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No. 66439-5-I

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**COURT OF APPEALS**

**OF THE STATE OF WASHINGTON**

**DIVISION 1**

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**ROBERT UTTER and FAITH IRELAND, in the name of the STATE OF WASHINGTON**

**V.**

**BUILDING INDUSTRY ASSOCIATION OF WASHINGTON**

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# APPELLANTS' REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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**Statutes**

Appellants Utter and Ireland ("Plaintiffs") respectfully submit this reply brief in support of their appeal and response to the cross-appeal of the Building Industry Association of Washington ("BIAW").

## REPLY IN SUPPORT OF APPEAL

In its response brief, the BIAW asserts *thirty one* times times that certain facts are undisputed or admitted. Repetition does not make it so. The trial court erred in dismissing Plaintiffs' claims on summary judgment despite genuine issues of material fact that should have proceeded to trial.

On appeal, the appellate court reviews an order granting summary judgment de novo "taking all facts and inferences in the light most favorable to the nonmoving party." *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605 (2010). The trial court ignored this basic rule and resolved contested factual issues in favor of BIAW, drawing all inferences in its -- the moving party's-- favor.

On a motion for summary judgment, the trial court was not allowed to resolve factual disputes, but only to determine whether or not factual issues are present. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 29 (1980). BIAW had the burden of proving the absence of a genuine issue of material fact and its enitlement to judgment as a matter of law. *Magula*

*v. Benton Franklin Title Co., Inc.* 131 Wn.2d 171 (1997). Neither standard was met.

Plaintiffs submitted uncontradicted and overwhelming evidence to proved that BIAW qualified as a political committee in the 2008 election cycle under the "contribution prong" of the political committee test. Plaintiffs submitted a chronological record of the BIAW Officers' sucessful solicitations of pledges from local building associations for BIAW's political activities, which alone was sufficient to qualify it as a political committee. For example, the document signed by all of the Local Associations documenting their pledges stated:

> ***WHEREAS BIAW is committing 100% of excess retro dollars to the 2008 gubernatorial election***,
> ...
> ***The following local associations pledge that all Retro Marketing Assistance funds received in 2007, beyond the amount budgeted for the year, will be sent to the BIAW and placed in the BIAW 2008 gubernatorial election account***, to be used for efforts in the 2008 gubernatorial race.

PFR Tab 28 (emphasis added) (CP 411). *See also* PFR 25, 26, 27, 29, 34, 35, 38, 39, 41, 42, 47, 50, 51, 52, 53, 55, 56, 57 (CP 401 – 419, 432 – 435, 440 – 446, 449 – 453, 464, 493 – 505, 509 – 514) (contemporaneous documentation of transaction from both BIAW and the pledging associations). This evidence established that BIAW became a political

committee and was required to report within two weeks of receiving these pledges. RCW 42.17.040.

BIAW defended itself with only self-serving and uncorroborated testimony. Such evidence could create, as best, a genuine issue of material fact, but it could not entitle BIAW to summary judgment.

The same is true of Plaintiffs' claim that BIAW became a political committee under the "expenditure prong" of the political committee test. Plaintiffs produced evidence that during the 2008 election cycle, BIAW reported making $233,648.89 in independent expenditures and over $6.4 million in contributions to other political committees. PFR Tabs 2, 3, 6, 7, 10 (CP 253, 264, 273-275, 277-281, 288-307). These campaign finance reports were signed under penalty of perjury and thus should be deemd to constitute BIAW's legally-binding admission that it made political expenditures during the campaign cycle. The trial court erred in completely disregarding all of this evidence and instead accepting the BIAW claim that it never made any contributions. *See Robinson v. Avis Rent a Car*, 106 Wash.App.104 (2001) (limiting a party's inconsistent statements on summary judgment). Moreover, Plaintiffs submitted evidence proving that regardless of whose accounts were used to make the contributions, BIAW financed and controlled them and was therefore legally responsible for them. PFR Tabs 23, 24, 30, 48, 49, 61, 62, 66, 71,

74. Once again, the trial court erred in disregarding this evidence and resolving what is at most a disputed fact in favor of the moving party.

