

NO. 48184-7-II

IN THE COURT OF APPEALS OF THE STATE OF Washington
DIVISION II

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 THEREFROM.

Respondents *in rem*,

STEVEN L. FAGER;
DBVWC, INC.; and
LUCILLE M. BROWN LIVING TRUST

Interested Parties.

2016 APR 27 AM 10:54
STATE OF WASHINGTON
BY DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

BRIEF OF RESPONDENT

JAMES R. DIXON
Attorney for Respondent
Dixon & Cannon, Ltd.
601 Union Street, Suite 3230
Seattle, WA 98101
(206) 957-2247

pm 4/25/16

TABLE OF CONTENTS

	Page
A. INTRODUCTION TO CASE.....	1
B. ISSUES IN RESPONSE.....	2
C. STATEMENT OF THE CASE.....	3
D. ARGUMENT IN RESPONSE.....	13
1. The plain language of the statute permits reimbursement for legal fees incurred in preventing a forfeiture, even when those fees served a secondary purpose.	13
a. There was a proceeding to forfeit property.....	13
b. The Fagers substantially prevailed in the hearing.....	14
c. The Fagers reasonably incurred legal fees in defending against the forfeiture.....	14
d. The attorney fees in this case are reasonable.	15
2. OPNET attempts to add restrictions not contained in the plain language of the statute.	15
3. Neither the “American Rule” nor sovereign immunity undercut the Supreme Court’s holding in <i>Guillen v. Contreras</i> . 20\	
4. OPNET’S reliance upon a federal court decision from Alabama construing a different forfeiture statute is misplaced. ...	24
5. <i>In Re MacGibbon</i> is not relevant to issues in this appeal.	32
6. Appellants’ argument that the court’s ruling would produce “absurd results” is far-fetched.....	34\
7. Appellant’s arguments relating to Tim Fager and DBVWC are untimely and lack merit.	36
8. Appellants’ challenges to the findings of fact are without merit.	44

a. Finding of Fact No. 3.....	45
b. Finding of Fact No. 8.....	46
c. Finding of Fact No. 14 e.....	47
d. Finding of Fact No. 15(d).....	48
e. Finding of Fact No. 15(e).....	49
f. Findings of Fact Nos. 6-11 and 14-15.....	49
g. Findings of Fact Nos. 9 and 15(c).....	49
9. Respondents' request for attorney fees on appeal.....	50
E. CONCLUSION.....	50

TABLE OF AUTHORITIES

	Page
Cases	
<i>Barlindal v. City of Bonney Lake</i> , 84 Wn. App. 135, 925 P.2d 1289 (1996).....	35
<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	44
<i>Brand v. Dept of L&I</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	19
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	33
<i>Espinoza v. City of Everett</i> , 87 Wn. App. 857, 943 P.2d 387 (1997).....	41
<i>Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	22, 23, 24
<i>Guillen v. Contreras</i> , 147 Wn. App. 326, 195 P.3d 90 (2008).....	17, 20, 22
<i>Guillen v. Contreras</i> , 169 Wn. 2d 769, 238 P.3d 1168 (2010).....	passim
<i>In re Estate of Lint</i> , 135 Wn.2d 518, 957 P.2d 755 (1998).....	45
<i>In re MacGibbon</i> , 139 Wn. App. 496, 161 P.3d 441 (2007).....	32, 33
<i>In re Sedlock</i> , 69 Wn. App. 484, <i>review denied</i> , 122 Wn.2d 1014 (1993).....	47
<i>McDonald v. Parker</i> , 40 Wn.2d 987, 425 P.2d 910 (1972).....	44
<i>Merriman v. Cokeley</i> , 168 Wn.2d 627, 230 P3d 162 (2010).....	44
<i>Moen v. Spokane City Police</i> , 110 Wn. App. 714, 42 P.3d 456 (2002).....	17
<i>Nucleonics, v. Washington Pub. Power Supply Sys.</i> , 101 Wn.2d 24, 677 P.2d 108 (1984).....	20

<i>NW Cascade v. Unique Const.</i> 187 Wn. App. 685, 351 P.3d 172 (2015).....	42, 43
<i>Outsource v. Nooksack</i> , 181 Wn.2d 272, 333 P.3d 380 (2014).....	20
<i>Port of Seattle v. Equitable Capital Group</i> , 127 Wn.2d 202, 898 P.2d 275 (1995).....	46
<i>Presnell v. Safeway</i> . 60 Wn.2d 671, 374 P.2d 939 (1962)	39
<i>Snohomish Reg'l Drug Task Force v. Real Prop.</i> <i>Known as 20803 Poplar Way</i> , 150 Wn. App. 387, 150 Wn. App. 387 (2009).....	16
<i>Spokane Research & Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	22
<i>Spokane Research & Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	30, 31
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995).....	39
<i>State v. Clark</i> , 124 Wn.2d 90, 875 P.2d 613 (1994).....	39
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	16
<i>State v. Fager</i> , 185 Wn. App. 1050 (unpublished opinion, filed 2/10/15).....	39
<i>State v. Fredrick</i> , 45 Wn. App. 916, 729 P.2d 56 (1986).....	40
<i>State v. Thiessen</i> , 88 Wn. App. 827, 946 P.2d 1207 (1977).....	21
<i>State v. Wilbur-Bobb</i> , 134 Wn. App. 627, 141 P.3d 665 (2006).....	40
<i>Utilities Dist. 1 of Grays Harbor Cty. v. Crea</i> , 88 Wn. App. 390, 945 P.2d 722 (1997).....	42
<i>Xieng v. Peoples Nat. Bank of Washington</i> . 63 Wash. App. 572, 821 P.2d 520 (1991) <i>affd</i> , 120 Wash. 2d 512, 844 P.2d 389 (1993)	50

Statutes

RCW 26.09 32
RCW 26.09.140 32
RCW 49.48.030 22, 23
RCW 69.50.505 34, 37
RCW 69.50.505(3)..... 14
RCW 69.50.505(5)..... 38, 41
RCW 69.50.505(6)..... 1, 13, 29, 50

Other Authorities

18 U.S.C. §3006A 27
28 U.S.C. 2465(b)(1)(A)..... 28

Rules

CrR 3.6 6, 9
CrR 8.3(b) 6
ER 401 40
ER 403 40
RAP 18.1(a) 50

U.S. Cases

Franks v. Delaware,
438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)..... 7
Miller v. U.S.,
779 F.2d 1378, 1389 (8th Cir. 1985) 31
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
478 U.S. 546, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)..... 25
U.S. v. Certain Real Property, Located in Huntsville, AL,
579 F.2d 1315 (11th Cir. 2010) passim
Webb v. Board of Education,
471 U.S. 234, 105 S.Ct.1923, 85 L.Ed.2d 233 (1985)..... 25

A. INTRODUCTION TO CASE

Appellants have devoted much of their brief to attacking a ruling the trial court never made. The trial court did not award attorney fees for defending against the criminal charges. To the contrary, the court specifically excluded fees solely related to the criminal case. The court only authorized reimbursement of those legal fees reasonably incurred in defending against the seizure in the forfeiture proceeding. The trial court noted the statute does not prohibit awarding legal fees for work that simultaneously defends the criminal and forfeiture actions. Because there was a forfeiture proceeding, and because the Fagers reasonably incurred attorney fees in fighting that forfeiture, the Fagers were entitled to reimbursement of those legal fees.

