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BY SUSAN L. CARLSON  
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Court of Appeal Cause No.79618-6-I

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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SE BOISE BOAT & RV STORAGE, LLC and A BOISE PROJECT, LLC,

Petitioner-Appellants,

v.

JAY and CORINNE GRAHAM,

Respondents.

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PETITION FOR REVIEW UNDER RAP 13.4

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**A. IDENTITY OF PETITIONER**

Petitioner, SE BOISE BOAT & RV STORAGE, LLC and A BOISE PROJECT, LLC (collectively “BBRV”), was Petitioner below and Plaintiff in the initial underlying action.

**B. COURT OF APPEALS DECISION**

BBRV petitions for review of the Court of Appeals Division I unpublished opinion filed on April 20, 2020. Petitioner timely moved for reconsideration which was denied on June 11, 2020, resulting in a RAP 13.4(a) deadline for this petition of July 13, 2020. A copy of the opinion is attached as Appendix A.

**C. ISSUES PRESENTED FOR REVIEW**

Review is necessary to correct erroneous rulings by the trial court and court of appeals that conflict with both Washington Supreme Court and Court of Appeals authorities. Review and reversal will allow the Court to correct an injustice in this case, clarify existing law, and also to provide guidance from bench to bar reminding practitioners that comporting to the law is wiser practice than trying to skirt it. The following issues are presented for review:

1. Respondent prevailed at the trial court on a motion to dismiss for lack of venue. Respondent did not prevail on anything else. Respondent moved for an attorney fee award for its research

and analysis on all contested subjects between the parties, regardless of whether issues were resolved. An issue for review is whether a fee award for prevailing on a venue motion must be limited to the relief obtained.

2. The trial court judge that granted dismissal did not rule on the motion for attorney fees and costs. The ruling judge articulated a new standard that conflicts with appellate authorities, saying:

In this proceeding, Defendants prevailed: they sought dismissal, Plaintiffs resisted, and Defendants obtained the relief they sought. This ‘proceeding’ is now closed, and Plaintiffs are estopped from asserting their claims in any future proceeding in this Court. These facts entitle Defendants to reasonable attorney fees under the language of the contract.

An issue for review is whether this newly fashioned rule and the resulting award withstand scrutiny against appellate authorities, which base fee entitlement on success achieved, require segregated fee petitions, limit awards to issues resolved, and prohibit awards on matters still open for litigation.

3. Without taking oral argument, the Court of Appeals neglected to conduct the required de novo review and fundamentally misapprehended the appeal effectively depriving Petitioner of a meaningful appeal right, erroneously stating: “BBRV

[Petitioner] does not challenge the legal basis for awarding fees and costs to Graham as the prevailing party.” The court further misstated: “Rather it [Petitioner] asserts that the amount awarded was manifestly unreasonable.” An issue for review is, in fact, the legal basis for an ensuing fee award when a party prevails only on a motion to dismiss for lack of venue and does not prevail on the other substantive issues moved upon.

4. The Court of Appeals misconstrued the nature of a venue dismissal, stating: “The court did not reject any of the Grahams’ arguments.” An issue on review is whether, under governing law, other subjects or arguments are even considered when venue is contested and moved on, because caselaw demonstrates that they are not and cannot be.
5. Respondent has presented caselaw that in certain circumstances authorizes a total fee award for what appears to be partial success. Our courts have recognized a “common core” principle that authorizes courts to award fees for hours that are related to the results obtained when they are not segregable from other hours spent. However, an issue on review is whether that remains an exception because the Court of Appeals treated it as an exception to swallow the rule, first, by

misapplying it to a venue dismissal and, second, by not requiring any attempt to segregate nor any finding that it was not segregable.

The Court can provide clarity on all the above issues.

#### **D. STATEMENT OF THE CASE**

##### The Parties

Petitioner is SE Boise Boat & RV Storage, LLC and A Boise Project, LLC (“BBRV”).<sup>1</sup> Respondent is Jay & Corinne Graham, members of BBRV.<sup>2</sup>

Petitioners filed this lawsuit on July 2, 2018 seeking to dissociate Respondents as members after discovery of a falsified document and after other chronic problems.<sup>3</sup> In the Complaint, in addition to seeking dissociation they asserted claims including breach of fiduciary duty, breach of duties of good faith and fair dealing, and breach of contract.<sup>4</sup>

The original operating agreement for BBRV contained a clause designating choice of venue as Ada County, Idaho. Based on other clauses in the operating agreement, Petitioners concluded that with a quorum and majority vote the venue could be changed to a location that was more practical for the plurality of the membership. Consequently,

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<sup>1</sup> CP 39

<sup>2</sup> CP 40

<sup>3</sup> CP 42

<sup>4</sup> CP 198

they adopted a resolution to change venue to King County, Washington.<sup>5</sup> Respondents initiated their own separate lawsuit not in Ada County, Idaho but in federal court in Boise, Idaho.<sup>6</sup>

#### Venue Motion in King County Superior Court

On October 18, 2018, Respondents filed a motion to dismiss all claims in the King County action.<sup>7</sup> In that motion, Respondents sought to dismiss based on improper venue and also presented other motions to dismiss in the alternative in the event the venue motion was not granted.<sup>8</sup>

On January 4, 2019, the trial court conducted a hearing and the same day issued an order ruling only on the venue issue and dismissing the action on that procedural ground.<sup>9</sup> The dismissal based on the procedural issue of venue did not address or dispose of other disputes between the parties. None of the alternative grounds for dismissal were mentioned in the Order.

