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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM
CLALLAM COUNTY SHERIFF BILL BENEDICT;
CLALLAM COUNTY SHERIFF'S DEPARTMENT; AND
CLALLAM COUNTY

Appellants,

v.

REAL PROPERTY KNOWN AS
(1) JUNCTION CITY LOTS 1 - 12 INCLUSIVE, BLOCK 35;
(2) LOT 2 OF THE NELSON SHORT PLAT LOCATED IN
JEFFERSON COUNTY; AND
ALL APPURTANCES AND IMPROVEMENTS THEREON, OR
PROCEEDS THERE FROM

Respondents *in rem*,

STEVEN L. FAGER;
DBVWC, INC.; AND
LUCILLE M BROWN LIVING TRUST
Interested Parties.

ON APPEAL FROM
THE SUPERIOR COURT OF WASHINGTON
FOR JEFFERSON COUNTY
No. 09-2-00413-6

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. ARGUMENT	1
A. This Court Should Decline To Rewrite Unambiguous Statutory Language Under the Guise of Interpretation	1
B. The Fagers’ Interpretation of RCW 69.50.505(6) Cannot Be Harmonized with the Plain Language of the Statute	1
C. Proceedings To Forfeit Property Are Civil, Not Criminal, in Nature	7
D. This Court Should Resist the Temptation To Rewrite an Unambiguous Statute To Suit the Fagers’ Notions of What Is Good Public Policy	12
E. This Court May Not Create Legislation Under the Guise of Interpreting a Statute	13
F. Timothy Fager Was Not, Is Not, and Cannot Be a Claimant Under RCW 69.50.505	16
G. The Fagers Are Not Entitled to Their Attorney Fees on Appeal	24
II. CONCLUSION	24

TABLE OF AUTHORITIES

	Page
 <u>FEDERAL CASES</u>	
<i>Helvering v. Mitchell</i> , 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938).....	9
<i>United States v. Certain Real Property</i> , <i>Located at 317 Nick Fitchard Road, N.W., Huntsville, AL</i> , 579 F.3d 1315 (11th Cir. 2009), <i>cert. denied</i> , 560 U.S. 927, 130 S. Ct. 3350, 176 L. Ed. 2d 1224 (2010).....	7, 11, 21
<i>United States v. One Assortment of 89 Firearms</i> , 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984).....	8, 9
<i>United States v. Ursery</i> , 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996).....	8, 9
 <u>WASHINGTON CASES</u>	
<i>Allan v. Dep't of Labor & Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	6
<i>Apostolic Faith Mission of Portland, Or.</i> <i>v. Christian Evangelical Church</i> , 55 Wn.2d 364, 347 P.2d 1059 (1960).....	21
<i>Associated Gen. Contractors v. King County</i> , 124 Wn.2d 855, 881 P.2d 996 (1994).....	16
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	23
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	3
<i>Burke v. Hill</i> , 190 Wn. App. 897, 361 P.3d 195 (2015).....	1

<i>California v. Tax Comm'n of State,</i> 55 Wn.2d 155, 346 P.2d 1006 (1959).....	20, 21
<i>Cerrillo v. Esparza,</i> 158 Wn.2d 194, 142 P.3d 155 (2006).....	1
<i>Christensen v. Skagit County,</i> 66 Wn.2d 95, 401 P.2d 335 (1965).....	20, 21, 22
<i>City of Spokane v. Spokane County,</i> 158 Wn.2d 661, 146 P.3d 893 (2006).....	3
<i>Collins v. Clark County Fire Dist. No. 5,</i> 155 Wn. App. 48, 231 P.3d 1211 (2010).....	18
<i>Courtright v. Sahlberg Equip., Inc.,</i> 88 Wn.2d 541, 563 P.2d 1257 (1977).....	6, 7
<i>Davis v. State ex rel. Dep't of Licensing,</i> 137 Wn.2d 957, 977 P.2d 554 (1999).....	15
<i>DeLong v. Parmelee,</i> 157 Wn. App. 119, 236 P.3d 936 (2010).....	6
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.,</i> 146 Wn.2d 1, 43 P.3d 4 (2002).....	3
<i>Elliott v. Dep't of Labor & Indus.,</i> 151 Wn. App. 442, 213 P.3d 44 (2009).....	5, 6
<i>Espinoza v. City of Everett,</i> 87 Wn. App. 857, 943 P.2d 387 (1997), <i>review denied,</i> 134 Wn.2d 1016 (1998).....	17, 18
<i>Falk v. Keene Corp.,</i> 113 Wn.2d 645, 782 P.2d 974 (1989).....	23
<i>Ford Motor Co. v. City of Seattle,</i> 160 Wn.2d 32, 156 P.3d 185 (2007).....	3

<i>Geschwind v. Flanagan</i> , 121 Wn.2d 833, 854 P.2d 1061 (1993).....	13
<i>Gorman v. Pierce County</i> , 176 Wn. App. 63, 307 P.3d 795 (2013).....	10
<i>Grayson v. Nordic Co., Inc.</i> , 92 Wn.2d 548, 599 P.2d 1271 (1979).....	20
<i>Griffin v. Thurston County Bd. of Health</i> 165 Wn.2d 50, 196 P.3d 141 (2008).....	3
<i>Guillen v. Contreras</i> , 169 Wn.2d 769, 238 P.3d 1168 (2010).....	1, 5
<i>Herzog Aluminum, Inc. v. Gen. Am. Window Corp.</i> , 39 Wn. App. 188, 692 P.2d 867 (1984).....	11, 12
<i>Johnson v. Dep't of Labor & Indus.</i> , 33 Wn.2d 399, 205 P.2d 896 (1949).....	6
<i>Key Bank of Puget Sound v. City of Everett</i> , 67 Wn. App. 914, 841 P.2d 800 (1992), <i>review denied</i> , 121 Wn.2d 1025 (1993).....	20, 22
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	16
<i>King County v. City of Seattle</i> , 70 Wn.2d 968, 425 P.2d 887 (1967).....	2
<i>Klossner v. San Juan County</i> , 93 Wn.2d 42, 605 P.2d 330 (1980).....	2
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010).....	3, 5
<i>In re Linderman</i> , 20 B.R. 826 (W.D. Wash. 1982).....	20, 21

