its use of "non-profit corporation forms", as "evidence" that ALWA was legitimately "confused" about its governing statutes misapprehends the facts. It also is contrary to the statutes governing corporations and the Secretary of State, including RCW 23.95.305, *supra,* and RCW 23.95.225(5), which Smith had no need to cite until receipt of the Decision. The latter statute provides in relevant part:

> (5) "The filing of … an entity filing **does not**:
>
> (a) Affect the validity or invalidity of the entity filing in whole or in part;

> (b) Relate to the correctness or incorrectness of information contained in the entity filing; or
>
> (c) **Create a presumption that the information contained in the filing is correct or incorrect**.

RCW 23.95.225(5) (emphasis added).

Under RCW 23.95.225(5), as a matter of law, ALWA's use of "non-profit forms" in submitting filings to the Secretary of State ***cannot establish*** whether its filing is or was valid or invalid; ***cannot establish*** whether the information stated by ALWA on its filing is or was correct; and ***cannot and does not*** create a presumption that ALWA's filing was correct. The Decision thus overlooked or misapprehended the effect of RCW 23.95.225(5) when it relied on the information on a form ALWA submitted to the Secretary of State as support for a "good faith" finding under RCW 23B 16.040(3).[4]

The only admissible evidence in the record that can be "competent, valid, correct and true" as to ALWA's corporate identity are the documents issued by the Secretary of State

[4] As noted *supra* p. 2, the Decision's focus on ALWA's supposed 501(c)(3) status at page 20 is also incorrect. In fact, the 1946 approval letters from the IRS provides ALWA, like Legion National, and like all the Posts, are exempt under section 501(c)(19) of the IRS Code, which applies to veterans' organizations. This error that ALWA is tax-exempt under Section 501(c)(3) of the IRS Code is significant, because the Decision relies on this erroneous tax-exempt status in determining that ALWA officers reasonably believed that the WNCA governed their affairs. *Slip Op*. at 19-21. A Public Benefit Corporation must be a 501(c)(3) tax exempt organization, which ALWA is not.

characterizing ALWA's corporate entity. Those are: [1] the original 1919 articles of incorporation appended to the certificate of incorporation issued by the Secretary of State to ALWA (what amounts to ALWA's "birth certificate"); and [2] the 1996 Certificate of Reinstatement issued by Ralph Munro, then Secretary of State, based on the RCW 23B.14.220 application after ALWA was administratively dissolved.

Thus, the trial court's December 15 Order specifically and correctly found that ALWA was reinstated as a "Washington Business Non-Profit Corporation":

> The American Legion Department of Washington, Inc., is organized as a Fraternal Association under Remington's Code of 1915 §§ 3733 and 37334 and **is governed by the provisions of Title 23B RCW as a Non Profit Business Corporation**. Department corporation has members [members/shareholders as described in RCW 23.86.360] **and <u>can</u> operate For Profit Businesses**. **The Department is <u>not</u> governed by the provisions of Chapter 24.03 RCW**, the Washington State Non-Profit Corporations Act.

December 15, 2017 Order, CP 389 (emphasis added).

Under this undisputed factual and legal background there is no basis for a finding that the officers in control of and operating ALWA believed in "good faith" that it was a non-profit corporation that did not need to disclose operational records to Appellant Smith

and his fellow Petitioners, who were concerned with embezzlement and mis-use of corporate ALWA assets, of which they were and are owners. The Court should reconsider the Decision because of its misapprehension of any genuine effect of the documents the ALWA operating officers submitted to the Secretary of State in supporting a "good faith" finding.

2. The Decision's complaint that Smith did not request the right records, or soon enough, is inconsistent with the trial court's unchallenged December 15 Order and the law.

Inexplicably, the Decision faults Smith by asserting, incorrectly, there is no evidence showing what records he requested and were denied by the ALWA managers, so therefore the fee statute doesn't apply, or that he was late in requesting them. This analysis is not in the "Statutory Interpretation" discussion but is at page 17 and footnote 5. App. A-17. In fact, based on the October hearing, the December 15 Order found that Smith and his fellow Petitioners:

> [1] Were members in good standing;
>
> [2] Made proper requests to inspect records for purposes of investigating corporate management of the affairs and finances of the Department;
>
> [3] Which records were denied by the Department; and

> [4] After the petition was filed, the Department produced copies of some records, but denied inspection of other records, including records related to employee wages, salaries and benefits.

See CP 388 ¶ 9. At that October hearing, ALWA's counsel specified succinctly just which documents were in dispute:

> Here's the records we're fighting over: Monthly trial balances, AKA, general ledger, payroll register, employee time sheets, employee sick and vacation leave records, payroll adjustment sheets, payroll records for a specific employee, William Powell, documents from personnel training account, employee complaints and lawsuits, documents supporting quote/unquote expenditure of legal fees in a prior dispute, all documentation of all financial relations between the Department and the American Legion Auxiliary, and then all of the records that were requested for the Department, all those same records for a totally different corporation, Post 110. That's what's at issue before Your Honor today, and that is in the spreadsheet that was filed by us.

RP (Oct. 18, 2017), pp. 41-42. There was no dispute between the parties about what records had been requested and denied, and were still being denied as of October, 2017, or that Smith, along with his fellow Petitioners, had requested them.

