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Court of Appeals No. 36165-5-II

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IN THE WASHINGTON COURT OF APPEALS  
DIVISION TWO

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WHITE CORAL CORPORATION,  
a British Virgin Islands Corporation,

Appellants,

v.

GEYSER GIANT CLAM FARMS LLC, a Washington limited liability company; SEATTLE SHELLFISH, LLC, a Washington Limited Liability Company; JAMES L. GIBBONS, individually and the marital community comprised thereof; and TED L. EDWARDS, Jr., individually and the marital community comprised thereof,

Respondents.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

White Coral Corporation (“White Coral”) replies to Seattle Shellfish LLC (“Seattle Shellfish”) and James L. Gibbon’s (“Gibbons”) Response Brief as follows.

## II. ARGUMENT

### A. DEPOSITING THE MINIMUM SECURITY UNDER RCW 4.84.210 WAS NOT REQUIRED

At pages 20-21 of their response brief, Seattle Shellfish and Mr. Gibbon claim that White Coral should have posted the minimum bond of \$200 under RCW 4.84.210 and because it didn’t, the appeal should be dismissed. Frankly, Seattle Shellfish and Mr. Gibbon are arguing that White Coral should have disobeyed a court order in order to meet a minimum bond requirement under RCW 4.84.210.

Such action by White Coral, *i.e.*, depositing the statutory bond amount with the Clerk without an order of the trial court would have subjected White Coral to a motion for contempt under RCW 7.21.010 *et seq.* as depositing such a sum could have been construed as a deliberate defiance of a court order. While White Coral contends in this appeal that the order requiring a \$125,000 deposit was incorrect, it still must be obeyed until it is changed by the trial court or reversed by an appellate court.

‘(W)here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt.’

(Citations omitted.) *Mead Sch. Dist. 354 v. Mead Educ. Ass’n*, 85 Wn.2d 278, 280, 534 P.2d 561 (1975). To suggest that White Coral’s deposit of the statutory bond of \$200 would have had any impact on this matter is simply incorrect.

Moreover, the statute requires that the bond be placed with the court in its registry. RCW 4.84.210. RCW 4.44.480, RCW 4.44.490 and RCW 4.44.500 require that a court order be issued before monies can be placed into the court registry. Without a court order allowing a deposit of the statutory amount into court’s registry, White Coral simply had no ability or authorization to do so.

**B. READING “COSTS” SNYNOMOUSLY WITH  
“CHARGES” DOES NOT RENDER EITHER TERM  
SUPERFLUOUS**

At Page 23, Seattle Shellfish and Mr. Gibbons argue that the terms “costs” and “charges” should be given different meanings making a citation to the general rule that words are to be given different meanings in statutory construction citing *Judd v. American Telephone & Telegraph Co.*, 152 Wn.2d 195, 202-03, 95 P.3d 337 (2004). Rather, the correct rule of statutory construction, as stated in *Judd*: “[s]tatutes must be interpreted and construed

so that *all* the language used is given effect, with no portion rendered meaningless or superfluous.” *Id.* at 202. Treating costs and charges as synonyms does not render either term superfluous as argued in Appellant’s Brief *passim*.

**C. SECURITY FOR JUDGMENT FOR THE FEES ON CHANGE OF VENUE WAS MASSIVELY INFLATED**

Seattle Shellfish and Mr. Gibbon also claim that security for the judgment on the fees for the change of venue should be deposited with the Court. Response, p. 24. That amount is \$4,002.75, some \$120,997.25 less than the bond of \$125,000. *Compare* CP 10-11 with CP 412-414. The ordered security is 31.25 times more than the judgment amount and is therefore is patently unreasonable. The trial court abused its discretion.

**D. INDEMNIFICATION IS NOT EQUIVALENT TO AN AWARD OF ATTORNEYS FEES**

Geysler also claims that indemnification constitutes a charge under the Statute at pages 25-27 of its response. As the LLC Agreement does not specifically provide for an award of attorneys fees and costs nor is there an obligation by White Coral to indemnify any party to this litigation, there is no basis for fees. Appellant’s Brief, pp. 32-36.

Seattle Shellfish and Mr. Gibbon further contend that it must look to White Coral's distributive share to pay for any indemnification of the individual members. It further contends that White Coral took distributions from Geysler when it knew that it would be bringing a claim against Seattle Shellfish and Mr. Gibbon and thus acted improperly citing RCW 25.15.235(1) and (2)<sup>1</sup>. Seattle Shellfish and Mr. Gibbon appear to claim that its present counsel's bills incurred in this action constitute a debt at the time that any prior distribution was made to White Coral. There is no evidence in the record to support such an argument.

There is no evidence in the record that White Coral took any distributions when Geysler was unable to pay its debts at the time the distribution was made as described by RCW 25.15.235(1).

Rather, the LLC Agreement specifically provides:

7.7 Limitation Upon Distributions. No distribution shall be declared and paid unless, after the distribution is made, the assets of the Company are in excess of all liabilities of the Company, except liabilities to Members on account of their liabilities.

CP 135-136. Thus, any distribution to White Coral was necessarily made with the agreement that assets of Geysler exceeded its

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<sup>1</sup> This issue was not raised at the trial court and is therefore not properly before this court. CP 338-346; 400-406. RAP 2.5(a).

liabilities as to make a distribution with such a state of affairs would have violated the LLC Agreement.

Moreover, Subsection 3 of the statute states:

Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said three-year period and an adjudication of liability against such member is made in the said action.