<i>Lowry v. Dep't of Labor & Indus.</i> , 21 Wn.2d 538, 151 P.2d 822 (1944).....	2, 6
<i>Multicare Med. Ctr. v. Dep't of Social & Health Servs.</i> , 114 Wn.2d 572, 70 P.2d 124 (1990).....	3
<i>Nave v. City of Seattle</i> 68 Wn.2d 721, 415 P.2d 93 (1966).....	15
<i>Northwest Cascade, Inv. v. Unique Constr.</i> , 187 Wn. App. 685, 351 P.3d 172 (2015).....	20, 21
<i>Panorama Vill. Condo. Owners Ass'n Bd. v. Allstate Ins. Co.</i> , 144 Wn.2d 130, 26 P.3d 910 (2001).....	11, 12
<i>Planned Parenthood of Great Northwest v. Bloedow</i> , 187 Wn. App. 606, 350 P.3d 660 (2015).....	3
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	16
<i>Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.</i> , 185 Wn. App. 959, 344 P.3d 705 (2015).....	5, 6
<i>Raum v. City of Bellevue</i> , 171 Wn. App. 124, 286 P.3d 695 (2012), <i>review denied</i> , 176 Wn.2d 1024 (2013).....	7
<i>Rest. Dev., Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003).....	1
<i>Roberts v. Dudley</i> , 140 Wn.2d 58, 993 P.2d 901 (2000).....	13
<i>Sedlacek v. Hillis</i> , 145 Wn.2d 379, 36 P.3d 1014 (2001).....	7, 12, 13
<i>Shum v. Dep't of Labor & Indus.</i> , 63 Wn. App. 405, 819 P.2d 399 (1991).....	3

<i>Snohomish Reg'l Drug Task Force</i> <i>v. Real Prop. Known as 20803 Poplar Way,</i> 150 Wn. App. 387, 208 P.3d 1189 (2009).....	5
<i>State v. Catlett,</i> 133 Wn.2d 355, 945 P.2d 700 (1997).....	8, 9, 10, 11, 15, 16
<i>State v. Jackson,</i> 137 Wn.2d 712, 976 P.2d 1229 (1999).....	7
<i>State v. Keller,</i> 143 Wn.2d 267, 19 P.3d 1030 (2001).....	4, 5
<i>State v. Lynch,</i> 84 Wn. App. 467, 929 P.2d 460 (1996).....	10
<i>State v. Miller,</i> 72 Wn. 154, 129 P. 100 (1913).....	6
<i>State v. Moen,</i> 110 Wn. App. 125, 38 P.3d 1049 (2002), <i>aff'd</i> , 150 Wn.2d 221, 76 P.3d 721 (2003)	10
<i>W. Telepage, Inc. v. City of Tacoma,</i> 140 Wn.2d 599, 998 P.2d 884 (2000).....	3, 5
<i>Walter Implement, Inc. v. Focht,</i> 107 Wn.2d 553, 730 P.2d 1340 (1987).....	17
<i>Xieng v. Peoples Nat'l Bank of Wash.,</i> 63 Wn. App. 572, 821 P.2d 520 (1991), <i>aff'd</i> , 120 Wn.2d 512, 844 P.2d 389 (1993)	24

COURT RULES

RAP 18.1(a) 24
Rules of Appellate Procedure (RAP) 2.5(a) 23

STATUTES

RCW 9A.16.110..... 15
RCW 10.46.210 15
RCW 69.50.505 9, 10, 16, 18, 20, 21, 22, 23, 24
RCW 69.50.505(3)..... 17
RCW 69.50.505(5)..... 17, 19, 20
RCW 69.50.505(6)..... 1, 2, 4, 5, 6, 7, 10, 11, 12, 14, 15, 16, 17, 23, 24
Title 69 RCW 2

OTHER AUTHORITIES

Final Legislative Report,
2SHB 1793 (1989) at 119 10
WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE,
25 David K. DeWolf, Keller W. Allen, Darlene Barrier Caruso,
§ 14:16 (3d ed.) 12

I. ARGUMENT

A. THIS COURT SHOULD DECLINE TO REWRITE UNAMBIGUOUS STATUTORY LANGUAGE UNDER THE GUISE OF INTERPRETATION

In seeking to justify the trial court's erroneous award of attorney fees under Revised Code of Washington (RCW) 69.50.505(6), Steven and Timothy Fager ("the Fagers") deliberately circumvent the rules of statutory construction. They ignore the plain meaning of this statute, and they attempt to add language to this statute in the guise of interpretation. This Court should decline to rewrite unambiguous statutory language under the guise of interpretation. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). This Court "must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). Instead, this Court should assume that the legislature meant exactly what it said. *Burke v. Hill*, 190 Wn. App. 897, 913, 361 P.3d 195 (2015).