Having prevailed on one issue, venue, Respondents filed a motion for fees on January 14, 2019 seeking \$21,880.20 in fees and costs related to the entirety of counsels' work, with no segregation for the venue

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<sup>5</sup> CP 43

<sup>6</sup> CP 44

<sup>7</sup> CP 1

<sup>8</sup> CP 8-17

<sup>9</sup> CP 197-201



claim.<sup>10</sup> Petitioner opposed the non-segregated petition and, while recognizing entitlement to a limited fee award based on the topic of venue, argued against any entitlement to fees incurred on other subjects. Petitioner did not contest the hourly rates and by declaration acknowledged that the fee award might reasonably be as high as five thousand dollars (\$5,000) for having prevailed on the venue question.<sup>11</sup>

In opposing the fee petition, Petitioner reminded the trial court that a lodestar fee award must be limited, that matters open for ancillary or parallel litigation are not proper for fee awards, that unsuccessful claims are not proper for fee awards, that a segregation of hours expended was required for this fee petition, and that a request may not be excessive and that the total hours claimed exceeded what Washington law allows for a simple venue Order.<sup>12</sup> Due to a transfer, the trial judge who ruled on the motion to dismiss did not rule on the fee petition. On January 23, 2019, the newly assigned judge issued an Order on attorney fees and costs.<sup>13</sup>

The trial court did not limit the lodestar, did not require a segregation of fees, and did not provide any discount for work that remained open for later resolution or for unsuccessful claims, or for any other reason. Instead, the trial court granted the full, unsegregated fee

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<sup>10</sup> CP 135

<sup>11</sup> CP 183-84

<sup>12</sup> CP 175-184

<sup>13</sup> CP 197

petition. Without addressing the lodestar rules that govern and ensure reasonableness of a fee petition, the trial court articulated a new theory. According to the trial court, owing to the grant of dismissal Respondents are now “estopped from asserting their claims in any future proceedings in this Court,” treating that as a substitute or equivalent to having prevailed on all the issues included in the fee petition.<sup>14</sup>

### The Appeal

Petitioner timely appealed. The appeal is limited to Order on Defendants’ Motion for Attorney Fees and Costs. There was no oral argument on appeal. On April 20, 2020, Division 1 of the Washington Court of Appeals affirmed the trial court.<sup>15</sup> Petitioner had argued that the standard of review before the Court of Appeals was de novo and that by performing a de novo review the Court of Appeals should conclude that Respondent had prevailed on one issue—venue—and was therefore only entitled to fees on the issue of venue.

The Court of Appeals fundamentally misconstrued the appeal. Rather than conduct a de novo review, the Court of Appeals stated:

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<sup>14</sup> CP 198. The full quote and rationalization follows: “In this proceeding, Defendants prevailed: they sought dismissal, Plaintiffs resisted, and Defendants obtained the relief they sought. This ‘proceeding’ is now closed, and Plaintiffs are estopped from asserting their claims in any future proceeding in this Court. These facts entitle Defendants to reasonable attorney fees under the language of the contract.” There is no caselaw supporting that abstraction. To the contrary, caselaw refutes such a generalization and requires a higher level of specificity from our practitioners and courts.

<sup>15</sup> Opinion, p.1.

BBRV does not challenge the legal basis for awarding fees and costs to the Grahams as the prevailing party. Rather, it asserts that the amount awarded was manifestly unreasonable.<sup>16</sup>

That was erroneous. Petitioner's Appellate Brief confirmed: "The review starts de novo to ensure proper determination of the basis for a fee award."<sup>17</sup> Moreover: "The appellate review starts as de novo review for all legal questions that form the basis and controlling standards for a lodestar fee award."<sup>18</sup>

The Court of Appeals Opinion is based on language that cannot be squared against our law governing venue questions. This language alone makes the Opinion untenable:

Here, the Grahams sought and successfully obtained dismissal of BBRV's claims, all of which stemmed from BBRV's attempt to enforce or interpret the parties' operating agreement. The court did not reject any of the Grahams' arguments. They were entitled to defend against BBRV's claims on every non-frivolous argument available.<sup>19</sup>

By essentially allowing a blanket and unlimited right to recoup any fees incurred, the court's summation ignores established rules and standards pertaining to venue. For example, parties are directed to seek to resolve venue issues first otherwise they risk waiving that argument.