Appellants argue that the attorney fee provision only applies to legal work that serves one purpose, the forfeiture proceeding. This restriction, however, does not appear anywhere within the statute. Consequently, appellants are left to argue that the restriction should somehow be inferred from the language in the statute. But courts may not infer a restriction in a statute that is to be liberally construed in favor of claimants. Under the plain language of RCW 69.50.505(6), if there is a pending forfeiture proceeding, and if the claimants reasonably incurred attorney fees in fighting that forfeiture, then attorney fees must be awarded.

Tim Fager is a major shareholder of DBVWC, a Washington Corporation. Steve Fager and DBVWC own the seized property. Because of Tim's financial interest in the property held by DBVWC, he incurred considerable attorney fees fighting the unlawful seizure of the property. In the superior court, Tim made it clear he was asserting his right to attorney fees as a DBVWC stakeholder. Appellants now assert that Tim cannot do so. This argument, however, was not made below, and cannot be raised for the first time on appeal. But even if the objection had been preserved, appellants have presented no authority prohibiting Tim from obtaining attorney fees under these circumstances.

B. ISSUES IN RESPONSE

1. In a forfeiture proceeding, is a claimant entitled to reimbursement for all legal work reasonably incurred to prevent the forfeiture, even if the legal work also benefitted the criminal case?

2. The Washington Supreme Court requires this attorney fee provision to be liberally construed in favor of claimants. The language of the statute does not expressly prohibit attorney fees where the work served a dual or secondary purpose. Should this Court reject appellants' attempt to add a restriction not contained within the plain language of the statute?

3. Appellants appear to focus on the limited pleadings filed under the forfeiture case number as proof that the Fagers' attorneys did

minimal work in the forfeiture. Can a judge reasonably find that legal work which results in the dismissal of a pending forfeiture proceeding is subject to reimbursement, even if there were limited pleadings filed in that proceeding?

4. Appellants had known for more than two years that they would be responsible for both Tim and Steve Fager's attorney fees if they lost the forfeiture. They also knew when the Fagers filed the motion for attorney fees, that Tim Fager was asserting his interest in the property through DBVWC, a corporation that shared ownership of the seized land. Despite this knowledge, appellants did not object or argue below that Tim was ineligible to assert his claim through the corporation. Should the Court refuse to consider an issue that was not raised below?

5. The evidence established that Tim Fager had a recognized financial interest in the seized property, and that he reasonably incurred attorney fees opposing the wrongful seizure. Did the trial court correctly include those attorney fees in the final award to claimants?

C. STATEMENT OF THE CASE

This appeal involves the unlawful seizure of real property located in rural Jefferson County, and the attorney fees awarded to Steve and Tim Fager after they successfully fought to have the property returned. The property, known as 115 Freeman Lane throughout the proceedings, was

owned by Steve Fager and the Discovery Bay Village Wellness Collective (DBVWC). Tim and Steve Fager are the majority shareholders in DBVWC. *CP 163, 167*. They are also major shareholders in the water company that operates on the property. *Id.*

In addition to the water company, there was also a medical marijuana grow operation on the property. Steve and Tim Fager were both medical marijuana patients. *CP 167*.

On October 9, 2009, the Jefferson County Prosecutor charged both Fagers with one count of Manufacturing Marijuana and one count of Possession with Intent to Deliver Marijuana. *CP 535*. The charges were based on marijuana found in a building at 115 Freeman Lane. Steve's and Tim's cases were joined for purposes of the criminal trial. *CP 52*.

In addition to the criminal charges, OPNET and Clallam County seized the 115 Freeman Lane property and initiated a forfeiture proceeding. Steven Fager, individually and in his role as representative for the DBVWC, was served with notice of the forfeiture and filed an objection. *CP 508-09*. Tim Fager was served with a forfeiture notice relating to personal property seized from his house, which had also been searched. *CP 355-59*. He filed an objection to that seizure, upon which he later prevailed. *CP 355-59*. Tim was not served with notice of the 115 Freeman Lane seizure and, accordingly, did not file a notice of claim.

The total value of the property seized was in excess of \$500,000 at the time of the raid. *CP 167*. The economic loss of this property through seizure would have impacted the Fagers much more than a criminal conviction. *Id*; *CP 163*. As self-employed businessmen, Tim and Steve were unconcerned with marijuana convictions on their records. *Id*.

Steve Fager hired Jeff Steinborn to represent him in the criminal case and the forfeiture, while Tim hired James Dixon for similar representation. *Id*. The attorneys entered into a joint defense agreement based upon shared goals. *CP 160*. Jeff Steinborn “advised Steve that he could plead guilty to a misdemeanor with little or no jail time, but that it would allow the State to keep his property.” *Id*. As Mr. Steinborn put it, “Steve was unequivocal in stating that while he was not concerned about a conviction for marijuana on his record, he was unwilling to surrender the property wrongfully seized by OPNET.” *Id*. Tim Fager expressed the same opinion to his attorney as well. As stated in James Dixon’s declaration, “In representing the Fagers, we theorized that the criminal and civil forfeiture cases were both part of a concerted attempt by OPNET to obtain the property at 115 Freeman Lane. From inception, our strategy in the criminal case was directed at preventing a civil forfeiture.” *CP 206*.

The attorneys informed their clients that a favorable ruling in a suppression motion would resolve the civil forfeiture because of collateral

estoppel. By contrast, if they won a suppression motion in the civil forfeiture case first, the State would not be barred from pursuing the criminal case. *CP 160, 163, 206*. The forfeiture proceedings were stayed pending resolution of the criminal case.

The defense began gathering evidence to prepare a motion to suppress or dismiss pursuant to CrR 3.6 and CrR 8.3(b). *CP 206*. At that point, no one anticipated that these motions would become a six-year odyssey, involving well over 10,000 pages of discovery. *CP 174, 178*. The Fagers soon learned that the provided discovery was poorly organized, incomplete and repetitive. *CP 221*. Further, despite the prodigious amount of paperwork provided, the government still failed to produce crucial records. The Fagers' attorneys were forced to file two separate motions to compel, which Judge Verser granted. *CP 268-80*.

With costs mounting, Steve Fager hired the local firm of Haas & Ramirez for the forfeiture/criminal matter. Steve made his position clear to Mr. Haas, who later recalled: "a criminal conviction was the least of Steven Fager's concerns. His sole focus was on protecting the property he had worked so long and hard to acquire." *CP 174*. The two attorneys, Mr. Dixon and Mr. Haas, divided the work to minimize the legal fees.

Detective Grall and other OPNET agents refused to be interviewed by the defense. This led to yet another motion, where the trial court or-

dered the officers to make themselves available. *CP 279*. The State still had not provided complete discovery. Consequently, throughout the suppression hearing, OPNET repeatedly referenced missing reports, which the court then ordered the State to produce by the next day. *CP 178*.