B. THE FAGERS' INTERPRETATION OF RCW 69.50.505(6) CANNOT BE HARMONIZED WITH THE PLAIN LANGUAGE OF THE STATUTE

Here, RCW 69.50.505(6), in relevant part, simply states, "In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorney's fees reasonably incurred by the claimant." Relying on *Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010), the Fagers argue that this Court should liberally construe RCW 69.60.505(6). (Br. of Resp't at 16-19). Based on a liberal construction of RCW 69.60.505(6), the Fagers argue

that they are entitled to more than just attorney fees incurred in the proceeding to forfeit property under title 69 RCW. (Br. of Resp't at 20, 33). In fact, the Fagers argue that, under RCW 69.60.505(6), they also are entitled to attorney fees incurred in the criminal proceedings because these legal services were "inextricable" with, and "frequently supported," the legal services in the proceeding to forfeit property under title 69 RCW. (Br. of Resp't at 33).

The Fagers' interpretation of RCW 69.50.505(6) would seem to substitute "any *criminal proceeding and related* proceeding to forfeit property under this title" for "any proceeding to forfeit property under this title" in the statute. Thus, were this Court to agree with the Fagers, RCW 69.50.505(6) then would state, "In any *criminal proceeding and related* proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorney's fees reasonably incurred by the claimant." (Emphasis added).

But liberal construction of a statute does not mean that this Court may read into the statute language that is not there. *See Klossner v. San Juan County*, 93 Wn.2d 42, 47, 605 P.2d 330 (1980); *King County v. City of Seattle*, 70 Wn.2d 968, 991, 425 P.2d 887 (1967); *Lowry v. Dep't of Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) ("We are not unmindful of the rule that the workmen's compensation act shall be liberally construed in favor of its beneficiaries, but, where the language of the act is not ambiguous and exhibits a clear and reasonable meaning,

there is no room for construction.”); *Shum v. Dep’t of Labor & Indus.*, 63 Wn. App. 405, 409, 819 P.2d 399 (1991).

The Fagers conveniently forget that statutory interpretation begins with the plain meaning of the statute. *Planned Parenthood of Great Northwest v. Bloodow*, 187 Wn. App. 606, 621, 350 P.3d 660 (2015). “When the meaning of the statute is plain on its face, the court must give effect to that plain meaning as the expression of the legislature’s intent.” *Planned Parenthood*, 187 Wn. App. at 621 (citing *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006)).

Thus, this Court first looks to the text of a statute to determine its meaning. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). If a statute is clear on its face, its plain meaning should be derived from the language of the statute (and related statutes), not outside sources. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007); *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002); *Multicare Med. Ctr. v. Dep’t of Social & Health Servs.*, 114 Wn.2d 572, 582, 70 P.2d 124 (1990). If the plain language is subject to only one interpretation, then this Court’s inquiry is at an end. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d

599, 608, 998 P.2d 884 (2000) (“Moreover, we do not construe unambiguous statutes.”).¹

Here, the Fagers’ interpretation of RCW 69.50.505(6) cannot be harmonized with the plain language of the statute.² On its face, RCW 69.50.505(6) does not include, or even refer to, any of the following phrases that would support the Fagers’ strained interpretation:

- “in any criminal proceeding under this title”;
- “in any criminal proceeding and related proceeding to forfeit property under this title”;
- “in any proceeding that is inextricably associated with a proceeding to forfeit property under this title”;
- “in any proceeding to forfeit property and accompanying criminal proceeding under this title;” or
- “in any proceeding to forfeit property and accompanying proceeding under this title.”

Rather, the plain language of RCW 69.50.505(6) precisely delineates the type of proceeding in which a claimant may be entitled to

¹ A statute is not ambiguous simply because different interpretations are conceivable. *Keller*, 143 Wn.2d at 276. And this Court is not obliged to discern an ambiguity by imaging a variety of alternative interpretations. *Keller*, 143 Wn.2d at 276-77.

² In fact, under their interpretation of the statute, the Fagers argue that “the court is required to evaluate legal work and determine whether it was *reasonably related* to the forfeiture proceeding.” (Br. of Resp’t at 35). The plain and unambiguous language of RCW 69.50.505(6) states no such requirement.

attorney fees with the phrase “[i]n any proceeding to forfeit property under this title.”

This phrase cannot be reasonably interpreted to mean anything but what it says. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). “Plain words do not require construction.” *Keller*, 143 Wn.2d at 276.³ Therefore, this Court should assume that the Legislature meant exactly what it said, *Keller*, 143 Wn.2d at 277, and this Court’s inquiry should be at an end. *See Lake*, 169 Wn.2d at 526; *W. Telepage, Inc.*, 140 Wn.2d at 608.

Of course, the Fagers argue that this Court should ignore what the Legislature unambiguously said in RCW 69.50.505(6) and side with them because RCW 69.50.505(6) should be “read liberally,” *Guillen*, 169 Wn.2d at 777, and “forfeitures are not favored,” *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 392, 208 P.3d 1189 (2009). (Br. of Resp’t at 16). In other words, the Fagers argue that this Court should agree with them as a matter of public policy.

“But it is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.” *Elliott v. Dep’t of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44

³ Furthermore, this Court “‘must not add words where the legislature has chosen not to include them,’” and this Court must “‘construe statutes such that all of the language is given effect.’” *Lake*, 169 Wn.2d at 526 (quoting *Rest Dev., Inc.*, 150 Wn.2d at 682).

(2009) (quoting *Johnson v. Dep't of Labor & Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949)); see also *Lowry*, 21 Wn.2d at 542. “It is a well-settled rule that ‘so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.’” *DeLong v. Parmelee*, 157 Wn. App. 119, 146, 236 P.3d 936 (2010) (quoting *State v. Miller*, 72 Wn. 154, 158, 129 P. 100 (1913)).