A party waives any claim of lack of personal jurisdiction if, before the court rules, he asks the court to grant affirmative

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<sup>16</sup> *Id.* p.4.

<sup>17</sup> Amended Appellant's Brief, p.9.

<sup>18</sup> *Id.*, p.10.

<sup>19</sup> Opinion, p6.

relief, or otherwise impliedly consents to the court's exercising jurisdiction.<sup>20</sup>

Furthermore, it is inaccurate to speculate that the trial court might have accepted Respondent's other arguments because: "To determine venue, the court assumes the allegations in the complaint are true."<sup>21</sup> Under governing law, the only issues considered by the trial court were those that pertained to venue. It is a misapprehension of venue law to entertain conjectures about the trial court not rejecting other arguments. No other issues were necessary for the relief obtained.

Reciting an assumption that other arguments were not rejected by the trial court and even suggesting that all non-frivolous arguments could have been advanced by Respondent, the Court of Appeals affirmed the trial court and again awarded fees to Respondent. In upholding the trial court, the Court of Appeals accepted caselaw commonly referred to as "common core" authorities. Respondent's lead case has been *Housing Authority of City of Seattle v. Bin*, 163 Wn. App. 367 (2011).

The *Bin* case, however, is not a venue case. It is instead a case that stands for the proposition that fee awards do not need to be reduced when time is incurred by a party who achieves relief "on the basis of a common

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<sup>20</sup> *State ex re. Coughlin v. Jenkins*, 102 Wn. App. 60, 63, 7 P.3d 818 (2000), citing *In re Steele*, 90 Wn. App. 992, 997-98, 957 P.2d 247, review denied, 136 Wn.2d 1031, 972 P.2d 467 (1998)).

<sup>21</sup> *Eubanks v. Brown*, 180 Wn.2d 590, 596, 327 P.3d 635 (2014).

core of facts and related legal theories.”<sup>22</sup> That authority is not pertinent when a party moves for and obtains only a dismissal based on venue. The Court of Appeals misapprehended the nature of the appeal, neglected to apply controlling authorities, provided no authority for the conclusion it reached, and affirmed the trial court that had relied not on any legal authority but on its newly articulated standard discussed above.<sup>23</sup>

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Under RAP 13.4(b), a petition for review will be accepted when one or more of the following criteria are met:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(c)(7) requires: “A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b).”

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<sup>22</sup> *Bin*, 163 Wn. App. at 378.

<sup>23</sup> *See* fn.14. Again quoting the trial court: “In this proceeding, Defendants prevailed: they sought dismissal, Plaintiffs resisted, and Defendants obtained the relief they sought. This ‘proceeding’ is now closed, and Plaintiffs are estopped from asserting their claims in any future proceeding in this Court. These facts entitle Defendants to reasonable attorney fees under the language of the contract.”

**Direct and concise statements of the reasons for review**

1. Review should be accepted because awarding fees on issues that have not been resolved fails to ensure reasonable limitations on fee awards and therefore conflicts with at least *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993); *Ewing v. Glogowski*, 198 Wn. App. 515, 523, 394 P.3d 418 (2017); and *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000).
2. Review should be accepted as in the public interest because the Supreme Court can confirm that litigants may not pile on other issues into a fee petition following a grant of dismissal on venue. Instead, litigants should submit segregated fee petitions tied to the results obtained. The rulings below are in conflict with that least *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672-73, 880

P.2d 988 (1994) and *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362.

3. Review should be accepted because Petitioner has been deprived of a meaningful appeal by a Court of Appeals that fundamentally misapprehended both the nature of the appeal and the standards for venue determinations. Preserving the right to a meaningful appeal for anyone is in the public interest for everyone.
4. Review should be accepted because the Supreme Court should confirm that the exception recognized in *Housing Authority of City of Seattle v. Bin*, 163 Wn. App. 367 (2011) and other “common core” cases is an exception to the normal rule and not the exception that swallows the rule. It is in the public interest to clarify this law and prevent any such confusion.
5. The trial court fashioned a rule that is more of an abstraction than a standard, stating: “This ‘proceeding’ is now closed, and Plaintiffs are estopped from asserting their claims in any future proceeding in this Court.” The Court of Appeals essentially upheld that articulation, which, if uncorrected, is a blanket allowance for any attorneys’ fees claimed after prevailing on a venue motion. That is contrary to established caselaw and it is in the public interest to correct the rulings that have occurred here.

Reasons for review exist under RAP 13.4(b)(1), (b)(2), and (b)(4).

### **The Court Authorities In Conflict**

This is not an abuse of discretion review. “The review starts de novo to ensure proper determination of the basis for a fee award.”<sup>24</sup> Moreover: “The appellate review starts as de novo review for all legal questions that form the basis and controlling standards for a lodestar fee award.”<sup>25</sup> Legal questions and legal error are not reviewed for abuse of discretion.