Following a nine-day hearing the court ruled for the defense. Written findings were entered on January 9, 2013. *CP 214*. In granting the *Franks*¹ motion, the trial court concluded that OPNET officers had repeatedly made false statements regarding their ability to smell marijuana, and that the false statements were made with reckless disregard for the truth. *Id.* The court also found governmental mismanagement due to the destruction of key evidence under questionable circumstances. With the evidence suppressed, the court dismissed the criminal charges. *Id.*

Acknowledging the interconnectedness of the criminal prosecution and the civil forfeiture, the prosecution left the decision of appeal to the OPNET stakeholders and outlined their likely liability for attorney fees. In an email dated January 14, 2013, Mark Nichols told Risk Management:

Presently, the OPNET stakeholders are discussing whether to file an appeal of Judge Verser's ruling. . . . If instead the decision is made to forego filing an appeal, or if an appeal is filed but is unsuccessful, then the criminal prosecution will in all likelihood be dismissed and the seizing agency's ability to prevail in the civil forfeiture proceeding will be . . .

¹ *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

severely compromised. **(I will note that the prevailing party in a forfeiture cause is entitled to attorney fees; thus, if the seizing agency is not able to prevail in the forfeiture proceeding it will in all likelihood be required to pay the Fagers' attorney fees, which are believed to be substantial.** Additionally, the Fagers' counsel continues to saber rattle regarding sec. 1983 liability and so we still anticipate that a claim for damages will be forthcoming).

CP 265-67 (emphasis added). After considering these consequences, OPNET decided to file an appeal.

Clallam County continued to unnecessarily escalate the Fagers' legal fees. The State cherry-picked portions of the suppression hearing transcripts to be sent to the Court of Appeals, in some cases going so far to order the direct examination of a witness, but not the cross examination. The Fagers filed a motion in superior court requiring the State to order an adequate record. *CP 210-11*. The motion was granted, but only the Fagers had incurred more legal expense. *Id.*

The appeal meant that the civil forfeiture still could not be resolved. A status report on the forfeiture was filed on April 23, 2014 indicating that the criminal case was on appeal and that the parties would continue to engage in informal discovery. *CP 42-44*. Ten months later, on February 10, 2015, this Court issued a unanimous decision affirming the trial court's suppression ruling in all regards. OPNET did not dismiss the

forfeiture or release the property then, nor did they do so when a mandate was issued the following month. Mr. Dixon substituted in as counsel for claimants, as Mr. Hass had been elected Jefferson County Prosecutor. Mr. Dixon filed a motion for summary judgment on April 24, 2015.² Yet another month-plus passed before OPNET finally released the property and moved to dismiss the forfeiture. *CP 107*. OPNET informed Mr. Dixon that they would not pay attorney fees without a hearing before the court. *CP 211*.

Claimants filed a motion for attorney fees, supported by timesheets and declarations from Jeff Steinborn, Mike Haas, James Dixon, Steve Fager and Tim Fager. *CP 48-50; 159-285*. In the motion, claimants explained that they were not seeking attorney fees for any work that did not relate specifically to the forfeiture. Time entries related solely to the criminal case were excluded. As Mr. Dixon explained:

10. In preparing this declaration in support of attorney fees, I reviewed my timesheets and invoices. I believe I have removed all charges for any hours expended solely on the criminal case, such as general research and investigation on criminal defenses and arraignments. This also included the time spent researching and presenting a separate CrR 3.6 motion to suppress marijuana found at Tim Fager's house. Although I was successful in the motion, that particular motion related solely to the criminal case rather than the

² Appellants claim in their brief that Steve Fager's prior attorney filed a joint status report with the court on April 23, 2014, and that Mr. Dixon filed a notice of appearance and summary judgment the following day. *Brief of App at 47*. Appellants have misread the record: summary judgment was filed a year later on April 24, 2015. *CP 42-44, 51-64*.

forfeiture. For the same reasons, I excluded my time spent recovering Tim Fager's personal property seized from his house. While this was time well spent, it did not directly relate to my efforts to invalidate the search at 115 Freeman Lane, and as such, was only indirectly related to the forfeiture.

11. In a few instances, my timesheets for a given day combined work solely related to the criminal case and work related to both in a single entry. In each such instance I excluded the entire block of time.

CP 208. Mr. Haas similarly omitted from his billing any entries that did not relate to the forfeiture. *CP 176.*

OPNET responded that there were additional charges in the timesheets that appeared to relate to just the criminal case. *CP 510-11.* The Fagers did not necessarily agree with OPNET's characterization of some of the time entries, but removed the questioned charges. *CP 537-38.* This resulted in a reduction of \$8,672.50 from the amount initially requested. *CP 495-96.* Following these reductions, OPNET indicated at the hearing that it had no factual objections as to reasonableness of the fees. *RP 20-21.*

A hearing occurred on August 5, 2015. OPNET's counsel acknowledged that this "specific case [has been] an unfortunate chapter in the seizing agency's history," and that "for a number of years [the seizing agency] has been working to return property back to its rightful owners." *RP 27.* Counsel then suggested that the seizing agency would have freely returned the Fagers' property without the motions. *RP 28-29.*

Through declarations, court orders and oral argument, the Fagers painted a very different picture of OPNET's activities. Fagers demonstrated how OPNET continuously failed to return property even when they were court ordered to do so, repeatedly forcing claimants to bring motions in court. *CP 178-79;460-64; See also, CP 490-92.*

OPNET'S main argument at the hearing was that the attorney forfeiture statute only permitted reimbursement of fees for work related "solely" to the forfeiture. *CP 318.* Work that benefited the criminal case could not be included. OPNET acknowledged that if this same legal work had been filed under the forfeiture cause number it would have been reimbursable. *RP 39.* OPNET argued that in order to receive attorney fees, the forfeiture proceeding had to be heard first. *Id.*

The Fagers responded by pointing to the plain language of the statute, which does not contain the limitation urged by OPNET. Moreover, the Supreme Court's mandate that this particular attorney fee provision be liberally construed in favor of claimants was inconsistent with the type of reading urged by OPNET. *CP 286-304, 475-499; RP 12, 26,30-31, 56-57.*

The trial court agreed with plaintiffs on one issue, that this has indeed been a bad chapter in OPNET's history of seizures. *RP 56.* As to OPNET's legal and factual arguments, however, the trial court found them unpersuasive. The court soundly rejected OPNET's claim that the property

would have been returned without a summary judgment. *RP 61*. The court also found that if the Fagers had brought the forfeiture action first, OPNET would have forced them to relitigate the suppression hearing in the criminal case because collateral estoppel would not have applied. *RP 57-58*. The court concluded it would have made no sense to try the civil forfeiture first. *RP 64*.

Based on all the evidence, the court found that the attorney fees were incurred to fight the forfeiture proceeding and regain their property. *RP 57-58*. The court recognized that the criminal case had also benefited from the legal work, but agreed that the statute did not prohibit awarding attorney fees for work that served a dual purpose. *RP 59-61*. As to the reasonableness of the attorney fees, the court noted the attorney fees were high, but that this was due in large part to the prosecution's approach to the case. *RP 57-59*. In the absence of specific challenge as to the reasonableness of any of the remaining timesheets, the court ordered the requested fees. *RP 56, 63-64*. The court included Tim Fager's attorney fees, as the evidence established that he had an ownership interest in the property through DBVWC. *RP 67*.