Here, the statutory language of RCW 69.50.505(6) unambiguously provides that a claimant may be entitled to attorney fees “[i]n any proceeding to forfeit property under this title.” The unambiguous statutory language of RCW 69.50.505(6) does not create a separate entitlement for attorney fees in any other proceeding – whether related or unrelated, civil or criminal. While the Fagers question the public policy of such a distinction, (Br. of Resp’t at 19), this Court cannot, under the guise of construction, substitute its view, the trial court’s view, or the Fagers’ view for that of the Legislature. *Courtright v. Sahlberg Equip., Inc.*, 88 Wn.2d 541, 545, 563 P.2d 1257 (1977); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 421, 832 P.2d 489 (1992).⁴

⁴ As this Court recently stated, “We do not rewrite unambiguous statutory language under the guise of interpretation.... And we do not add language to an unambiguous statute even if we believe the legislature ‘intended something else but did not adequately express it.’” *Protect the Peninsula’s Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 970, 344 P.3d 705 (2015) (citations omitted).

After all, this Court is “not a super legislature.” *Courtright*, 88 Wn.2d at 545. “This Court should resist the temptation to rewrite an unambiguous statute to suit [its] notions of what is good public policy, recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function.’” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (quotations and citations omitted)).⁵ Departure from the unambiguous statutory language of RCW 69.50.505(6) is improper. *See Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024 (2013).

C. PROCEEDINGS TO FORFEIT PROPERTY ARE CIVIL, NOT CRIMINAL, IN NATURE

In questioning Clallam County’s reliance on *United States v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL*, 579 F.3d 1315, 1319, (11th Cir. 2009), *cert. denied*, 560 U.S. 927, 130 S. Ct. 3350, 176 L. Ed. 2d 1224 (2010), (Br. of Appellants at 16-21), the Fagers argue that “the Washington statute is more broadly written” than the federal civil forfeiture statute. (Br. of Resp’t at 29). Therefore, the Fagers argue that “any proceeding to forfeit property,” *see* RCW 69.50.505(6), should include not only civil forfeiture proceedings

⁵ “An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature.” *Sedlacek*, 145 Wn.2d at 390.

but also criminal proceedings that are “related to the pending forfeiture matter.” (Br. of Resp’t at 28-30).

This argument must fail, as it ignores holdings from both the United States Supreme Court and the Washington State Supreme Court that proceedings to forfeit property are not criminal in nature, but rather civil in nature. *See United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996); *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997).

In *Ursery*, the United States Supreme Court held that civil forfeitures are neither criminal proceedings nor “punishment” for double jeopardy purposes. *Ursery*, 518 U.S. at 292. In support of its holding, the United States Supreme Court noted, “Congress specifically structured these forfeitures to be impersonal by targeting the property itself.” *Ursery*, 518 U.S. at 289. “In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object.” *Ursery*, 518 U.S. at 289 (quotations and citations omitted). Among other things, the United States Supreme Court noted that “other procedural mechanisms governing forfeitures,” such as the burden of proof resting with the claimant, indicated that Congress intended such proceedings to be civil, not criminal, in nature. *Ursery*, 518 U.S. at 289; *see also United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984).

The United States Supreme Court also explained that civil forfeitures are not punishment for several reasons: (1) *in rem* forfeitures have not historically been viewed as punitive; (2) the statutes in issue lack a scienter requirement, so they are not designed to punish any person for a criminal act; (3) the deterrent purpose of the statutes applies in both civil and criminal contexts; and (4) a statute's mere "connection to a criminal violation" does not prove that the proceedings are criminal in nature. *Ursery*, 518 U.S. at 291-92 ("By itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal."); *see* 89 *Firearms*, 465 U.S. at 365-66; *see also Helvering v. Mitchell*, 303 U.S. 391, 399, 58 S. Ct. 630, 82 L. Ed. 917 (1938) ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission.").

In *Catlett*, our Supreme Court agreed with the analysis in *Ursery*, stating, "The fact that the basis for the civil forfeiture may be criminal activity does not render the forfeiture proceeding either criminal or a resulting forfeiture punishment for double jeopardy purposes." *Catlett*, 133 Wn.2d at 364-65. Our Supreme Court concluded that, like the federal civil forfeiture statutes, "RCW 69.50.505 also serves nonpunitive goals." *Catlett*, 133 Wn.2d at 368. Among other things, our Supreme Court explained that RCW 69.50.505 was designed to reimburse government for its prosecutorial costs and to remove property involved in drug activities. *Catlett*, 133 Wn.2d at 368.

Even more importantly, our Supreme Court stated that “the plain language of RCW 69.50.505 and its legislative history attest to its civil nature.” *Catlett*, 133 Wn.2d at 366. “The Legislature also specifically noted the civil forfeiture statute is a civil process.” *Catlett*, 133 Wn.2d at 366 (citing Final Legislative Report, 2SHB 1793 (1989) at 119 (“Seizure and forfeiture and civil processes and are independent of the outcome of any criminal charges that might be brought against the owner of the property.”)).⁶

Therefore, contrary to what the Fagers imply, (Br. of Resp’t at 28-30, 33), RCW 69.50.505 is a *civil forfeiture statute*. *Catlett*, 133 Wn.2d at 366; *see also State v. Moen*, 110 Wn. App. 125, 130-31, 38 P.3d 1049 (2002), *aff’d*, 150 Wn.2d 221, 76 P.3d 721 (2003); *State v. Lynch*, 84 Wn. App. 467, 477, 929 P.2d 460 (1996). A priori, “any proceeding to forfeit property,” *see* RCW 69.50.505(6), is a civil proceeding, not a criminal proceeding. Thus, attorney fees under RCW 69.50.505(6) must be limited to those fees reasonably incurred by the claimant in any *civil* proceeding to forfeit property.