Turning to the law controlling those legal standards, the lodestar must be limited to hours reasonably expended.”<sup>26</sup> It is undisputed that to ensure a reasonable award the court should “discount work which could be useful in ancillary or parallel litigation.”<sup>27</sup> It is undisputed that for a reasonable lodestar there must be a discount for “unsuccessful claims, duplicated effort, or otherwise unproductive time.”<sup>28</sup> It is undisputed that:

If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues...<sup>29</sup>

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<sup>24</sup> Amended Appellant’s Brief, p.9.

<sup>25</sup> *Id.*, p.10.

<sup>26</sup> *Berryman*, 177 Wn. App. at 662.

<sup>27</sup> *Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995), citing *Fetzer*, 122 Wn.2d at 151, n. 6, 859 P.2d 1210.

<sup>28</sup> *Berryman*, 177 Wn. App. at 662, quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

<sup>29</sup> *Ewing v. Glogowski*, 198 Wn. App. 515, 523, 394 P.3d 418 (2017), quoting *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000).



Likewise:

If, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues.<sup>30</sup>

The decisions below obviously conflict with this well-established law.<sup>31</sup>

### **The Trial Court's Fashioned Abstraction**

Rather than apply any of the above referenced law, rather than require a segregated fee petition, rather than limit the fee award to the success obtained, the trial court abstracted as follows:

In this proceeding, Defendants prevailed: they sought dismissal, Plaintiffs resisted, and Defendants obtained the relief they sought. This 'proceeding' is now closed, and

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<sup>30</sup> *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994), citing *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986); *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26 (1993).

<sup>31</sup> In addition to conflict with well-established law, counsel for Respondents made a gross misrepresentation to the Court of Appeals in Respondent's Answer and Opposition to Motion for Reconsideration, p.9, fn9. Petitioner did not have a chance to respond because the Court of Appeals denied reconsideration without requesting a Reply brief. However, Respondent signed its June 3, 2020 submission, stating: "It is relevant that although BBRV has for the last seventeen months stated in pleadings that it plans to file an Idaho lawsuit against the Grahams "forthwith" or soon, it has not done. Nor do the Grahams expect BBRV to do so – as the briefing the trial court established, BBRV's claims are not cognizable under Idaho law." That was wholly untrue. While our law does not require that other litigation be underway, only that "material could be useful in ancillary or parallel litigation," it is undeniable that such litigation was and is underway. Appendix B contains public record documents showing the lawsuit that was dismissed from the King County venue having commenced in Ada County before counsel's misstatement. In fact, the Appendix B Affidavit of Service confirms Respondent was served May 14, 2020 and the docket printout shows Respondent filed an Answer and Counterclaim on June 4, 2020.

Plaintiffs are estopped from asserting their claims in any future proceeding in this Court. These facts entitle Defendants to reasonable attorney fees under the language of the contract.

There is no caselaw supporting that abstraction. To the contrary, caselaw refutes such a generalization and requires a higher level of specificity from our practitioners and courts. Contrary to the trial court's ruling, fee awards must be based on "prevailing" and must be "reasonable." Here, Respondent did not prevail on anything except venue and it is unreasonable to allow a full boat award for hours incurred on subjects that remain open between the parties.

**The Court of Appeals Mis-reliance on "Common Core" Cases**

The Court of Appeals failed to correct the error and instead accepted Respondent's invitation to entertain a different review. The Court of Appeals cited to *Housing Authority of City of Seattle v. Bin*, 163 Wn. App. 367 (2011). Neither that case nor its related line of "common core" cases are even relevant. In *Bin* a party had obtained relief on the substance of claims presented, prevailing on the merits of a due process challenge. It was not a venue case. That fact alone completely divorces the holding in *Bin* from the case here where Respondent prevailed only on a motion that results in changing venue and did not defeat underlying claims on the merits such as breach of fiduciary duty.

In *Bin*, a tenant defeated a housing authority landlord's attempt to evict her by proving on the merits violations of due process.<sup>32</sup> There were several different claims all related to due process violations.<sup>33</sup> The relief was "substantial" because it dismissed the action in its entirety based on the due process violation, and all claims moved upon revolved around due process.<sup>34</sup> *Bin* does not apply here. While Respondent moved for dismissal on both substantive grounds and procedural grounds, the Court simply granted a change in venue and therefore, as required under the law, declined ruling on the substantive grounds. In *Bin*, that action was defeated on the merits and ended entirely. Having ruled on the substance of the merits, that was "substantial relief." Respondent obtained a dismissal based on venue, no ruling on the substance of the disputes, and the other disputes remain open and underway in other actions. This case is not controlled by *Bin* nor by the other common core cases.