The Court entered factual findings that reflected its oral rulings. *CP 534-41*.

D. ARGUMENT IN RESPONSE

1. The plain language of the statute permits reimbursement for legal fees incurred in preventing a forfeiture, even when those fees served a secondary purpose.

The forfeiture statute contains an attorney fee provision. In 2001, this statute was modified so that claimants could receive reimbursement from the government for wrongfully seized property. “The purpose of the addition of the attorney fee provision was to provide greater protection to people whose property is seized.” *Guillen v. Contreras*, 169 Wn. 2d 769, 777, 238 P.3d 1168, 1172 (2010). As modified, the statute provides in relevant part:

In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant.

RCW 69.50.505(6).

RCW 69.50.505(6) has four requirements for reimbursement: 1) a forfeiture proceeding, where 2) the claimant substantially prevails, and in doing so 3) reasonably incurs attorney fees that 4) are reasonable. All four conditions are easily satisfied in this case.

a. There was a proceeding to forfeit property.

OPNET seized the 115 Freeman Lane property on October 9, 2009. The forfeiture statute provides that when real property is seized, “proceedings for forfeiture shall be deemed commenced by the seizure.”

RCW 69.50.505(3). Thus, the forfeiture proceeding began on October 9, 2009, and continued until August 5, 2015, when it was dismissed. *CP 107*. The first condition is satisfied here.

b. The Fagers substantially prevailed in the hearing

A claimant “substantially prevails” when he or she recovers property that had been seized by law enforcement. *Guillen*, 169 Wn.2d at 780. The trial court found that the claimants were the prevailing party and OPNET has not challenged that ruling.

c. The Fagers reasonably incurred legal fees in defending against the forfeiture.

Judge Harper made a factual finding that “the Fagers reasonably incurred the requested attorney fees in defending against the forfeiture.” *CP 539*. The trial court considered all of the evidence submitted, and determined that the Fagers would not have spent over \$300,000 in attorney fees to avoid a misdemeanor that would not have impacted either of their livelihoods. The court reasonably concluded that the discovery and suppression motions were directed at the forfeiture proceeding and preventing loss of real property. This was a factual finding for which there was substantial evidence. Judge Harper recognized that the legal work directed at the forfeiture also served the criminal case, but that this secondary purpose

did not change the fact that attorney fees were incurred in contesting the pending civil forfeiture. *Id.*

d. The attorney fees in this case are reasonable.

At the hearing, OPNET's counsel stated they were not challenging the reasonableness of the attorney fees and the amount charged, but rather, whether as a matter of law, the claimants were entitled to reimbursement for work relating to the criminal case. *RP 20-21*. Based on his own review of the records as well as OPNET's concession, the trial judge found the fees to be reasonable. OPNET has not challenged that ruling on appeal.

Despite the lack of challenge, appellants include tables and multiple footnotes regarding the breakdown of legal fees. They are unnecessary. This Court will either affirm the trial court's award or remand to the trial court for recalculation of the attorney fees. In either event, the tables are irrelevant to any issue before this Court,

2. OPNET attempts to add restrictions not contained in the plain language of the statute.

Under the plain language of the statute, the court's findings support the award of attorney fees. The judge made findings that the fees were reasonably incurred in a forfeiture proceeding to prevent the loss of property. The court remarked at oral argument that Mark Nichols also inter-

preted the statute this way, as shown in his email to Risk Management.³
RP 60-61.

Appellants seek to avoid liability by asking this Court to add an unwritten restriction to a claimant's right to obtain attorney fees. OPNET argues that as a matter of law, legal work filed in a criminal case cannot be considered work for the forfeiture proceeding. In other words, legal work can only serve one purpose.

The legislature could have drafted a statute that contains this limitation. But the legislature did not and the court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Appellants' argument for inferred restrictions must fail.

Washington cases reveal two governing principles that guide the interpretation of forfeiture statutes. First, "forfeitures are not favored and such statutes are construed strictly against the seizing agency." *Snohomish Reg'l Drug Task Force v. Real Prop. Known as 20803 Poplar Way*, 150 Wn. App. 387, 392, 150 Wn. App. 387 (2009). Second, the legislature intended the attorney fee provision "to be read liberally." *Guillen v.*

³ OPNET's counsel correctly argued that OPNET is not bound by Mr. Nichols' interpretation of the statute. The court agreed, and indicated that he was not putting much stock in it. Nonetheless, the court found it interesting that the County's counsel had the same plain reading of the statute. *RP 60-61.*

Contreras, 169 Wn.2d at 777. Public policy supports awarding attorney fees to claimants seeking the return of property wrongfully seized by law enforcement. *Moen v. Spokane City Police*, 110 Wn. App. 714, 718-21, 42 P.3d 456 (2002).

Guillen v. Contreras is instructive for its discussion regarding the legislative intent and liberal interpretation of the attorney fee provision of the forfeiture statute. In *Guillen*, police seized a car and cash that appeared to be used in a drug transaction. The trial court ruled that the car and some of the money was not subject to forfeiture, but that most of the money was properly forfeited. *Guillen*, 169 Wn.2d at 771-72. Because the claimant only recovered approximately one quarter of the property seized, the trial court found the claimant was not the “substantially prevailing” party. *Id.*

The court of appeals affirmed that ruling. *Guillen v. Contreras*, 147 Wn. App. 326, 195 P.3d 90 (2008). The appellate court first observed that in other areas of law, the term “substantially prevails” means the party wins the majority of the issues. *Id.* at 332-34. The court then contrasted that with language in the Industrial Insurance Act where the legislature intended workers to receive attorney fees for even a partial win. *Id.* at 334-35. The Court of Appeals concluded, “[Due to the legislature’s] reliance on the time-tested ‘substantially prevailing party’ standard, we do not be-

lieve it intended to allow forfeiture claimants to recover attorney fees unless they prevailed on all the major issues in the case.” *Id. at 335*.

The Washington Supreme Court accepted review and reversed the Court of Appeals. In explaining its approach to this statutory language, the Supreme Court stated, “this court pays particular attention to the legislative purpose behind attorney fee provisions.” *Gullien*, 169 Wn.2d at 777. Looking at the purpose of the statute—to provide greater protection to people whose property is seized—the Court concluded that the legislature “intended this attorney fee provision to be read liberally.” *Id. at 778*. Analogizing to the liberal application of attorney fees for injured workers, the Court concluded that even a partial recovery of property triggers the attorney fees provision. *Id.*

This legislative intent is consistent with the trial court’s ruling in the current case. The fight with OPNET over this property nearly bankrupted the Fagers. *CP 168-69*. Only by incurring substantial attorney fees were the Fagers able to establish OPNET’s reckless disregard for the truth in its investigation. The Fagers were fortunate they had the resources to continue their protracted battle with OPNET. However, even they could not have brought these motions without the knowledge that they would receive reimbursement from OPNET once the property was returned.