Here, in a procrustean argument, the Fagers try to cut, stretch, and shape certain attorney fees that they incurred in the criminal proceedings to fit under RCW 69.50.505(6). (Br. of Resp’t at 14, 24, 28-30, 33, 35). The Fagers claim that Clallam County is paying “for the fees incurred as a

⁶ The Fagers may urge this Court to disregard *Catlett*, but this Court is bound to follow our Supreme Court’s precedent and has no authority to abolish it. *Gorman v. Pierce County*, 176 Wn. App. 63, 76, 307 P.3d 795 (2013).

result of filing the forfeiture proceeding.” (Br. of Resp’t at 34). Simply relying on obfuscation and labeling these attorney fees as being “related to the pending forfeiture matter,” (Br. of Resp’t at 29), or “for work that served a dual purpose,” (Br. of Resp’t at 12, 20), does not change the character of how or when these attorney fees were incurred. *See, e.g., 317 Nick Fitchard Road*, 579 F.3d at 1320.

The Fagers cannot deny that they incurred the disputed⁷ attorney fees in the criminal proceedings. They did not incur these attorney fees in any civil proceeding to forfeit property. Because attorney fees under RCW 69.50.505(6) must be limited to those fees reasonably incurred by the claimant in “any proceeding to forfeit property,” and because “any proceeding to forfeit property” is civil, not criminal, *Catlett*, 133 Wn.2d at 366, the Fagers’ claim for the attorney fees that they incurred in the criminal proceedings must fail. Contrary to what the Fagers vociferously argue, (Br. of Resp’t at 13, 28-29, 33, 34), they have not identified any contractual provision, statutory provision, or well recognized principle of equity that would entitle them to an award for attorney fees that they incurred in the criminal proceedings. *See Panorama Vill. Condo. Owners Ass’n Bd. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 191, 692 P.2d 867 (1984).

⁷ As Clallam County previously noted in its opening brief, it does not dispute the reasonable attorney fees that Steven Fager incurred in the civil proceedings to forfeit property, i.e., \$20,571.92.

As the Fagers recognize and concede, (Br. of Resp't at 34), absent any contractual provision, statutory provision, or well recognized principle of equity, the trial court in this case had no authority to award the attorney fees that they incurred in the criminal proceedings. *See Herzog*, 39 Wn. App. at 191.

D. THIS COURT SHOULD RESIST THE TEMPTATION TO REWRITE AN UNAMBIGUOUS STATUTE TO SUIT THE FAGERS' NOTIONS OF WHAT IS GOOD PUBLIC POLICY

Given that no contractual provision, statutory provision, or well recognized principle of equity entitled the Fagers to an award of attorney fees that they incurred in the criminal proceedings, the "American Rule" applied to these attorney fees in this case. *Panorama*, 144 Wn.2d at 143. Under the "American Rule," the Fagers bore the attorney fees that they incurred in the criminal proceedings. *See* 25 David K. DeWolf, Keller W. Allen, Darlene Barrier Caruso, WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 14:16 (3d ed.). While the Fagers argue that they will have only a "pyrrhic victory" without an award of certain attorney fees that they incurred in the criminal proceedings, (Br. of Resp't at 19), this argument is better directed to the Legislature. *See Sedlacek*, 145 Wn.2d at 390; *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999).

As discussed above, RCW 69.50.505(6) does not serve as an end-run around the "American Rule," which in this case required the Fagers to bear the attorney fees that they incurred in the criminal proceedings. Thus, the Fagers' argument, (Br. of Resp't at 17-19, 24, 34-36), even

assuming *arguendo* that it is sound from a policy standpoint, does not reflect the current status of the law in Washington. Essentially, the Fagers invite this Court to engage in a type of judicial activism that our Supreme Court has rejected. See *Sedlacek*, 145 Wn.2d at 390.

Therefore, this Court should resist the temptation to rewrite an unambiguous statute to suit the Fagers' notions of what is – or is not – good public policy. See *Sedlacek*, 145 Wn.2d at 390; *Jackson*, 137 Wn.2d at 725; see also *Roberts v. Dudley*, 140 Wn.2d 58, 79, 993 P.2d 901 (2000) (Talmadge, J., concurring) (“The specter of judicial activism is unloosed and roams free when a court declares, ‘This is what the Legislature meant to do or should have done.’”). This Court is obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). This Court “must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.” *Sedlacek*, 145 Wn.2d at 390.⁸

E. THIS COURT MAY NOT CREATE LEGISLATION UNDER THE GUISE OF INTERPRETING A STATUTE

Furthermore, the Fagers conveniently fail to address anywhere in their briefing that they already had an opportunity to recover the attorney fees that they incurred in the criminal proceedings. CP at 401-35. In December 2014, the Fagers filed and served a “Complaint for Violation of

⁸ The Legislature, not this Court, is the fundamental source for the definition of this State’s public policy. *Sedlacek*, 145 Wn.2d at 390.

Civil Rights and Personal Injury” in the United States District Court for the Western District of Washington. CP at 401-35. The Fagers included 15 federal and state causes of action in their Complaint, including a state claim for malicious prosecution. CP at 430-31. Among other things, the Fagers sought general damages, nominal damages, and punitive damages. CP at 434. They also sought “reasonable costs, expenses and attorney fees.” CP at 434.

In January 2015, after Clallam County filed its motion to dismiss, the federal court concluded, “Plaintiffs’ federal claims are barred by the applicable statute of limitations, and/or fail to state a claim for relief.” CP at 455. The federal court declined to exercise pendent jurisdiction over the remaining state law claims – false imprisonment, conversion, malicious prosecution, invasion of privacy, negligence, and intentional infliction of emotional distress. CP at 455. Thereafter, the federal court dismissed the federal claims with prejudice and dismissed the state claims without prejudice. CP at 455.