Given the nature of the evidence submitted by Plaintiffs, and BIAW's inadequate and inadmissible rebuttal evidence, the Court would have been justified in granting summary judgment to Plaintiffs as the non-moving party, and this Court should do so on appeal. *See Inpecoven v. Dept. of Revenue,* 120 Wn.2d 357 (1992) (summary judgment for nonmoving party entered by appellate court). On the other hand, the trial court was not permitted to effectively discard all of Plaintiffs' evidence and resolve these factual disputes in favor of the BIAW on summary judgment.

**A. It is not "undisputed" that BIAW was uninvolved in the political activities at issue in this case.**

Given the overwhelming evidence showing that BIAW itself conducted and/or is legally reponsible for soliciting pledges, receiving contributions and making expenditures for a political campaign, the conflicting evidence presented by BIAW can at most create a genuine issue of material fact for trial. BIAW's primary argument that it is "undisputed" that BIAW Member Services Corporation ("BIAW-MSC"), not BIAW, conducted these activities, and therefore BIAW bears no responsibility for these activities is simply wrong.

### 1. Even BIAW's own tax returns contradict BIAW's denial that it funds political campaigns.

BIAW claims that "it is undisputed ... that BIAW, the non-profit, does not contribute to political committees." BIAW relies upon its 2008 Form 990 tax return, which it cites as proof that BIAW had "no expenses related to political activities." BIAW Response at 9.[1] *See also id. at* 29 ("Nowhere on that form are there any electoral expenditures.") This claim is manifestly false. Part IV, Line 3 of Form 990 asks "Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Sechedule C, Part I."*[2] BIAW – the non-profit defendant in this action – answered "Yes" and attached the Schedule C that disclosed significant campaign expenditures.[3]

BIAW told the Federal Government, under penalty of perjury, that it *does* "engage in direct or indirect political campaign activities on behalf of or in opposition to candidates."[4] This admission is consisetent with the BIAW's reporting to the Public Disclosure Commission, which also constitute binding admissions that the BIAW – the non-profit defendant in

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[1] Answering Brief and Opening Cross-Appeal Brief of the Building Industry Associaiton of Washington ("BIAW Response").

[2] PFR Tab 12 (CP 316-330).

[3] *Id.*

[4] *Id.*

ths action – makes and/or is otherwise legally responsible for political campaign contributions, including those at issue in this case. *See* PFR Tabs 2, 3, 6, 7, 10 (CP 253, 264, 273-275, 277-281, 288-307) (BIAW's PDC reporting claiming responsibility for millions of dollars in campaign contributions).

BIAW cannot shirk its own federal tax returns and campaign reporting, submitted under oath, to deny that it has any involvement in funding political campaigns. Indeed, it should be legally bound by these admisssions. Even if the Courts allowed a defendant to deny the truthfulness of its own federal tax returns and campaign reports, such denials can at most create a genuine issue of material fact.

The other documents relied upon by BIAW to attack the truthfulness of its own federal and state filings are also unavailing. For example, it relies upon internal "income statements," but these documents are clearly inadmissible, being unsigned and unauthenticated, and therefore cannot support a grant of summary judgment. *Ebel v. Fairwood Park II Homeowners Ass'n.*, 136 Wn.App. 787, 790 (2007) ("A trial court may not consider inadmissible evidence when ruling on a summary judgment motion.")[5] Their is no foundation laid as to these "income

[5] They were submitted *by Plaintiffs* as a single exhibit to simply to demonstrate the magnitude of the BIAW operations as compared to the size of the political expenditures,

statements" purpose or their accuracy as to the division between the two entities. In addition, since these "income statements" end in June 2008, they do not even cover the period when the political expenditures at issue were made. BIAW argues that the lack of a political expenditure line item on the BIAW's "income statement" proves that BIAW make no political expenditures. BIAW Brief, at 9. Actually this ommision proves the unreliability of the income statements, since they directly contradict BIAW's tax returns disclosing such expenditures.

To support its claimed uninvolvement in politics, BIAW improperly relies upon the conclusions of the Public Disclosure Commission's investigation – as if they were proof. BIAW Asnwering Brief, at 8, 12-14. The trial court apparently did the same. However, these reports are clearly inadmissible under Washington Law. *See Brundridge v. Fluor Fed. Servs. Inc.,* 164 Wn.2d 432, 451 (2008) (trial court abused discretion in admitting investigative report that was the "product of an investigation, presumably involving interviews with affected parties, and the investigator's evaluation of the evidence as a whole."); *Bierlein v. Byrne,* 103 Wn.App. 865, 870-871 (2000) (rejecting a discretionary standard, and instead adopting bright line rule that investigative reports do not qualify for certified public document hearsay

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and there is no indication that they accurately reflect the division of operations or finances between the two corporations.

exception; upholding exclusion of findings of Equal Employment Opportunities Commission); *Green v. APC,* 136 Wn.2d 87, 100 (1998) (medical facts cited in a case report are not admissible evidence in a Washington court).