The Supreme Court addressed this same economic reality in *Guillen*, where the family recovered a car and a small amount of the money that had been seized:

Without an award of attorneys' fees, the family will probably have to forfeit all the cash recovered and sell the car to pay its attorneys fighting the civil forfeiture. If the purpose of the statute is to protect citizen's rights against wrongful seizure of their property, then granting attorney fees whenever claimants substantially prevail on some issue, or receive more than nominal relief, may be necessary to accomplish that statutory purpose.

Guillen, 169 Wn.2d at 778. The same rationale applies here. Under OPNET's tortured interpretation of the statute, the government can avoid responsibility for its actions by filing criminal charges. Without attorney fees, the Fagers' recovery of the unlawfully seized property would be a pyrrhic victory, as the Fagers would still be nearly \$300,000 out-of-pocket as a result of OPNET's illegal actions. This is inconsistent with the letter and spirit of the forfeiture statute. See *Brand v. Dept of L&I*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999) ("[I]t is important to evaluate the purpose of the specific attorney fee provision and to apply the statute in accordance with that purpose.")

"A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined." *Nucleonics, v. Washington Pub. Power Supply Sys*,

101 Wn.2d 24, 29, 677 P.2d 108, 110 (1984). OPNET's attempt to narrowly construe the language of the attorney fee provision to exclude any legal work that served a dual purpose runs afoul of that basic rule of interpretation.

3. Neither the "American Rule" nor sovereign immunity undercut the Supreme Court's holding in *Guillen v. Contreras*.

Despite *Guillen*'s unequivocal holding that the attorney fee provision is to be liberally construed in favor of claimants, appellants persist in claiming that a narrow construction is required. Appellants rely primarily upon the "American Rule," which is a general presumption that parties will pay their own attorney fees in the absence of statutory authority. *Brief of App.* 31-34. Ironically, the only Washington forfeiture case that mentions the American Rule is the overruled Court of Appeals decision in *Guillen*. See *Guillen*, 147 Wn. App. at 331. OPNET's argument that the American Rule supports a narrow reading of the forfeiture statute's attorney fee provision has been put to rest by the Supreme Court's ruling in *Guillen* that a liberal construction is necessary. *Guillen*, 169 Wn.2d at 777.

Next, appellants claim that the rule of sovereign immunity requires a narrow, restricted reading of that statute. Appellants note that this rule was recently reaffirmed by the Supreme Court in *Outsource v. Nooksack*, 181 Wn.2d 272, 284, 333 P.3d 380 (2014). See *Brief of App.* at 24. But

appellants fail to mention that its support comes from the sole dissenting opinion in that case. *181 Wn.2d at 284. (J McCloud dissenting) Nooksack* questioned whether Washington State courts had jurisdiction over a case arising on an Indian reservation. *Id. at 274.* The Court found that the tribe had waived its sovereignty immunity through language in the contract, while the dissent believed that the majority had not applied a narrow enough reading to the language. *Id. at 286 (J. McCloud dissenting).* This case does not support appellant's argument that the attorney fee provision in the current case must be strictly construed in favor of the government.

The main case relied upon by appellants on the issue of sovereign immunity is *State v. Thiessen*, 88 Wn. App. 827, 829, 946 P.2d 1207 (1977). The defendant in *Thiessen* prevailed on a self-defense claim and was awarded attorney fees, along with interest. The State appealed only the interest part of the award, and the defense conceded error on appeal. *Id. at 828.*

The Court of Appeals accepted the concession. The court looked at the statute authorizing interest on certain types of judgments against the state, and determined that the defendant's self-defense claim did not fit into any of those categories. Because the legislature had not waived sovereign immunity as to the imposition of interest on self-defense claims, interest was not allowed. *Id. at 30.* The court did not hold that any statute

involving the government must be strictly construed. It simply found that the legislature had not included this type of claim as one in which interest could be imposed.

These two cases provide a shaky foundation upon which to argue that the liberal interpretation compelled by *Guillen* should be abandoned. Appellants' argument also ignores other liberally construed Washington statutes that impose liability on the government. *See e.g., Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 44-46, 42 P.3d 1265, 1272-73 (2002) (The attorney fee provision for injured workers must be liberally construed against the City to effect the statute's purpose.); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) ("We interpret the PDA liberally to promote full disclosure of government activity.")

In *Fire Fighters, Local 46 v. City of Everett*, a labor union and two of its members filed a complaint in superior court against the City of Everett, seeking recovery of attorney fees after the union prevailed in a grievance arbitration proceeding. 146 Wn.2d at 32. The applicable statute was RCW 49.48.030, which provided in relevant part:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer . . .

RCW 49.48.030 (emphasis added). The City argued that the plain language of the statute did not authorize a separate action for attorney fees. Specifically, the City argued that under the plain language of the statute, the reasonable attorney's fees had to be assessed “in” the action in which the employee recovers a judgment for wages or salary owed. The trial court agreed with the City’s narrow interpretation of the statute and granted summary judgment in its favor. *Id.* at 33.

The Supreme Court accepted review of the case and soundly rejected this argument:

“The City's interpretation would seem to substitute “the same” for “any” in the statute. Thus, the statute would read “In *the same* action in which any person is successful in recovery judgment for wages or salary owed to him, reasonable attorney's fees . . . shall be assessed.” This restrictive interpretation is contrary to the liberal construction doctrine and Washington courts' holdings in other cases. . . .

Rather, the statutory language would seem to only require that an employee receive wages or salary owed “in any action” in order to recover attorney fees. The attorney fees, however, need not be awarded in the same action as that in which wages or salary owed are recovered.

We therefore hold that RCW 49.48.030 does not require that for attorney fees to be awarded in any action, that action must be the “same action” in which wages or salary owed are recovered.

Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d at 43-44 (omitting internal citations).

In the present case, the trial court found there was a proceeding to forfeit property and that the Fagers incurred legal fees for work done challenging the evidence in that proceeding. Nonetheless, OPNET asks this Court to narrowly construe the phrase “in any proceeding to forfeit property under this title” to mean that if the work also benefited the criminal case, it does not fit within the statute. This strained reading of the statute would thwart its purpose, which is to compensate people whose property has been wrongfully seized by the government. Similar to the Supreme Court’s holding in *Fire Fighters, Local 46 v. City of Everett*, this Court should reject OPNET’s argument.

4. OPNET’S reliance upon a federal court decision from Alabama construing a different forfeiture statute is misplaced.

OPNET places great weight on *U.S. v. Certain Real Property, Located in Huntsville, AL*, 579 F.2d 1315 (11th Cir. 2010). In *Huntsville*, the United States Government indicted two individuals who were shareholders in a corporation that built parts for Blackhawk Helicopters. The Government also seized the real property belonging to the corporation and initiated a civil forfeiture proceeding. Using a federal statute with no state counterpart, the government obtained a stay in the criminal indictment. The criminal case proceeded to a bench trial and the defendants were acquitted on all counts. *See Huntsville*, 579 F.3d at 1317-18.