Rather than refile their state law claims in state court (presumably because their state law claims also would be barred by the applicable statute of limitations), the Fagers simply waited six months and filed their motion for attorney fees. CP at 286-303. By arguing that RCW 69.50.505(6) allowed for an award of attorney fees incurred in the civil forfeiture proceeding *and* in the related criminal proceedings, (CP at 286-303), the Fagers not only sought an end-run around their burden of proof

regarding malicious prosecution, but they also sought an end-run around the applicable statute of limitations.⁹

Were this Court to agree with the Fagers' statutory interpretation of RCW 69.50.505(6),¹⁰ it would result in unlikely, absurd, and/or strained consequences. In addition to being an end-run around burdens of proof and statutes of limitations, it would create a new right of recovery only for claimants who were charged with drug crimes. It also would allow claimants who were charged with drug crimes to use a civil statute, *see Catlett*, 133 Wn.2d at 366, as a means to recover attorney fees incurred in criminal proceedings.

But civil statutes providing for the imposition of attorney fees and costs do not apply to criminal hearings. *See State v. Sizemore*, 48 Wn. App. 835, 838, 741 P.2d 572, *review denied*, 109 Wn.2d 1013 (1987); *see also State v. Keeney*, 112 Wn.2d 140, 141-45, 769 P.2d 295 (1989). In fact, criminal statutes providing for an award of attorney fees and costs in criminal cases simply include: (1) RCW 9A.16.110 (where the defendant acted in self-defense) and (2) RCW 10.46.210 (where the complaint against the defendant was frivolous or malicious). *See State v. Lee*, 96

⁹ Malicious prosecution and abuse of process fall within the personal injury statute of limitations, meaning the limitations period is three years. *Nave v. City of Seattle*, 68 Wn.2d 721, 724, 415 P.2d 93 (1966).

¹⁰ Of course, before even agreeing with the Fagers, this Court first would have to find that RCW 69.50.505(6) is ambiguous. *See Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

Wn. App. 336, 979 P.2d 458 (1999); *Sizemore*, 48 Wn. App. at 839. Significantly, neither of these statutes is at issue in this case.

Thus, were this Court to agree with the Fagers' statutory interpretation of RCW 69.50.505(6), this Court would have to disregard the above case law. This Court would have to hold that RCW 69.50.505(6), a civil statute, *see Catlett*, 133 Wn.2d at 366, applies to criminal proceedings. This Court would have to assume that, when the Legislature enacted RCW 69.50.505(6), it intended *sub silentio* to create a new right of recovery for claimants who were charged with drug crimes.

This Court may not read into a statute matters that are not in it. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). This Court may not create legislation under the guise of interpreting a statute. *Associated Gen. Contractors v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996 (1994). Most importantly, this Court must avoid construing statutory language so as to result in unlikely, absurd, and/or strained consequences. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Therefore, the Fagers' statutory interpretation of RCW 69.50.505(6) must fail.

F. TIMOTHY FAGER WAS NOT, IS NOT, AND CANNOT BE A CLAIMANT UNDER RCW 69.50.505

With a classic obfuscation argument, the Fagers attempt to divert this Court's attention from the undeniable fact that Timothy Fager *never* filed a notice of claim in the civil forfeiture proceedings, nor did he move to intervene in the civil forfeiture proceedings. (Br. of Resp't at 36-43).

Because Timothy Fager never filed a notice of claim, he was not – is not, and cannot be – a “claimant” under either RCW 69.50.505(5). Similarly, because he was not – is not, and cannot be – a “claimant “ under RCW 69.50.505(6), Timothy Fager is not entitled to any reasonable attorney fees that he incurred in the civil forfeiture proceedings.¹¹

First, the Fagers fault Clallam County for having “never served Tim with notice” of the civil forfeiture. (Br. of Resp’t at 38). This argument is inapposite. Before commencing the civil forfeiture in this case, Clallam County conducted a title search, which identified Steven Fager, DBVWC, Inc, and the Lucille M. Brown Living Trust as having a known interest in the real property subject to civil forfeiture. CP at 7-13. Importantly, the title search did *not* identify Timothy Fager as having a known interest in the real property. CP at 7-13. Thus, under RCW 69.50.505(3), Clallam County was not required to notify Timothy Fager. Instead, under RCW 69.50.505(3), Clallam County simply was required to notify Steven Fager, DBVWC, Inc., and the Lucille M. Brown Living Trust, which it did on October 9, 2009. CP at 14-17.

Second, relying on *Espinoza v. City of Everett*, 87 Wn. App. 857, 943 P.2d 387 (1997), *review denied*, 134 Wn.2d 1016 (1998), the Fagers essentially argue that Steven Fager’s notice of claim was sufficient to provide Clallam County with warning of Timothy Fager’s notice of claim.

¹¹ In the absence of a contract, statute, or recognized ground of equity, a court has no power to award fees as part of the litigation. *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 561, 730 P.2d 1340 (1987).

(Br. of Resp't at 38, 41). Yet, as Clallam County previously noted in its opening brief, Steven Fager was the only individual and/or entity to timely file a notice of claim. CP at 31. The notice of appearance filed by Steven Fager's attorney was on behalf of him alone, not on behalf of any other individual or entity. CP at 31. Unlike the notice of claim in *Espinoza*, 87 Wn. App. at 862,¹² neither Steven Fager nor his attorney informed Clallam County that DBVWC, Inc., the Lucille M. Brown Living Trust, Timothy Fager, or any other unidentified individual and/or entity had a known right or interest in the real property. CP at 31.