#### **Fees for Venue Motions Are Segregable**

In some cases, but not this case, a court might find that hours need not be reduced or segregated from a fee award:

Where, however, the trial court finds the claims to be so related that no reasonable segregation of successful and

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<sup>32</sup> *Bin*, 163 Wn. App. at 370-71

<sup>33</sup> *Id.*

<sup>34</sup> *Bin*, 163 Wn. App. at 377.

unsuccessful claims can be made, there need be no segregation of attorney fees.<sup>35</sup>

That will never be the case in a matter where a party obtains a dismissal based on venue, specifically because in venue cases only venue can be considered by the courts and the parties petitioning for fees can easily segregate the portion of their time that pertains to venue from any time that pertains to other substantive issues. In a venue motion, only issues pertaining to venue will be considered: “To determine venue, the court assumes the allegations in the complaint are true.”<sup>36</sup>

Indeed, this Court should confirm as follows for venue motions:

[T]he court must separate the time spent on those theories essential to [the cause of action for which attorneys' fees are properly awarded] and the time spent on legal theories relating to the other causes of action.... This must include, on the record, a segregation of the time allowed for the [separate] legal theories....<sup>37</sup>

Our law will only be correctly applied and an injustice prevented if the Supreme Court accepts review.

**Petitioner Requests Fee Award:** As incident to prevailing on this petition, and under both the operating agreement and applicable appellate rules, Petitioner requests an appropriate award of fees and costs.

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<sup>35</sup> *Hume*, 124 Wn.2d at 673, citing *Pannell v. Food Servs. of Am.*, 61 Wn. App. 418, 447, 810 P.2d 952, 815 P.2d 812 (1991), *review denied*, 118 Wn.2d 1008, 824 P.2d 490 (1992) (emphasis added).

<sup>36</sup> *Eubanks v. Brown*, 180 Wn.2d 590, 596, 327 P.3d 635 (2014).

<sup>37</sup> *Hume*, 124 Wn. 2d at 673, quoting *Travis*, 111 Wn.2d at 411, 759 P.2d 418.

**F. CONCLUSION**

The trial court fashioned a new rule that conflicts with existing law and must be rejected. The Court of Appeals misapprehended the nature of the appeal and the nature of venue determinations. Washington law has not been enforced, has been violated, and can only be corrected now if the Supreme Court takes review. Review will allow the Supreme Court to confirm and clarify existing legal standards and rules and prevent an injustice to Petitioner. Although there is guidance within existing caselaw, the Court has not yet issued a holding specific to attorney fee awards in the context of a venue dismissal, so this case presents the opportunity to clearly resolve that for the bar. Petitioner respectfully requests review.

DATED this 13<sup>th</sup> day of July, 2020

RESPECTFULLY SUBMITTED,

**THE COLLINS LAW GROUP, PLLC**

By 

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Adam C. Collins

WSBA #34960

Attorneys for Petitioner BBRV &

## PROOF OF SERVICE

The undersigned certifies under penalty of perjury, under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served in the manner noted a copy of the following upon designated counsel:

1. PETITION FOR REVIEW UNDER RAP 13.4

*Via EService via the Clerk*

Patrick C. Bageant  
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1775 West State Street, #286  
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Attorney for Respondent Graham

Dated at Issaquah, Washington this 13th day of July, 2020.

/s/ Adam C. Collins  
Adam C. Collins

# APPENDIX

## A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SE BOISE BOAT & RV STORAGE, LLC,	)	No. 79618-6-1
an Idaho limited liability company, and A	)	
BOISE PROJECT, LLC, an Idaho limited	)	DIVISION ONE
liability company,	)	
	)	UNPUBLISHED OPINION
Appellants,	)	
	)	
v.	)	
	)	
JAY GRAHAM, and CORINNE GRAHAM,	)	
a married couple,	)	
	)	
Respondents.	)	

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HAZELRIGG, J. — Idaho business entities SE Boise Boat & RV Storage, LLC and A Boise Project, LLC (collectively BBRV) sued Idaho residents Jay and Corrine Graham (the Grahams) in King County alleging claims based on BBRV's operating agreement. The trial court granted the Grahams' motion to dismiss based on improper venue and, applying the lodestar method, awarded them \$21,880.20 in attorney fees and costs. BBRV asserts that the trial court abused its discretion in failing to segregate time and limit the fee award to hours reasonably expended. We affirm and also grant the Grahams request for attorney fees on appeal.



## FACTS

BBRV comprises two Idaho business entities formed for the purpose of purchasing and developing real property in Ada County, Idaho and operating a storage facility at that property. The Grahams are residents of Idaho and members of BBRV. The operating agreement for BBRV contains a clause designating Ada County, Idaho as the location for venue.

On June 27, 2018, eight of BBRV's ten members, without notice to the Grahams, agreed to amend the operating agreement to change the location for venue to King County, Washington. BBRV then filed suit in King County against the Grahams alleging breach of fiduciary duty, breach of duties of good faith and fair dealing, breach of contract, and dissociation of the Grahams from BBRV. The Grahams filed a motion to dismiss all claims for lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue, and failure to state a claim. In its opposition to the Grahams' motion to dismiss, BBRV disclosed the operating agreement amendment and asserted that venue in King County was now proper. In reply, the Grahams argued that BBRV's secret attempt to amend the operating agreement was illegal under Idaho law.