After trial, the Government sought to dismiss the civil forfeiture case. The claimants agreed and argued that they were entitled to reimbursement of *all* attorneys' fees and costs for the defense of the criminal charge. *See Id.* at 1318-20. The government objected. The district court acknowledged that although courts have broadly interpreted the fee provision in the federal statute, this particular issue was one of first impression. 566 F. Supp.2d at 1260. The court also noted, "The Supreme Court has held in the context of section 1983 lawsuits, that work done in a separate administrative proceeding is recoverable if it was "useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *Id.* citing to *Webb v. Board of Education*, 471 U.S. 234, 243, 105 S.Ct.1923, 85 L.Ed.2d 233 (1985). *See also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561, 106 S. Ct. 3088, 3096, 92 L. Ed. 2d 439 (1986) ("We agree that participation in these administrative proceedings was crucial to the vindication of Delaware Valley's rights under the consent decree and find that compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court.") The court concluded the criminal case was necessary in order to fight the forfeiture, and therefore all criminal defense fees should be reimbursed.

On appeal, a 2-1 majority reversed the district court's decision and accepted the Government's argument that the claimants should not be permitted to recover fees incurred for work done that was unrelated to the litigation of the forfeiture proceeding. *See Huntsville* 579 F.3d at 1320-1322. In reaching this conclusion, the two-judge majority opinion disagreed with the district court's liberal interpretation of the statute. The circuit court reasoned the fee shifting provision of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) "must be construed strictly in favor of the sovereign." *Id.* at 1320. Accordingly, any fee shifting which imposes liability on the government must be "unequivocal." *Id.* Using that as the starting point, the majority refused to read the shifting provision as allowing for attorney fees paid to defend the criminal action.

The court acknowledged United States Supreme Court cases that have interpreted the term "proceeding" in other contexts to include actions outside of the court case itself. The court distinguished these cases by finding a different purpose behind those attorney fee provisions. Those attorney fees were necessary to encourage people to bring lawsuits. By contrast, reasoned the circuit court, "There is no comparable concern here, where the criminal defendants Axion and Latifi were sufficiently motivated by the criminal charges to avidly pursue their criminal defense." 579 F.3d at 1325.

The circuit court also relied upon additional statutory provisions within CAFRA. Congress had enacted legislation that allows the federal government under certain circumstances to stay the forfeiture over objection until the criminal case is resolved. This legislation specifically addresses the interplay of the criminal and forfeiture matters. Given this, the Court found it significant that Congress did not expressly state that claimants in civil forfeiture proceedings can obtain fees incurred in a related criminal case. 579 F.3d at 1321-22.

The two-person majority decision noted that the claimants had another means by which to pursue attorney fees related to the criminal action. Congress enacted a legal process—commonly referred to as the Hyde Amendment—that specifically authorizes the trial court in a criminal case to order attorney fees incurred in the defense of a criminal proceeding brought in bad faith. *Id.*, at 1325-26.⁴ The Court observed that there was still a Hyde motion pending in the trial court on this case. The Circuit Court found that under the claimant’s theory, the fee provision in CAFRA would essentially circumvent the limitations set forth in the Hyde Amendment. *See Id.* The Court concluded that Congress could not have

⁴ The Hyde Amendment is codified at 18 U.S.C. §3006A. This statute allows for recovery of fees incurred in defense of a criminal action where the Government’s position is “vexatious, frivolous or in bad faith.”

intended this result. The case was remanded for recalculation of fees and interest. *Id.* at 1326.

Huntsville does not support OPNET's position. First and foremost, our courts require the attorney fee shifting provision to be liberally construed in favor of the claimant, whereas *Huntsville* strictly construed the federal statute in favor of the government. This was a primary difference between the district court's interpretation of the statute and the circuit court's reading of that same provision. In *Guillen*, the same thing happened in reverse. It was the lower court that attempted to narrowly construe the statute to limit attorney fees, and it was the Washington Supreme Court that rejected that approach, and instead embraced a broad, liberal reading of the fee shifting statute. *Guillen*, at 777 (2010).

Second, Washington State has no laws analogous to the federal legislation that the circuit court specifically relied upon in determining Congress' intent. Thus, there is no conflict with other laws in allowing claimants to seek reimbursement of attorney fees for work done towards the forfeiture during the criminal case.

Third, even the specific language of the Washington and federal attorney fee provisions differ. The federal statute provides "in any civil proceeding to forfeit property" whereas our statute provides "in any proceeding to forfeit property" *Compare* 28 U.S.C. 2465(b)(1)(A) (emphasis add-

ed) with RCW 69.50.505(6). On its face, the Washington statute is more broadly written.

Fourth, the Circuit Court believed attorney fees were not required where the criminal defendants had sufficient motivation to defend against serious criminal charges. In the present case, Judge Harper made a specific finding to the contrary. The undisputed evidence was that the Fagers could have pleaded guilty to a gross misdemeanor, and that a criminal conviction would have little or no impact on their livelihood. *CP 160, 163, 167*. The court found that the Fager's primary purpose in incurring such high attorney fees was to prevent the seizure of their property. *CP 536, 539*. The award of attorney fees serves the legislative goal of protecting people whose property has been wrongfully seized.

Finally, the facts and legal theory in the present case differ from those in the federal case. In *Huntsville*, the defendants/claimants sought and received reimbursement for all attorney fees related to the criminal case. The district court awarded the fees on the basis that winning the criminal case was helpful to the civil forfeiture. By contrast, the Fagers only sought attorney fees directly related to the forfeiture. Any legal work that related just to the criminal case was excluded. The trial court specifically found that all of the remaining legal work related to the pending forfeiture matter. *The fact that the legal fees served a secondary purpose of*

assisting in the criminal case does not make the legal work ineligible for reimbursement.

Although Washington will sometimes look to federal caselaw for guidance, Washington courts will not follow federal courts when there are differences in the policy considerations or in the statutory scheme. A case in point is *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005), which involved a suit under Washington's Public Disclosure Act. The City of Spokane failed to provide records relating to a development project. A journalist joined in with a non-profit organization to file a PDA suit against the City. In a related lawsuit between the City and the developer, those same documents were produced. Once they were disclosed in that case, the City moved to dismiss the PDA case as moot. *Id.* at 95-96.

The trial court granted the City's motion. The Court of Appeals upheld the ruling on the basis that the journalist had not caused the production of the records, and therefore could not be considered a "prevailing party." *Id.* at 96-97. The Supreme Court accepted review.

The City again argued that the journalist was not a prevailing party, analogizing to caselaw under the Federal Freedom of Information Act. Federal caselaw defines a "prevailing party" as one who causes the disclosure of the withheld documents. *Miller v. U.S.*, 779 F.2d 1378, 1389 (8th

Cir. 1985). Although earlier Washington court of appeals decisions had borrowed from federal case law for purposes of interpreting the PDA, the Washington Supreme Court refused to do so: “Nowhere in the PDA is prevailing party status conditioned on causing disclosure, a standard [plaintiff] argues is borrowed from the different federal disclosure scheme. We will not read into the statute what is not there.” *Spokane Research*, 115 Wn.2d at 103. The Court ruled that the policy goals of Washington’s PDA did not support the federal approach. *Id. at fn 10*. Turning to those policy goals, the Court explained: “Permitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit ... would undercut the policy behind the act.” *Id at 104*.