These investigative reports could not be considered on summary judgment and cannot be used to bolster the trial court's dismissal of the claims. *Ebel,* 136 Wn.App. at 790; CR 56(e) ("Declarations must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant is competent to testify on the matter.") On summary judgment, the court is allowed to consider only competent evidence. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826 (1994). The Court of Appeals should refuse to consider improper evidence in reviewing an order on summary judgment, notwithstanding opposing party's failure to object. *See Wilkerson v. Wegner*, 58 Wn. App. 404, 408 n.3 (1990).

Finally, throughout its brief, BIAW claims that at the hearing the trial court decided certain issues and plaintiffs' counsel admitted certain issues. Had BIAW wanted to make such claims, it should have asked for a court reporter at the hearing. These unsupported and disputed claims are inappropriate and inadmissible in absence of a hearing transcript.

### 2. The evidence is overwhelming that BIAW – not MSC – solicited and received pledges, and at the very least that issue is genuinely disputed.

The BIAW never even tries to respond to the documentary evidence from a multitude of separate corporations showing that BIAW – not BIAW-MSC – solicited and received pledges for political activities in 2007. It does not address any of the evidence set forth on pages 9 through 14 of Plaintiff's opening appellate brief. No contemporaneous documents mention BIAW-MSC or ChangePAC, or otherwise even remotely support BIAW's defense that BIAW-MSC solicited contributions from local associations to ChangePAC. BIAW Brief, at p. 12.[6] *Every* contemporaneous document says that the BIAW solicitied pledges for BIAW's own political activities. BIAW's self-serving, uncorroborated testimony --- relied upon throughout BIAW's Brief – can at most create a question of fact in light of this contradictory evidence.

BIAW understands the importance of contemporaneous documents, since it rhetorically argues that *it* submitted "numerous

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[6] Needless to say, BIAW is wrong in stating that Plaintiffs concede that "that BIW-MSC was responsible for the conduct they complaint about." BIAW Brief at 17. BIAW seeks to prove this concession by partial quotes and untranscribed oral arguments. For example, BIAW states that Plaintiffs concede that "the improper transfers and expenditures were processed through the accounts of BIAW-MSC," BIAW Brief at 17. In fact, this quote was taken from a sentence describing the Attorney General's decision not to sue BIAW – a conclusion that Plaintiffs obviously disagreed with, since Plaintiffs did sue BIAW. CP 15 ¶ 52, 55.

conemporaneous documents." BIAW Brief at 26. Yet, the Court need only look to the Defendants' Factual Record – BIAW's only evidentiary submittal – to see that this is a false claim. Every piece of its evidence was created *after* Plaintiffs filed their 45 day notice letter and brought these violations to light. In contrast, Plaintiffs'evidence was created by the BIAW and its affiliates while they still intended to keep their campaign financing scheme secret. *See* Plaintiffs' Opening Brief at 19-20 (discussing BIAW's explicit plan to keep the contributions secret).

**B. Even if BIAW had proven that its subsidiary handled the funds – a contested allegation -- BIAW would still be legally responsible for the contributions.**

Even if the BIAW were allowed to rebut its own tax returns, campaign filings, and contemporaneous documents, and deny that it made campaign contributions, it would still be legally responsible for the political expenditures because it financed and controlled them.

BIAW claims that it cannot be responsible if it did not handle the funds because (1) RCW 42.17.660 is the "sole" statute that Plaintiffs rely upon for BIAW's liability, and (2) that statute only applies to campaign contribution limits. BIAW Brief, at 31. BIAW is wrong on both counts. In addition to RCW 42.17.660(2), BIAW would be responsible for the contributions of its controlled entity under RCW 42.17.670 ("All contributions made by a person or entity, either directly or indirectly, to ...

a political committee, are considered to be contributions from that person or entity to the ... political committee, as are contributions that are in any way earmarked[7] or otherwise directed through an intermediary or conduit to the ... political committee.") *See* Plaintiffs' Opening Brief, at 24.