On January 4, 2019, the trial court granted the Grahams' motion to dismiss on the basis that "[v]enue is not proper in this court under the governing operating agreement." The Grahams then moved for an award of \$21,880.20 in attorney fees and costs based on the BBRV operating agreement, RCW 4.28.185(5), and equitable considerations. The motion included a request for 62.24 hours of attorney time at an hourly rate of \$290 for Washington counsel Patrick Bageant,

and 15.10 hours of attorney time at an hourly rate of \$210 for Idaho counsel Thomas J. Lloyd.

On January 23, 2019, the trial court entered findings of fact and conclusions of law in support of its order awarding attorney fees and costs to the Grahams. The court found that each of BBRV's claims was an attempt to enforce or interpret the BBRV operating agreement, and that dismissal of those claims entitled the Grahams to reasonable attorney fees as the prevailing party under the language of that contract.<sup>1</sup> The court further found that the Grahams were entitled to fees under RCW 4.28.185(5).<sup>2</sup> Applying the lodestar method, the court then found that the amount of attorney fees and costs claimed by the Grahams was reasonable.

The court entered the following pertinent findings:

With respect to Hollystone Law's time, \$290 is an extremely reasonable rate based upon the qualifications and experience of the relevant timekeeper, and the nature of the legal analysis required by the Plaintiff's claims.

Similarly, 62.24 hours was a reasonable amount of time to review the record, research and prepare two legal briefs on a motion to dismiss, and prepare for, attend, and argue the motion itself. This amount of time is particularly fair in that it does not reflect the actual time spent. It does not, for example, include time spent by all time keepers and it does not even include all time spent by the primary timekeeper.

With respect to Elam & Burke's time, \$210 is a reasonable rate in Boise, Idaho, and an extremely reasonable rate in Seattle, Washington, based upon the qualification and experience of the

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<sup>1</sup> The BBRV operating agreement provides: "In the event any Proceeding is commenced for the purpose of interpreting or enforcing any provision of this Agreement, the prevailing party in such Proceeding shall be entitled to recover a reasonable attorneys' fee in any such Proceeding or any appeal thereof in addition to the costs and disbursements allowed by law."

<sup>2</sup> RCW 4.28.185(5) provides: "In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees."

relevant timekeeper, and the nature of the work Plaintiffs' claims required . . . . As to the amount of time spent, 15.1 hours—which represents only some but not all of the actual time devoted to this matter—is a more-than-fair basis upon which to calculate a lodestar for [ ] the work [that] Elam & Burke did.

Finally, no adjustment is warranted. The quality of Defendants' counsel's work is on par with or above the work produced by other counsel working at the same rate.

Accordingly, the court awarded \$21,880.20 to the Grahams, the full amount they requested. BBRV appealed the fee award.

#### ANALYSIS

BBRV does not challenge the legal basis for awarding fees and costs to the Grahams as the prevailing party. Rather, it asserts that the amount awarded was manifestly unreasonable. We disagree.

The trial court may award attorney fees only when authorized by statute, contract, or recognized ground of equity. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Whether a trial court is authorized to award attorney fees is a question of law reviewed de novo. Gander v. Yeager, 167 Wn. App. 638, 646, 282 P.3d 1100 (2012). When attorney fees are authorized, we will uphold the attorney fee award absent a manifest abuse of discretion. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 272 P.3d 802 (2012)). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Trial courts apply the lodestar method of calculating reasonable attorney fees. Ewing v. Glogowski, 198 Wn. App. 515, 521, 394 P.3d 418 (2017). The court determines the number of hours reasonably expended in the litigation based on documentation of the work performed and the attorney who performed the work. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). “[T]he party seeking fees bears the burden of proving the reasonableness of the fees.” Mahler, 135 Wn.2d at 434. The court may adjust the lodestar up or down to reflect factors not considered in the lodestar. Ewing, 198 Wn. App. at 521. To provide an adequate record for review, the court must enter findings of fact and conclusions of law in support of the award. Fiore v. PPG Indus., Inc., 169 Wn. App. 325, 351, 279 P.3d 972 (2012).

BBRV asserts that the trial court erred in failing to require segregation of hours, inconsistent with its duty to discount hours that are unreasonable under controlling standards. It contends that it was improper for the trial court to determine that 77.34 hours of attorney time was reasonable and to grant the full amount of requested fees where the Grahams raised multiple alternative grounds for dismissal but prevailed only on their venue argument.