As in *Spokane Research*, there are significant differences in the federal statutory scheme relating to forfeitures and attorney fees, rendering the divided opinion in *Huntsville* even less persuasive. Further, the *Huntsville* ruling is inconsistent with the strong policy considerations underlying Washington’s attorney fee provision. The seizing agency in the Fagers’ case should not be able to move forward on a criminal prosecution, lose, and then avoid attorney fees resulting from the wrongful seizure of property, as that “would undercut the policy behind the [forefeiture] act.” *See Spokane Research*, 155 Wn.2d at 103-04.

5. *In Re MacGibbon* is not relevant to issues in this appeal.

Appellants' reliance upon *In re MacGibbon*, 139 Wn. App. 496, 161 P.3d 441 (2007), demonstrates a fundamental misunderstanding of the trial court's ruling in our case. *See Brief of App. at 14-16, 22. MacGibbon* involved a divorce and family maintenance order in superior court pursuant to RCW 26.09. Later, the mother brought several administrative actions to enforce the maintenance order against the father. *MacGibbon* at 500-03. This resulted in a series of administrative orders, which the father challenged in superior court. The superior court affirmed the rulings, and awarded the mother attorney fees for both the administrative enforcement actions and the father's appeal of the administrative orders. *Id.* at 503. The father filed an appeal to Division One.

The question on appeal focused on the attorney fees. The superior court had relied upon RCW 26.09.140, which allows for attorney fees to be awarded in "any proceeding under this chapter." *MacGibbon* at 504. But neither the administrative enforcement actions nor the appeals of those administrative orders fell under Chapter 26.09. *Id.* at 505. Because the attorney fees were not incurred under Chapter 26.09, that statute could not support the fees. *Id.* On appeal the respondent argued that social policy supported expanding the attorney fees to other types of maintenance en-

forcement actions. The appellate court rejected that argument, noting that public policy concerns are for the legislature, not the court. *Id.* at 506-07.

The issues in *MacGibbon* bear little resemblance to those in our case. Here, there was a pending forfeiture proceeding, and the court awarded attorney fees incurred by the Fagers in fighting that ongoing forfeiture. That the same legal work also supported the accompanying criminal case does not negate the fees authorized under the forfeiture statute. The criminal and forfeiture proceedings were inextricable, and the work in one frequently supported the other. Consequently, the Fagers did not ask for, and the trial court did not order, fees beyond what the statute authorized. *MacGibbon* has no bearing on the issues presented in OPNET's appeal.

Appellants also rely upon *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006), which was an unsuccessful challenge to a ballot initiative. Mr. Malkasian sought attorney fees for his successful defense of the initiative under a common fund theory, which the Supreme Court found inapplicable. *Id.* at 268-70. Mr. Malkasian also asked for attorney fees because he was a wrongly named defendant. The Court appropriately held that even if true, attorney fees may be awarded only if authorized by contract, statute or recognized grounds of equity. 157 Wn.2d at 270-71.

Appellants' reliance upon *Malkasian* is misplaced. The Fagers have not requested attorney fees under a common fund theory. Further, the Fagers agree that attorney fees can only be awarded when authorized by contract, statute or equity. Here, the trial court relied upon the plain language of RCW 69.50.505 and its legislative intent to conclude that attorney fees were allowed under the facts of this case. The cases cited by appellants are off the mark.

6. Appellants' argument that the court's ruling would produce "absurd results" is far-fetched.

Appellants argue that under the trial court's ruling, Clallam County would be charged legal fees incurred in a criminal case brought by Jefferson County. *Brief of App. at 36*. This argument is misleading in two ways. First, the seizing agencies are not paying for attorney fees incurred in the criminal case. They are paying for the fees incurred as a result of filing the forfeiture proceeding. The fact that the legal work also benefited the criminal case does not change the reason the attorney fees were incurred.

Second, the appellants are disingenuous when they suggest that the criminal charges were brought by Jefferson County in anything other than name. As set forth in the motion for summary judgment, Clallam County has controlled the criminal case and the forfeiture from the beginning. *See CP 53, 58-59*. Specifically, it was Clallam County prosecutors, not Jeffer-

son County prosecutors, who attended the hearings, drafted briefs, argued motions, and defended the case on appeal. In fact, Mark Nichols, the Clallam County chief prosecutor, allowed the shareholders in the forfeiture action to decide whether Judge Verser's suppression ruling should be appealed. *CP 265-67*. Even when the seizing agency is not so obviously driving the criminal prosecution, as it did here, this Court has recognized the privity that exists between the prosecution and the plaintiffs in the forfeiture action. *See Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 143-144, 925 P.2d 1289 (1996).

Next, appellants argue that the legislature never intended for courts to determine the purpose behind the legal work performed. *Brief of App. at 37*. Appellants fail to cite any authority for this legislative intent, and with good reason. Trial courts routinely make factual findings. It is part of their job to weigh evidence and make credibility calls. *See e.g., In re Sego*, 82 Wn.2d 736, 739-740, 513 P.2d 831 (1973). Under the forfeiture statute, the court is required to evaluate legal work and determine whether it was reasonably related to the forfeiture proceeding. Appellants' argument that the legislature did not want courts making this determination is meritless.

Appellants also claim that the trial court's ruling would "likely spell an end to civil forfeiture proceedings." *Brief of App. at 37*. If appellants are suggesting that police routinely trespass and demonstrate reckless

disregard for the truth in obtaining search warrants, then appellants' prophesy may come true. The Fagers, however, choose to believe that most law enforcement agencies follow the law and do not misrepresent their actions. If the Fagers are correct, and most law enforcement adhere to the requirements of the law, then this ruling would have little impact on future forfeiture actions. Admittedly, a published decision by this Court upholding the trial court's ruling may encourage a more prudent approach to seizing a citizen's property. To the extent the appellants believe that caution on the part of the police is an "absurd result", the Fagers disagree.

7. Appellant's arguments relating to Tim Fager and DBVWC are untimely and lack merit.

As part of the motion for attorney fees, the Fagers described Tim's ownership interest in the 115 Freeman Lane property. Through declarations, it was established that DBVWC was one of the owners of the property, and that Tim was a major shareholder in that corporation. Tim was also partial owner of the water company that operated on the property. *CP 163, 167*. The loss of the property would have a significant financial impact on Tim. *Id.* All of Tim's legal fee bills were attached to an affidavit. *CP 229-263, 285*.

OPNET filed a 30-page response brief opposing the requested attorney fees. *CP 305-34*. OPNET raised numerous dubious defenses, and

never alleged that Tim's claim for attorney fees should be treated differently than Steve's claim. Only at the conclusion of oral argument did counsel make mention of Tim not being a named party to the law suit:

But then finally we have a fee agreement between Mr. Tim Fager and Mr. Jim Dixon. But Your Honor, Mr. Tim Fager is not a party to this case.

If you read the caption, it reads OPNET and other plaintiffs versus real property with real party in interest being Steve Fager and Discovery Bay Water Company [sic] and Lucille Ball Trust. Tim Fager is not even a party into this case.