BIAW is also wrong to assert that RCW 42.17.660(2) only applies "for purposes of campaign contribution limits." BIAW Brief, at 31. Previous reported decisions did address this statute's application to contribution limits, but they do not limit the statute's application to that context. The attribution rules upon which Plaintiffs rely apply "[f]or purposes *of this chapter*." RCW 42.17.660.

*Edelman v. State ex rel Pub. Disclosure Commission*, 152 Wn.2d 584, 590 (2004)[8] never purports to override the statutory directive that the attribution limits apply throughout chapter RCW 42.17. Moreover, *Edelman* was about a totally different provision in RCW 42.17.660(2).

In *Edelman,* the Supreme Court considered whether a PDC rule was inconsistent with the *first sentence* of RCW 42.17.660(2) – not the second sentence upon which Plaintiffs rely here. The Court correctly

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[7] For the purposes of this section, "earmarked" means a designation, instruction, or encumbrance, whether direct or indirect, expressed or implied, or oral or written, that is intended to result in or does result in all or any part of a contribution being made to a certain candidate or state official. RCW 42.17.670.

[8] *State ex rel. Evergeen Freedom Foundation*, 11 Wn.App. 587, 494 n. 3 (2002) gives no support to BIAW. It simply describes, in a footnote, a settlement reached by the PDC and one campaign committee.

described that *first sentence* as specifying the relationship between entities in which the entities are considered a single entity for purposes of campaign contribution limits. Indeed, that sentence begins "Two or more entities are treated as a single entity if ... ."

*Edelman* says nothing about the attribution rule in the second sentence of RCW 42.17.660(2), which is at issue in this case. That sentence provides that "All contributions made by a person ...whose contribution or expenditure activity is financed, maintained, or controlled by a trade association...are considered made by the trade association... ." RCW 42.17.660(2).

Plaintiffs introduced contemporanous evidence proving that BIAW (a trade association) financed and controlled the campaign contributions in question, which would make BIAW legally responsible for these contributions even if they were run through its subsidiary's accounts. *See* Plaintiffs' Opening Brief, at 25-27. Plaintiffs submitted the contract that makes these funds the legal property of BIAW, making BIAW the financier of the contributions. PFR Tab 71 (CP 679 - 680). Plaintiffs also put into evidence BIAW's corporate minutes reflecting its Board of Directors' and Executive Committee's decision to make the contributions. *See* pages 26 through 28 of Opening Brief. This evidence proves that BIAW "controlled" the contributions. Thus, Plaintiffs proved that BIAW

is legally responsible for the contributions, regardless of which entity's accounts were used. BIAW's Answering Brief did not rebut this evidence,

**C. There is a genuine factual issue over whether influencing elections is one of BIAW's primary purposes.**

BIAW also never responds to the six pages of Plaintiffs' brief summarizing the overwhelming evidence that electoral activities – not lobbying – was *the* primary focus of BIAW during this period. Plaintiffs' Opening Brief at 28 to 33. Courts have recognized that this is a fact-intensive analysis, one that cannot be resolved in a contested case on summary judgment. *See EFF, 111 Wn.App. at 598-599.*

**D. The Attorney General did not take action against BIAW.**

Plaintiffs notified the State Attorney General that the ***BIAW*** had violated the Act and that if he did not take action ***against the BIAW,*** Plaintiffs would do so. PFR Tab 1, CP 244. As BIAW admits, "[t]he AG took no action against BIAW,"[9] which left Plaintiffs free to do so.

Instead, the AG took action *against BIAW-MSC* and his Thurston County case focused solely upon the actions of BIAW-MSC; that case never addressed whether or not BIAW itself qualified as a political committee by soliticing and receiving pledges (under "contribution prong"), and by making millions of dollars in political expenditures (under

[9] BIAW Brief, at 1.

"expenditure prong") – the issues in this case. The AG's suit focused narrowly on whether BIAW-MSC became a political committee through its actual receipt of moneys into its account and it subsequent donation of such moneys to ChangePAC.

The AG's action has a minor factual overlap with the "contribution prong" claim in this case, but the legal responsibilities of BIAW and BIAW-MSC under the Act are distinct. Plaintiffs claim that BIAW became a political committee when it had the expectation of making expenditures and when it began *soliciting and receiving pledges* from Local Associations for political activities.