“In determining the number of hours reasonably expended, the court ‘should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time.’” Fiore, 169 Wn. App. at 352 (quoting Chuong Van Pham v. City of Seattle, Seattle City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007)). However, “[w]here a party achieves ‘substantial relief’ on the basis of a set of claims involving ‘a common core of facts and related legal theories,’ it is not

necessary to reduce the party's attorney fees simply because the court did not adopt each contention raised." Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 378, 260 P.3d 900 (2011). "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." Bright v. Frank Russell Invest., 191 Wn. App. 73, 80, 361 P.3d 245 (2015) (quoting Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)) (emphasis omitted).

Here, the Grahams sought and successfully obtained dismissal of BBRV's claims, all of which stemmed from BBRV's attempt to enforce or interpret the parties' operating agreement. The court did not reject any of the Grahams' arguments. They were entitled to defend against BBRV's claims on every non-frivolous argument available. In awarding attorney fees and costs to the Grahams as the sole prevailing party, the trial court was not required to limit the award to hours spent on the one defense on which it based its decision. Moreover, the trial court found that the amount requested was "particularly fair in that it does not reflect the actual time spent." The trial court did not abuse its discretion in declining to further segregate the fee award where the record shows counsel segregated the petition before submitting it.

BBRV further contends that the fee award was excessive because a venue ruling is purely procedural and does not resolve the issues on the merits. But the BBRV operating agreement provides for an award of fees to the prevailing party in any "[p]roceeding [ ] commenced for the purpose of interpreting or enforcing any

No. 79618-6-I/7

provision of this Agreement.” Dismissal on the merits is not required. Moreover, defendants need not prevail on the merits to be entitled to fees under RCW 4.28.185(5). Voicelink Data Servs., Inc. v. Datapulse, Inc., 86 Wn. App. 613, 626-28, 937 P.2d 1158 (1997).

BBRV next argues that the trial court should have discounted time expended defending its breach of fiduciary duty claim, which may eventually be resolved through litigation in Ada County, Idaho or in federal court in Boise. “It is appropriate to discount work which could be useful in ancillary or parallel litigation.” Absher Const. Co. v. Kent School Dist. No. 415, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). But BBRV does not assert that the Grahams are party to any pending litigation, and counsel for the Grahams are not involved in any other case in which BBRV is a party. We cannot say the trial court abused its discretion in declining to discount the fee award on the basis that the Grahams might eventually need to defend a breach of fiduciary duty claim.

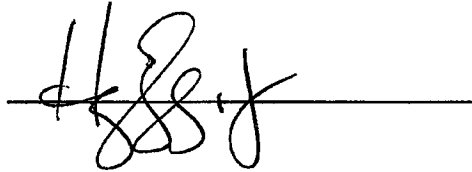
Lastly, BBRV asserts that the award, which included hours billed by two attorneys, unreasonably compensated the Grahams for duplicated effort and overstaffing. But the Grahams were forced to hire Washington counsel solely because BBRV improperly attempted to amend the venue clause in the operating agreement to bring the case in King County. The additional hours were not duplicative or wasteful.

The Grahams and BBRV each request an award of attorney fees on appeal based on the operating agreement, RCW 4.28.185(5), and RAP 18.1. “Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or

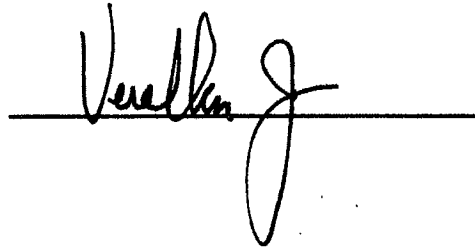
No. 79618-6-1/8

contract" and properly requested under RAP 18.1. In re Guardianship of Wells, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). Because the Grahams prevail on appeal, they are entitled to fees and costs upon compliance with RAP 18.1(d).

Affirmed.



WE CONCUR:



# APPENDIX

## B



**AFFIDAVIT OF SERVICE**

State of Idaho

County of Ada

Civil Court

Case Number: CV 01 20 07594

Plaintiff:

**SE BOISE BOAT & RV STORAGE, LLC., an Idaho Limited Liability Company, and A BOISE PROJECT, LLC, an Idaho Limited Liability Company**

vs.

Defendant:

**JAY AND CORINNE GRAHAM, a married couple**

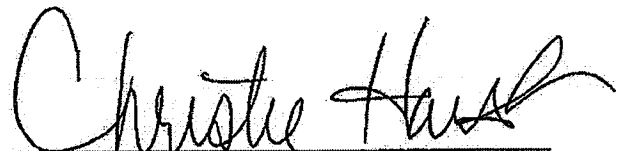
Received by HD Legal Messengers LLC to be served on **JAY AND CORINNE GRAHAM, 804 W RICHMOND ST, BOISE, ID.**

I, Christie Harsh, being duly sworn, depose and say that on the **14th day of May, 2020 at 3:49 pm, I:**

**Personally served by delivering two true and correct copies of the Summons and Verified Complaint on JAY AND CORINNE GRAHAM At the date and time set forth above.**

**By personally serving JAY GRAHAM, HUSBAND who is a person over the age of eighteen , while residing at the usual place of abode of JAY AND CORINNE GRAHAM to wit: 804 W RICHMOND ST, BOISE, ID**

I hereby certify, that I am a resident of the County of Ada, State of Idaho,  
That I am over the age of eighteen years, that I am not a party to the action or related to any of the parties in the above entitled action



Christie Harsh

HD Legal Messengers LLC  
2312 N. Cole Rd., Ste 1  
Boise, ID 83704  
(208) 331-4156

Our Job Serial Number: HDL-2020000315  
Ref: SE BOISE BOAT  
Service Fee: \$45.00

Subscribed and Sworn to before me on the 20th day of May, 2020 by the affiant who is personally known to me.