Moreover, the implication in the Decision that Smith requested key documents "too late" again undoes the underlying purpose of the inspection and fee provisions of the statute to give shareholder/owners the tools to hold corporate management accountable and give management the incentive to be forthcoming. Given that policy, the fact the statute states

no specific time-frame for requesting documents (such as before starting litigation) must be viewed in Smith's favor. His requests were not "late".

C. The Decision's analysis from the point of view of the corporation and its operators undoes the underlying policy that the corporate officers and managers are to be accountable to the shareholder/owners, consistent with the common law, with the fee provision needed to provide incentive to officers and managers to make disclosures and for shareholders to seek record reviews.

Early decisions of our courts set out the common law rule of requiring inspection of corporate records when sought by shareholder/owners. For instance, in 1899 our Supreme Court affirmed the right of a certain Ms. Weinberg, a stockholder, to have access to the books of the Pacific Brewing Company over its strenuous objections, invoking the common law as developed in England and in this country. *State* Ex *Rel. Weinberg v. Pacific Brewing & Malting Co., et al.,* 21 Wash. 451, 58 P. 584 (1899). The Court noted that the many statutes adopted in this country guaranteeing the right of inspection "seem to be generally held not to be innovations in, but declaratory of the common law." 21 Wash. at 460. When confirming such a rule for Washington State by its decision, the Court explained:

> Corporations, owing to the ease with which they can be formed under the liberal provisions of the statute, and affording, as they do, a limited liability for investors, have become a favorite means for the combination of capital, and are now engaged in almost every variety and character of

> business. In fact, they have largely superseded partnerships. Not having behind them the personal responsibility and fortunes of the promoters, or that of those who may have invested in their capital stock, the interests of the public at large require, and especially that part of the public dealing with them, that **the courts adopt the rule which will most largely conduce to honesty in their management**. We believe that these interests will be better protected by the holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation, and, when it is charged to be otherwise, the burden should be on the officers refusing such request or the corporation to establish it.

Pacific Brewing, 21 Wash. at 463-464 (emphasis added).

The bolded text confirms a critical part of the rationale for the inspection rule – the court's rule it adopted is the one that will "most largely conduce to honesty in [the corporations'] management". That is also what animates the statutes at issue here – promoting honesty in management. Washington has since codified shareholders' rights of inspection of corporate records in statutes which "enlarge, extend, and supplement, the common law rule" of shareholders' right of inspection. *State ex rel. Grismer v. Merger Mines Corp.*, 3 Wn.2d 417, 422, 101 P.2d 308 (1940). This means

the common law roots are important, informative on the purposes of the statutes, and support an expansive reading of the statutes to effect the underlying common law purposes, including promoting "honesty in management."

Construing the good faith provision from the standpoint of the corporate managers who are subject to scrutiny for misbehavior, as the Decision does here, is inconsistent with our settled law on shareholder rights. As *Pacific Brewing* and other cases show, the presumptions are in favor of the stockholder to make the inspection and, per the statute consistent with the underlying purpose of the inspection right, the presumption is they receive fees if rebuffed. That is why the statute states the award of fees as an entitlement: the court "***shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees,***… RCW 23B.16.040(3) (emphasis added). The Supreme Court explained the shareholder's rights which necessarily underlie fee awards:

> So the rule in this state is that, to the extent of rights given by statute or the by-laws of a corporation, the right of a stockholder to inspect the books, records, and documents of the corporation may not be abridged or denied, except in protection of necessary trade secrets, or to combat some evil purpose, alleged and proved, such as the theft or destruction of records, or similar improper purpose.

*State v. Guarantee Mfg. Co.,*103 Wash. 151, 157, 174 P. 459 (1918).

Thus it is the corporate officers and managers who must meet a high burden to show they did the right thing to protect the corporate interests in denying the shareholder's request, whether in whole or in part. That is the settled law.

But the Decision here does not, in fact, give effect to the common law and statutory policies underlying shareholder rights. The Decision is inconsistent with this settled law and denies the right to fees in a way that will provide future mischief by corporate managers and officers wary of genuine scrutiny. Reconsideration therefore should be granted and a new decision issued reversing the denial of fees, awarding fees on appeal, and remanding to determine the proper amount of fees below.

V. CONCLUSION

Appellant Scott Smith respectfully requests the panel reconsider the November 25 decision for the above reasons and reverse the trial court.

Respectfully submitted this 16th day of December, 2019.

HALSTEAD & COMINS RICK PS	CARNEY BADLEY SPELLMAN, P.S.
By: */s/ Joanne G. Comins Rick*	By: */s/ Gregory M. Miller*
Joanne G Comins Rick	Gregory M. Miller
WSBA No. 11589	WSBA No. 14459

Attorneys for Appellant Scott Smith

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Attorneys for Respondent Trevor Zandell PHILLIPS BURGESS, PLLC 724 Columbia Street NW, #320 Olympia, WA 98501 tzandell@phillipsburgesslaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – Court's e-service system
Co-Counsel for Appellant Smith Joanne G. Comins Rick Halstead & Comins Rick PS P. O. Box 511 Prosser, WA 99350 jgcrick@gmail.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – Court's e-service system

DATED this 16th day of December, 2019.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS
Legal Assistant/Paralegal to Gregory M. Miller

CARNEY BADLEY SPELLMAN

March 16, 2020 - 3:49 PM

Filing Petition for Review

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