When, much later, the pledges were actually paid, the moneys were apparently eventually transferred into the accounts of BIAW-MSC. The AG's allegation was that BIAW-MSC became a political committee by *receiving these moneys* into its account. This has no impact on whether BIAW itself became a political committee under the Act by its solicitation and receipt of pledges. Moreover, there was not even a factual overlap between the AG's claim about BIAW-MSC's receipt of $487,000 and Plaintiffs' "expenditure prong" claim, which involves over $6 million in political expenditures.

As BIAW acknowledges, the AG did not argue to the trial court that his case against BIAW-MSC precluded Plaintiffs' action against

BIAW. Moreover, when the AG settled his case against BIAW-MSC, the settlement never releases or even references this case or any claims against BIAW. DFR Tab 6 (CP 116 - 120). Obviously the AG did not see the preclusive effect that BIAW claims.

The trial court rightfully rejected this claim preclusion argument the first three times BIAW made it, and it has no more merit now.

### E. The Reporting Requirements at Issue Here Have Been Declared Constitutional and Do Not Impose a Significant Burden.

BIAW argues that the Act's registration and disclosure requirements "must survive 'exacting' judicial scrutiny." It fails to mention, however, that the Ninth Circuit late last year analyzed the Act's political committee registration requirements under this standard and found them to be constitutional, and the U.S. Supreme Court declined to review this well reasoned decision. *Human Life of Washington v. Brumsickle,* 624 F.3d 990, 1008-1014 (9th Cir. 2010), *cert. denied,* 131 S.Ct. 1477; 179 L.Ed.2d 302 (2011).

The Ninth Circuit held "Washington State's political committee disclosure requirements are ... narrowly tailored" and found them to be "not unduly onerous" and "quite modest." 624 F.3d at 1012-1013, 1022. The Court noted that registering for a political committee requires only a two page form. *Id.* at 997. It evaluated all of a political committee's

reporting requirements and deemed them "not unduly onerous" and "quite modest," and concluded that "they survive exacting scrutiny." *Id.* at 1012-13, 1022. It also held that the Act's definition of "political committee" and "expectation" meet constitutional muster. *Id.* at 1019-1020. *Brumsickle* controls here, rendering BIAW's vague constitutional claims without merit. Moreover, *Brumsickle* precludes BIAW's argument that registering as a political committee poses a significant burden, let alone one with constitutional dimensions.

## RESPONSE TO CROSS-APPEAL

### I. SUMMARY OF ARGUMENT.

Defendant BIAW brought a Motion for Attorneys' Fees and Costs ("Motion") under RCW 42.17.400(4)(b) below claiming that two former Justices of the Washington Supreme Court brought this case for improper and harassing motives and without any reasonable legal or factual cause for doing so. The trial court disagreed and found that the award of attorneys' fees was discretionary, not mandatory, and denied the motion. BIAW fails to even cite, let alone attempt to meet, its burden on appeal of establishing that the standard of review (abuse of discretion) has been met: i.e., that the trial court, with full knowledge of the procedural history and factual background in this case, somehow abused its discretion in rejecting

the defendant's motion for fees. In fact, the trial court was well within its discretion to deny the motion.

The trial court rejected the defense argument (made without any evidentiary facts presented in support) that the former Justice had attempted to "to destroy a trade association", Motion p.1 CP 851, had "tried the case in the media," engaged in "improper ex parte proceedings," "tarnished a political opponent on the eve of an election," "pursued harassing discovery," "disregarded findings by the Public Disclosure Commission rejecting plaintiffs' claims," and "failed to present any evidence supporting their claims,' etc. Motion p.1, CP 851. Each of these wild accusations are palpably false.

Defendant's Answering Brief and Cross Appeal ("Brief") at pp.43-44 makes similar scurrilous charges. Defendant now argues that the lawsuit was "harassing" (Brief at p.42) even if not "without legal basis." It states the Justices "knew from the beginning that the PDC and AG had ...rejected [the claim] as lacking merit." *Id.* Not true. Plaintiffs' claims always has had merit, and indeed they led the PDC and AG to bring action against BIAW-MSC, and BIAW-MSC to pay a quarter million dollar fine.

BIAW fails to acknowledge that the PDC investigated the very same "coordination" claim (i.e., that BIAW coordinated fundraising with the Rossi campaign) for over a year, while this case was held in abeyance

awaiting the conclusion of this investigation. Yet BIAW is not claiming that the PDC engaged in "harassment." It claims that Justices Utter and Ireland "unreasonably litigated" their claims (Brief at p.43), but Judge Paris Kallas heard and rejected all of BIAW's principal arguments as to why the case was merely harassing and should be dismissed, and she deemed it sufficiently meritorious to allow a gubernatorial candidate to be deposed in the period leading up to his election.