NOTARY PUBLIC

STATE OF IDAHO, COUNTY OF Ada

COMMISSION EXPIRES 7/30/23

**CARMA FARRAR  
COMMISSION #9261  
NOTARY PUBLIC  
STATE OF IDAHO  
MY COMMISSION EXPIRES 07/30/2023**

### Case Information

CV01-20-07594 | SE Boise Boat & RV Storage LLC, A Boise Project, LLC Plaintiff, vs. Jay Graham, Corinne Graham Defendant.

Case Number  
CV01-20-07594  
File Date  
05/12/2020

Court  
Ada County District Court  
Case Type  
AA- All Initial District Court Filings (Not E, F, and H1)

Judicial Officer  
Norton, Lynn G.  
Case Status  
Active - Pending

### Party

Plaintiff  
SE Boise Boat & RV Storage LLC

Active Attorneys ▼  
Lead Attorney  
Oleson, Justin B.  
Retained

Plaintiff  
A Boise Project, LLC

Active Attorneys ▼  
Lead Attorney  
Oleson, Justin B.  
Retained

Defendant  
Graham, Jay

Active Attorneys ▼  
Lead Attorney  
Lloyd, Thomas John  
Retained

Defendant  
Graham, Corinne

Active Attorneys ▼  
Lead Attorney  
Lloyd, Thomas John  
Retained

### Events and Hearings

05/12/2020 New Case - District Civil

05/12/2020 Complaint Filed
05/12/2020 Summons Issued ▼  Comment And Filed
05/12/2020 Civil Case Information Sheet
05/12/2020 Summons ▼  Served 05/14/2020  Served 05/14/2020
05/26/2020 Affidavit of Service ▼  Comment Served 5/14/20
06/04/2020 Civil Case Information Sheet
06/04/2020 Answer ▼  Comment Answer and Counterclaim
06/05/2020 Order ▼  Comment for Scheduling Conference & Order Re: Motion Practice
06/30/2020 Stipulation ▼  Comment Stipulation for Scheduling and Planning
07/01/2020 Scheduling Conference ▼  Judicial Officer Norton, Lynn G.  Hearing Time 2:30 PM  Cancel Reason Vacated
07/01/2020 Notice of Trial Setting, Final Pre-Trial Conference & Order
07/07/2020 Notice of Intent to Take Default ▼  Comment 3 day
07/09/2020 Answer ▼  Comment to Counterclaims
06/16/2021 Status Conference ▼  Judicial Officer Norton, Lynn G.  Hearing Time 2:30 PM

06/30/2021 Pre-trial Conference ▾

Judicial Officer  
Norton, Lynn G.

Hearing Time  
2:30 PM

08/02/2021 Jury Trial ▾

Judicial Officer  
Norton, Lynn G.

Hearing Time  
8:30 AM

Comment  
4 days

**Financial**

SE Boise Boat & RV Storage LLC

Total Financial Assessment	\$221.00
Total Payments and Credits	\$221.00

5/11/2020	Transaction Assessment			\$221.00
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5/11/2020	EFile Payment	Receipt # 45375-2020-R01	SE Boise Boat & RV Storage LLC	(\$221.00)
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Graham, Jay

Total Financial Assessment	\$136.00
Total Payments and Credits	\$136.00

6/3/2020	Transaction Assessment			\$136.00
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6/3/2020	EFile Payment	Receipt # 52351-2020-R01	Graham, Jay	(\$136.00)
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**THE COLLINS LAW GROUP PLLC**

**July 13, 2020 - 3:01 PM**

**Filing Petition for Review**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Appellate Court Case Title:** Personal Restraint Petition of Jeremy Edward Gaines (518716)

**The following documents have been uploaded:**

- PRV\_Petition\_for\_Review\_20200713150013SC202197\_2063.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was Petition for Review WA Supreme Ct filed 7.13.20.pdf*

**A copy of the uploaded files will be sent to:**

- pbageant@hollystonelaw.com

**Comments:**

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Sender Name: Adam Collins - Email: adam@tclg-law.com  
**Filing on Behalf of:** Jami K Elison - Email: jami@tclg-law.com (Alternate Email: )

Address:  
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ISSAQUAH, WA, 98027-2515  
Phone: 425-295-7170

**Note: The Filing Id is 20200713150013SC202197**