RCW 25.15.235(3). Here, there is no evidence in the record that Geyser initiated any action (or adjudicated liability on the point) within three years of any distribution to White Coral to recover the distribution. In fact, neither Geyser, Seattle Shellfish nor the individual defendants have asserted such a counterclaim in this action. CP 292-293. Thus, the argument fails as a matter of law.

Further, the LLC Agreement provides that members are not responsible for the debts of Geyser.

5.2 Limitation of Liability and Indemnification.  
Each Member's liability shall be limited, and each Member shall be indemnified by the Company, as set forth in the Agreement and to the fullest extent under the Washington Act and other applicable law. No Member will be personally liable for any debts or losses of the Company beyond his, her or its respective Capital Contributions or as otherwise required by law. A Member who receives any

distribution is liable to the Company only to the extent now or hereafter provided by the Washington Act.

CP 126. The LLC Agreement further states:

6.2 Additional Contributions. No Member shall be required to make any Capital Contributions other than its share of the Initial Capital Contribution. ...

CP 129. As a matter of law, there is no obligation to pay for attorneys fees.

#### **E. ANY CLAIM OF FRIVOLITY IS PREMATURE**

Again, Seattle Shellfish and Mr. Gibbons claim that White Coral's suit is not only frivolous under RCW 4.84.185 but also a violation of CR 11<sup>2</sup> and thus, the bond is proper. Response, pp. 27-29. However, there is no finding or order of any kind by the trial court that the claims raised by White Coral violate RCW 4.84.185 or CR 11. Seattle Shellfish and Mr. Gibbon's also claim that the unruléd upon motion for summary judgment constitutes a basis for the bond.

These theories are not properly before this Court. RAP 2.4(a); *Merese v. Stelma*, 100 Wn. App. 857, 867, 999 P.2d 1267 (2000) ("An appellate court will generally not review a matter on

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<sup>2</sup> Seattle Shellfish and Mr. Gibbons did not raise a CR 11 issue below and thus it is not properly before this court. RAP 2.5(a).

which the trial court did not rule.”). There is no court order from the trial court upon which this court may decide whether or not White Coral’s claims are frivolous or violate CR 11. Further, there is no decision on the pending motion for summary judgment.

To impose a bond under RCW 4.84.210, based on unruled motions and alleged issues in a case is improper. Both RCW 4.84.185 and CR 11 require specific findings which do not exist here. To impose a bond based on these claims, without a court order, during the beginning of a case is improper. As Seattle Shellfish and Mr. Gibbons did not obtain a court order on any claim of frivolity or CR 11 violation or an unruled upon summary judgment motion is simply improper.

Further, by this action, White Coral sought production of Geyser’s books and records which it is entitled to have as a matter of law, not only under the LLC Agreement but also by statute. CP 317; CP 126, ¶5.5; CP 136, ¶5.5; RCW 25.15.135. As such, the action is not frivolous. *State ex. Rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 909, 969 P.2d 64 (1998) (action is considered as a whole) (action is considered as a whole); *Timson v. Pierce County*, 136 Wn. App. 376, 432, 149 P.2d 427 (2006) (if an action can be supported by any rational argument, then it is not frivolous).

Further, all doubts as to frivolity are resolved in favor of White Coral. *Verharen*, at 909. The case is not frivolous.

As for the CR 11 accusation, prompt notice of possible violations is the basis for imposing sanctions is required. *Biggs v. Vail*, 124 Wn.2d 193,197, 76 P.2d 448, 451 (1994).

[W]without prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper. . . . Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses. . . . Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. ***Without such notice, CR 11 sanctions are unwarranted.*** (Internal citations omitted). [Emphasis added.]

*Biggs*, at 198. Here, there is no such communication. Thus, the claim fails as a matter of law.

**F. REQUIRING A \$125,000 PAYMENT AS A CONDITION TO MAINTAINING AN ACTION IS AN ACCESS TO JUSTICE ISSUE**

At page 28, Seattle Shellfish and Mr. Gibbons argue that the Court should assume that White Coral has the ability to pay the bond and that it has failed to show prejudice thus, apparently, arguing for a different standard of review. This is a new argument not raised below and, frankly, should not be considered by the trial court. RAP 2.5(a).

Seattle Shellfish and Mr. Gibbon fail to cite any legal authority that a litigant must show prejudice under RCW 4.84.210 as the applicable standard of review. Rather, the standard of review of the construction of a statute is the *de novo* as stated in Appellant's Brief, at Pages 9-13. Prejudice to a party is not involved in a court's interpretation of a statute as to apply such a standard is to change the interpretation of statutory language by case by case basis as opposed to providing a consistent interpretation of the statute for application to all litigants. See *State v. Ashby*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2007 WL 3171815, ¶15 (Div. 2 Docket No. 34185-9-II, Oct. 30, 2007) ("The purpose of statutory construction is to give content and force to the language used by the Legislature."). Prejudice to White Coral is not the standard here under RCW 4.84.210, rather the appropriate standard is whether the court properly construed the statute which is subject to *de novo* review.

Seattle Shellfish and Mr. Gibbon further fail to cite to any authority that a court must assume a party has an ability to pay an increased bond or cash deposit under RCW 4.84.210. Frankly, assuming an ability to pay any kind of bond imposes a financial requirement on litigants as a condition to initiating an action in the

Washington courts. The imposition of such a requirement is a violation of the privileges and immunities clause of the Washington Constitution, either under Article One, Section 8 or 12, as those who are better off will necessarily have more access to the courts than those who are not.

#### VI. CONCLUSION

Again, the trial court should be reversed, a bond or cash equivalent of \$200 should be imposed upon White Coral pursuant to RCW 4.84.210, and its claims should be reinstated.

Dated this 3<sup>rd</sup> day of December, 2007.

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