Having lost these arguments below, BIAW should not now be heard to assert them on appeal as if they were well taken, let alone argue that they are proof that these jurists used this lawsuit to harass BIAW. Finally, BIAW now argues that it is Plaintiffs' counsel who should pay the attorneys fees. Again, the trial court made no finding of ANY impropriety or misconduct by Plaintiffs' counsel. None is shown. BIAW's motion was not brought under CR 11 and there is no authority for an award of fees against counsel in this circumstance and none is cited. Finally, the Court should reject any notion that Plaintiffs violated the defendant's First Amendment rights by filing this lawsuit. Plaintiffs are not state actors. This Court should reject BIAW's attempt to substitute its judgment for the sound discretion of the trial court.

## II. ISSUE ON APPEAL.

1. Did the trial court properly exercise its discretion in denying the Defendant's Motion for Attorneys Fees?

## III. STANDARD ON REVIEW.

A trial court's denial of a motion for attorneys' fees is reviewed on an abuse of discretion standard. *See Curhan v. Chelan County, 156 Wn. App. 30 , 230 P.3d 1083 (2010); Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Id.* (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court may award attorney fees to the prevailing party if the action was frivolous and advanced without reasonable cause. RCW 4.84.185. A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004).

## IV. COUNTER STATEMENT OF THE FACTS AND PROCEDURE: THE LAWSUIT WAS PROPERLY BROUGHT TO VINDICATE CAMPAIGN FINANCE LAWS, NOT TO HARASS DEFENDANT.

The facts justifying this action are spelled out in great detail in the summary judgment opposition papers filed below. See CP 843-844, 211-

237. They are summarized in the factual statement above. The procedural history of this case refutes BIAW's claim that the Plaintiffs' motive was to "harass" it, not to vindicate full disclosure of election financing.

On July 25, 2008, the two retired Justices who are the plaintiffs notified the State Attorney General that they would file a lawsuit against the BIAW for violations of the Act if the State did not do so. See PFR Tab 1 on file. CP 243-251 On September 19, 2008, the Attorney General filed a lawsuit against BIAW-MSC in Thurston County Superior Court, but took no action against BIAW. DFR Tab 5. CP 109-114.

On October 6, 2008, Plaintiffs filed their original complaint in this action, and then filed a First Amended Complaint to narrow the case upon request by the Attorney General. *Lowney Decl.* ¶ 4. CP 239 Plaintiffs immediately obtained an ex parte order permitting immediate depositions. *Id.* Ultimately, Judge Paris Kallas ruled that the ex parte order allowing discovery was *procedurally* improper, but affirmed the decision after providing BIAW and Dino Rossi the opportunity for briefing. *Id.*

In the first weeks of this lawsuit, no less than three motions were filed that argued that Plaintiffs' claims overlapped the claims of the Attorney General in the Thurston County case against BIAW-MSC.[10] On

[10] On October 13th, the BIAW moved for a protective order arguing that Plaintiffs lacked standing in part because "plaintiffs' claims are already encompassed by an action field by

October 27, 2008, Judge Kallas rejected these jurisdictional arguments and allowed Plaintiffs to move forward with discovery before the 2008 election.[11] *Id.* Judge Kallas ruled "Early discovery allows the parties to confirm – or dispel – the allegations before the election. And such prompt investigation furthers the purposes of the Campaign Practices Act, RCW 42.17, which include 'complete disclosure of all information respecting the financing of political campaigns', as well as 'full access to public records so as to assure continuing public confidence of fairness of elections.'"[12] This ruling was correct and has not been appealed from.

The wide reporting of the case and the dissemination of the deposition transcript did serve the public disclosure goals of the Act, as Judge Kallas had anticipated. However, Plaintiffs' goal to obtain evidence for pre-election relief was thwarted by Dino Rossi's claim that he had no recollection of key events, and his testimony on key events was directly contradicted by other witnesses, leaving an insufficient record on which to

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the state against defendants that is currently pending before in Thurston County Superior Court." Defendants' Motion for Protective Order, at 6. CP 1065 Dino Rossi's briefing on his motion to quash the subpoena for his deposition made this identical argument. Rossi Reply RE: Motion to Quash/Motion for Protective Order, p.1-2. On October 20th, BIAW filed a motion to dismiss again raising this argument. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, p.2 ("nearly identical allegations form the basis of a pending Thurston County action by the AG against BIAW's Member Services Corporation". )

[11] Order Granting Plaintiffs' CR30(A) Motion for Expedited Discovery and Denying Motion for Protective Order. CP 1089-1090.