Third, in an attempt to bootstrap Timothy Fager to be a claimant under RCW 69.50.505, the Fagers argue that Timothy Fager had a "financial interest" in the real property because he was a shareholder of DBVWC, Inc. (Br. of Resp't at 36-37).¹³ Specifically, they argue, "The

¹² In *Espinoza*, a claimant's attorney notified the City of Everett in a letter of his client's claim of ownership and right to possess a car. *Espinoza*, 87 Wn. App. at 862. In this same letter, the claimant's attorney informed the City of Everett that he represented a group of unidentified individuals who were lawful owners of a large sum of money that also was seized by the City of Everett. *Espinoza*, 87 Wn. App. at 862. The claimant's attorney requested a hearing as to both the car and the cash. *Espinoza*, 87 Wn. App. at 862.

¹³ The Fagers argue that Timothy Fager "was also partial owner of the water company that operated on the property." (Br. of Resp't at 36). Nevertheless, the Fagers do not explain how this fact relates to Timothy Fager's claim of an ownership interest in the real property. This Court should not consider arguments that are not developed in the brief and for which a party has not cited authority. *See Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 95-96, 231 P.3d 1211 (2010).

loss of the property would have a significant financial impact on Tim.” (Br. of Resp’t at 36). Again, DBVWC, Inc., *never* filed a notice of claim. Contrary to what the Fagers would have this Court infer, it is immaterial for purposes of this analysis whether Steven Fager was “the appointed representative for DBVWC.” (Br. of Resp’t at 38). After all, Steven Fager *never* filed a notice of claim on behalf of DBVWC, Inc., either. CP at 31.

As Clallam County previously noted in its opening brief, DBVWC, Inc., first asserted an interest in the real property via Steven Fager’s summary judgment motion, which was filed on April 24, 2015. CP at 51-64. Even then, *more than five years and six months* after Clallam County had filed the Summons and Notice of Intended Seizure and Forfeiture, (CP at 14-17), DBVWC, Inc., still had not filed a notice of claim. Instead, Steven Fager simply noted that he “[brought] this summary judgment motion in his individual capacity as well as in his role as DBVWC’s representative.” CP at 52. Even assuming *arguendo* that this statement was sufficient to notify Clallam County of DBVWC, Inc.’s interest in the real property, it was made well outside the 90-day window under RCW 69.50.505(5) for DBVWC, Inc., to notify Clallam County in writing of its claim to ownership. From October 9, 2009, until April 24, 2015, there was nothing in the record to alert Clallam County that DBVWC, Inc., contested the seizure and forfeiture. *Contra Snohomish Regional Drug Task Force*, 150 Wn. App. at 396-97.

Despite the Fagers' argument to the contrary, (Br. of Resp't at 38-41), RCW 69.50.505 places the burden of establishing a compensable interest on the person or entity claiming it, not on the seizing law enforcement agency. See *Key Bank of Puget Sound v. City of Everett*, 67 Wn. App. 914, 920, 841 P.2d 800 (1992), review denied, 121 Wn.2d 1025 (1993). Under RCW 69.50.505(5), DBVWC, Inc., was required to notify Clallam County in writing of its claim to ownership within 90 days of being served with the Summons and Notice of Intended Seizure and Forfeiture. It did not do so, and therefore DBVWC, Inc., failed to timely preserve its interest. See *Key Bank of Puget Sound*, 67 Wn. App. at 920 ("There is no basis for concluding that the Legislature intended to encourage or permit piecemeal adjudication of interests in forfeited property.").

Moreover, Timothy Fager's status as a shareholder in DBVWC, Inc., simply does not afford him personal standing in the civil forfeiture proceeding. While the Fagers try to distinguish the facts of *Northwest Cascade Inv. v. Unique Construction*, 187 Wn. App. 685, 351 P.3d 172 (2015), (Br. of Resp't at 42-43), the well-settled law in Washington is that a corporation is an entity created by statute, which is distinct and apart from the shareholders of the corporation. *In re Linderman*, 20 B.R. 826, 828 (W. D. Wash. 1982); *Grayson v. Nordic Co., Inc.*, 92 Wn.2d 548, 599 P.2d 1271 (1979); *Christensen v. Skagit County*, 66 Wn.2d 95, 97, 401 P.2d 335 (1965); *California v. Tax Commission of State*, 55 Wn.2d 155,

346 P.2d 1006 (1959); *see also Northwest Cascade, Inc.*, 187 Wn. App. at 702.

“Accordingly ownership of corporate stock does not vest the shareholder with a pro rata share of ownership in corporate property.” *In re Linderman*, 20 B.R. at 828; *Christensen*, 66 Wn.2d at 97 (“An individual shareholder has no property interest in physical assets of the corporation.”); *Apostolic Faith Mission of Portland, Or. v. Christian Evangelical Church*, 55 Wn.2d 364, 347 P.2d 1059 (1960); *Tax Commission of State*, 55 Wn.2d at 157 (“An individual shareholder has no property interest in its physical corporate assets.”).¹⁴ Thus, while Timothy Fager may have been a “major shareholder” in DBVWC, Inc., (Br. of Resp’t at 36), this interest alone could not afford him personal standing as a claimant under RCW 69.50.505, let alone to recovery of attorney fees that he incurred in his personal – and separate – criminal proceeding.

Fifth, in attempt to obfuscate the issues, the Fagers argue that Clallam County did not raise these challenges to Timothy Fager’s status before the trial court. (Br. of Resp’t at 38-41). The Fagers claim, therefore, that they were deprived of an opportunity to develop the record below. (Br. of Resp’t at 39-41). But again, RCW 69.50.505 places the

¹⁴ Interestingly, despite faulting Clallam County for relying on *317 Nick Fitchard Road*, (Br. of Resp’t at 24-30), the Fagers now rely on *317 Nick Fitchard Road* to argue that the claimants in that case were shareholders of a corporation. (Br. of Resp’t at 43). They were not; the claimants were the corporation, its president, and his wife. *317 Nick Fitchard Rd.*, 549 F.3d at 1317.

burden of establishing a compensable interest on the person or entity claiming it, not the on the seizing law enforcement agency. *See Key Bank of Puget Sound*, 67 Wn. App. at 920.