[12] Order Granting Plaintiffs' CR30(A) Motion for Expedited Discovery and Denying Motion for Protective Order. CP 1089-1090.

seek injunctive relief. *Lowney Dec.* ¶ 6 on file. CP 239. It was Dino Rossi who called two press conferences on the day of his deposition; Plaintiffs' counsel merely answered reporters' questions about the deposition. See Withey Declaration. CP 1004-1005. Dino Rossi lost the 2008 election by a wide margin.

As the flurry of pre-election activity in the case ended, the PDC launched its own investigation into the alleged coordination between BIAW and Rossi – identical allegations to an original claim in this action. *Lowney Decl.* ¶ 7.CP 237. BIAW agreed to this informal stay of discovery in this case during the investigation, and several times the parties mutually agreed to move the case back, informing the trial court that "The stipulated continuance is based upon the fact that the Public Disclosure Commission (PDC) of the State of Washington still has an ongoing investigation of the claims filed by these Plaintiffs relating to the BIAW's role in campaign fundraising during the 2008 election". *Id.*[13] Plaintiffs took no action on this claim until BIAW moved for summary judgment, at which time Plaintiffs deferred to the PDC's finding of no improper coordination and did not contest dismissal of that claim. Since the PDC had a reasonable cause to investigate the "coordination" case for over a year, that claim in this suit cannot be deemed "frivolous" even if it

[13] Stipulation and Order of Trial Continuance, Dec. 11, 2009.

was eventually dismissed. There was no wrongful conduct by Plaintiffs or their counsel in their prosecution of this action. No court has entered any such finding. This Court should reject it.

## V. LEGAL ARGUMENT.

### A. The lower court correctly exercised its discretion to deny the motion because under RCW 42.17.400(4)(b) an award of attorneys fees is discretionary and can only be based upon a finding that the lawsuit was brought without reasonable cause.

Only in a case where the court both dismisses the citizen action lawsuit AND makes a finding that it "was brought **without reasonable cause"** the court "**may** order the person commencing the action to pay all costs of trial and reasonable attorneys' fees incurred by the defendant." (emphasis added). RCW 42.17.400(4)(b). Clearly a dismissal of the case alone does not mean there was not reasonable cause for bringing it. There was no basis for the trial court to find that former Justices Utter and Ireland, who both carefully considered the extensive evidence of the BIAW's political campaign fundraising operation, as well as the Act's requirements, acted without reasonable cause. See Withey Declaration. CP 1004. The only factual grounds cited by Defendant below are that (1) both made campaign contributions to Christine Gregoire for governor (Motion, fn 4 at p.4 CP 854) , (2) both made statements that their reasons for bringing the action included their concern to enforce the Act against

BIAW in part because of its pending in judicial races. See Maguire Decl, Exh. D CP 896.

Plaintiffs' concern about BIAW's attack on a State Supreme Court Chief Justice and its impact on the judicial system has nothing to do with whether they had reasonable cause to bring this case or whether it was frivolous. BIAW's argument otherwise was and is nonsense. The motives of the plaintiffs is not the legal test of what constitutes "without reasonable cause" in the Act.

BIAW cites *State of Washington ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn.App. 586, 49 P.3d 894 (2002) to support its contentions that demonstrating a lack of reasonable cause is "not difficult" (Brief at p.42). However, *E.F.F.* does not set the standard or necessary elements required to constitute a claim "without reasonable cause" under RCW 42.17.400(4)(b).

According to *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911(1974), the purpose of RCW 42.17.400(4) for attorney's fees in a citizen's lawsuit is "to prevent frivolous and harassing lawsuits." *E.F.F.*, 111 Wn.App. at 615. "Frivolous" lawsuits and actions "without reasonable cause" have been defined by courts as those that "cannot be supported by any rational argument on the law or the facts." *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn.App. 690, 696-97, 723

P.2d 483 (1986). Allegations that, upon careful examination, prove legally insufficient are not, for that reason alone, frivolous." *Id.* Thus, contrary to Defendant's assertion that it "has been subject to a harassing suit," it is clear that Plaintiffs' claims are not frivolous, i.e., brought without reasonable cause. The evidence upon which this case is based is set forth above and in Plaintiffs' opposition to summary judgment proceedings on file CP 211-237. Plaintiffs' claims are rationally supported by facts and argument, regardless whether they are dismissed. *Bill of Rights Legal Foundation*, 44 Wn.App. at 697.

Furthermore, the purpose of Chapter 42.17.400 is to avoid secrecy in political campaigns and lobbying contributions and expenditures by ensuring that such information is disclosed to the public. Specifically, "that the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." RCW 42.17.400(10). The chapter must be "liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and

so as to assure that the public interest will be fully protected." RCW 42.17.400.

For this Court to hold that the trial court abused its discretion and should have found that the Plaintiffs' action was brought without reasonable cause would be contrary to the policy of the Act and to public interest, and would undoubtedly chill future litigation that promotes the provisions of RCW Chapter 42.17.

Finally, even if the Court dismissed Plaintiffs' claims agianst BIAW, it is unquestionable that the need for the enforcement actions – both that of the AG and Plaintiffs – resulted from the BIAW and BIAW-MSC's efforts to build a war chest without disclosing its existence. BIAW's contemporaneous documents prove this effort at secrecy. It is therefore in no position to complain about the burden of defending its actions.

**B. There has been no violation of Defendant's First Amendment rights.**

The goal of the Justices' lawsuit was not to "chill speech" they disagreed with, as BIAW now complains (Brief at p.44). The goal was to enforce transparency in campaign finance dealings as the law requires. Only an award of $500,000 in fees against Plaintiffs would chill speech and would undermine citizen enforcement of campaign finance laws.

BIAW cites various case authorities for the proposition that the First Amendment prohibits the State from silencing speech it disapproves of. Brief at pp.46-47. None come close to holding that the award of attorneys fees is necessary to vindicate constitutional rights, particularly where neither Plaintiffs nor their counsel are "state actors" subject to such provision.

**C. No award of fees against the state is justified.**

BIAW argues for an award of attorneys fees and costs under RCW 421.17.400(5). However, that provision only allows, under circumstances not present here, an award against the State, not Plaintiffs acting as private attorneys general. The State was never even given notice of the Defendant's Motion for Attorneys' Fees let alone an opportunity to appear and contest such award. The stated basis for an award of fees is that the State did not intervene to bring a halt to the lawsuit. Defendant cites no authority for this farfetched view. It is rank speculation for BIAW to suggest that Judge Kallas would have dismissed this case had the State had tried to intervene. The public policy in favor of the full, free and transparent disclosure of campaign finance dealings would be forever thwarted were a Court to assess close to one half million dollars in fees and costs in a case such as this. For all of these reasons the Motion was properly denied. No abuse of discretion is shown.

**D. Plaintiffs did contest the amount of the fee requested.**

Contrary to BIAW's assertion on appeal, Plaintiffs did contest the exorbitant amount of the fee requested. They argued below: "Finally, given the fact that this case has seen only two discovery motions, one summary judgment motions, one principal deposition and a few other discovery matters, the defendant's assertion that close to a half of million dollars in fees is 'reasonable' failed the smell test." See Plaintiffs' Opposition to Defendants' Motion for Costs and Fees. CP 1002.

## CONCLUSION

The trial court erred in granting summary judgment to BIAW and dismissing the political committee claim with prejudice, and such ruling should be reversed on appeal. Given the lack of admissible defense evidence, summary judgment should be granted to Plaintiffs on appeal.

The trial court did not err in denying Defendants' motion for attorneys fees, and the Court should affirm that ruling. The trial court fairly and dispassionately examined the procedural history and the factual evidence before it and found, in its discretion, that an award of attorneys' fees was not justified.

Plaintiffs request to be granted attorneys fees at trial and on appeal pursuant to RCW 42.17.400.

Respectfully submitted this 4th day of May, 2011

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**DECLARATION OF SERVICE**

I, Lonnie Lopez, hereby declare that on I caused/will cause this document to be delivered on the respondent in this matter as follows:

1) By email and U.S. Mail on May 4, 2011.

Stated under oath this 4th day of May, 2011, in Seattle Washington.

Lonnie Lopez