Here, the facts are undisputed that no one, other than Steven Fager, ever filed a notice of claim. CP at 31. Neither Steven Fager nor his attorney informed Clallam County that Timothy Fager had a known right or interest in the real property. CP at 31, 355-60. Simply put, Timothy Fager failed to meet his burden of timely preserving his interest. *See Key Bank of Puget Sound*, 67 Wn. App. at 920. He was not a claimant under RCW 69.50.505, and the Deputy Prosecuting Attorney was correct in simply stating, “Tim Fager is not a party to this case.” (Report of Proceedings (RP) at 43).

Furthermore, even assuming *arguendo* that DBVWC, Inc., timely notified Clallam County of its interest in the real property, Timothy Fager’s status as a “major shareholder” in DBVWC, Inc., (Br. of Resp’t at 36), could not afford him personal standing as a claimant under RCW 69.50.505. *See Christensen*, 66 Wn.2d at 97. It would have been unnecessary, as the Fagers argue, to introduce “more evidence regarding [Timothy Fager’s] financial interest in the property through DBVWC.” (Br. of Resp’t at 39).

Finally, in making their argument, the Fagers conveniently ignore that their counsel argued before the trial court that “[Timothy Fager] is a partial owner of the company which is one of the claimants in this. So he most certainly does have an interest in this.” RP at 44. During oral

argument, the Deputy Prosecuting Attorney specifically asked the trial court to “elucidate a little bit just as to the propriety of those billing statements pertaining to Tim Fager. There was an argument from the seizing agency that he is not a party to this case.” RP at 67. In response, the trial court stated, “Well – well, okay. *I believe as I understand it he’s a part owner of DBVWC, Inc.. I think.* So, you know, I – um, everything I read suggests the fees that are being charged pertained – ultimately pertained to this case, so.” RP at 67 (emphasis added).

Although the issue of Timothy Fager’s status as a claimant under RCW 69.50.505 may not have been clearly framed before the trial court,¹⁵ the parties nevertheless argued this issue. RP at 43-44, 67. The trial court had sufficient notice of the parties’ dispute, and it was given an opportunity to consider and rule on relevant authority, particularly RCW 69.50.505. Therefore, the purpose of Rules of Appellate Procedure (RAP) 2.5(a) is served, and this issue is properly before this Court. *See Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990).¹⁶

¹⁵ For example, the Fagers titled their motion for attorney fees as “Claimants’ Motion for Attorney fees,” (CP at 286), even though Steven Fager was the only individual and/or entity to have filed a notice of claim. CP at 31.

¹⁶ In any event, “[a]n appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision.” *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989). Here, the heart of this case is the correct application of RCW 69.50.505(6), which necessarily involves the question of whether Timothy Fager was a claimant entitled to reasonable attorney fees that he incurred in the civil forfeiture proceedings.

G. THE FAGERS ARE NOT ENTITLED TO THEIR ATTORNEY FEES ON APPEAL

Clallam County agrees with the Fagers that the general principle in Washington is that those entitled to an award of attorney fees below also are entitled to attorney fees on appeal, *Xieng v. Peoples National Bank of Washington*, 63 Wn. App. 572, 587, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993). As previously discussed, however, the Fagers' interpretation of RCW 69.50.505(6) is incorrect. RCW 69.50.505 is a civil forfeiture statute. Attorney fees under RCW 69.50.505(6) must be limited to those fees reasonably incurred by the claimant in any civil proceeding to forfeit property.

Therefore, because the Fagers are not the prevailing parties on appeal, they are not entitled to attorney fees and costs under RAP 18.1(a) and RCW 69.50.505(6).

II. CONCLUSION

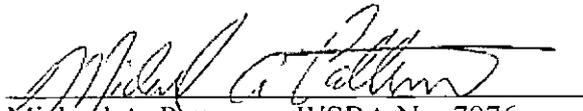
Here, in seeking to justify the trial court's erroneous award of attorney fees under RCW 69.50.505(6), the Fagers ask this Court to deliberately circumvent the rules of statutory construction. The Fagers also ask this Court to rewrite a plain and unambiguous statute to suit their notions what is good policy.

But as Clallam County has argued, the drafting of a statute is a legislative, not a judicial, function. So long as the language of RCW 69.50.505(6) is unambiguous, a departure from its plain meaning is not

justified by any consideration of its consequences or of public policy.
This Court's inquiry should be at an end.

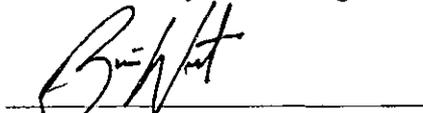
Therefore, Clallam County respectfully requests this Court to: (1) reverse the trial court's award of attorney fees and costs; (2) remand this case to the trial court with directions to award Steven Fager \$20,571.92 in attorney fees and costs he incurred in the civil forfeiture proceeding; and (3) deny all other requests for attorney fees and costs.

RESPECTFULLY SUBMITTED this 1st day of July, 2016.



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CERTIFICATE OF SERVICE

I, Sherry Morales, hereby declare that on this 1st day of July, 2016, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

ATTORNEY NAME & ADDRESS	METHOD OF DELIVERY
Brian Wendt Clallam County Prosecuting Attorney's Office 223 East Fourth St., Suite 11 Port Angeles, WA 98362	■ Electronic Mail
James R. Dixon Dixon & Cannon, Ltd. 601 Union Street, Suite 3230 Seattle, WA 98101	■ Electronic Mail ■ Legal Messenger

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 1st day of July, 2016 at Seattle, Washington.



Sherry Morales, Legal Assistant

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