And so we would submit to this Court that any billings in connection with Mr. Fager's representation were not contemplated with respect to this civil forfeiture.

And I think one thing that's interesting is that all civil forfeiture proceedings involving Tim Fager concluded in 2011.

RP 43.

The court awarded the requested attorney fees incurred by both Tim and Steve Fager. The court explained that it was doing so based on Tim's financial interest in the property through DBVWC. *RP 67-68.* OPNET's counsel presented no argument to rebut Tim's ownership interest in the property.

On appeal, OPNET argues that Tim Fager is not a party to the forfeiture because he "failed to satisfy the statutory prerequisites of RCW 69.50.505." *Brief of App. at 39.* Specifically, OPNET argues that Tim had

to file a claim of interest in the property under RCW 69.50.505(5) in order to recover reimbursement of attorney fees. *Id.*

As an initial matter, this argument fails because RCW 69.50.505(5) only requires a claimant to give notice after he or she is served with a notice of forfeiture. Here, OPNET never served Tim with notice. On a more fundamental level, however, OPNET'S argument misconstrues the trial court's ruling. The court found that Tim's ownership interest in the property is through DBVWC. Steve Fager is the appointed representative for DBVWC, and he filed a notice of claim. DBVWC is a party to the lawsuit.

Directing most of its argument at Tim's "failure" to provide notice, OPNET only briefly addresses the validity of Tim's claim through DBVWC. *See Brief of App. at 43-44.* OPNET makes two arguments. First, although Steve Fager filed a notice of claim, he did not specifically do so under the name DBVWC. OPNET now argues that DBVWC's failure to file a written notice pursuant to RCW 69.50.505(5) means that DBVWC was not part of the lawsuit. Second, OPNET argues that a corporation shareholder cannot make a property claim under the forfeiture statute. *RP 43-44.*

Significantly, neither of these challenges were raised below, and the law is clear that parties cannot raise a new argument on appeal. As our Supreme Court has explained, "Objections must be accompanied by a rea-

sonably definite statement of the grounds therefor so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect.” *Presnell v. Safeway*, 60 Wn.2d 671, 675, 374 P.2d 939 (1962). OPNET and Clallam County should be particularly aware of this requirement. Following the suppression ruling in the criminal case, they attempted to challenge evidence not properly objected to below. *This Court refused to consider those arguments for the first time on appeal. See State v. Fager*, 185 Wn. App. 1050 (unpublished opinion, filed 2/10/15).

Had OPNET raised this objection below, Tim Fager could have introduced more evidence regarding his financial interest in the property through DBVWC. *See State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995) (the rule requiring an objection is “supported by considerations of fairness to the opposing party.”) After the parties had developed a record below, the trial court could have ruled and provided this Court with a sufficient record from which this Court could evaluate the trial court’s ruling. *State v. Clark*, 124 Wn.2d 90,105, 875 P.2d 613 (1994) (Raising the issue below helps ensure the “benefit of developed argument on both sides and lower court opinions squarely addressing the questions.”) But the trial court was deprived of an opportunity to do so, based on the lack of a specific objection below.

Appellants may argue their general objection that Tim Fager was not a party was sufficient to preserve the issue. But appellate courts require a more specific objection. *See e.g., State v. Fredrick*, 45 Wn. App. 916, 922, 729 P.2d 56 (1986) (An ER 401 objection on relevancy is insufficient to preserve appellate review on ER 403 objection as to unduly prejudicial.) Another example of the requirement for specific objections can be found in *State v. Wilbur-Bobb*, 134 Wn. App. 627, 634, 141 P.3d 665 (2006), where the defense made a foundation objection to the state toxicologist's testimony on retrograde extrapolation. After a few follow up questions by the prosecutor, defense counsel objected again:

I don't have any information or any indication that this is scientifically accepted. We don't have any model or any information as to that. We don't know what specific articles he's read.

...

I continue my objection as to foundation.

134 Wn. App. at 633 (emphasis added). The trial court overruled the objection, stating that the expert was qualified to render an opinion. On appeal, the court found that the *Frye* issue had not been properly raised: "We will not allow an objection to credentials to be transformed into a *Frye* argument on appeal." *Id.* at 634.

The same result is required here. OPNET did not object at all in its written material, and made only the briefest mention of Tim Fager's finan-

cial and legal interest in its oral argument. OPNET cannot transform its general objection that Tim Fager was not listed as a claimant into a more specific objection that DBVWC's did not comply with the requirements of RCW 69.50.505(5) or that Tim has no property rights through DBVWC.

The obvious reason counsel did not raise an objection to Tim Fager in the written response to the trial court is that the seizing agency had known for at least two years that they were facing attorney fees from both Fager brothers. This is apparent from the previously discussed email from Mark Nichols dated January 14, 2013, in which he warned that OPNET faced potential liability for "the Fagers' attorney fees." *CP 266*.

When Steve filed his notice of claim, it was not necessary that he specifically identify additional individuals that would have a claim through DBVWC. *See e.g., Espinoza v. City of Everett*, 87 Wn. App. 857, 862, 867, 943 P.2d 387 (1997) (sufficient notice provided when an attorney indicated that he represented a group of unnamed individuals who owned the seized money as part of a joint venture). Steve was the representative and his notice of claim was sufficient.

Nor is appellants' argument that Steve Fager only filed a personal notice of appearance and claim persuasive. *Brief of App. at 42*. Lacking a contemporary objection and argument, the record on this issue was not developed. However, even going on the evidence that is in the record, ap-

pellants only served one summons combining Steve and DBVWC because they knew that Steve Fager was the representative of the corporation See CP 15-17.

Ultimately, when not involving service of original process, issues of notice usually boil down to a simple question: was the other party aware that a claim was being made? See e.g. *Utilities Dist. 1 of Grays Harbor Cty. v. Crea*, 88 Wn. App. 390, 395-96, 945 P.2d 722 (1997) (so long as a party has actual notice that it may be liable for attorney fees and an opportunity to settle the matter, saving the parties time and expense, a trial court's award of attorney fees is not an abuse of discretion). There is no doubt that appellants knew of Tim Fager's claim and that they were going to be responsible for those attorney fees. Their belated protest that strict procedure was not followed is a smokescreen.

Similarly, the argument that Tim's ownership of DBVWC does not give him a legal interest in the forfeiture was not made below, and so there was no opportunity to develop this record either. Undeterred by the lack of objections below, OPNET cites to this Court's decision in *NW Cascade v. Unique Const*, 187 Wn. App. 685, 351 P.3d 172 (2015), for the proposition that a corporate shareholder does not have a property interest in the corporation's property. *Brief of App. at 43*. But the issue there was very different. The defendants conveyed real property from one corporation to

another, and a jury found they did so intending to unlawfully defraud creditors. As a result, the trial court “deprived . . . the [defendants] of any legal or equitable interest in the . . . property.” *NW Cascade*, 187 Wn. App. at 702.

The defendants did not challenge that ruling. *Id.* Instead, they asserted homestead rights, desiring to avoid the same debt. Based on the trial court’s unchallenged ruling, however, this Court reasoned that the defendants did not have any right or interest to the property. *Id.* The court further concluded that the defendants’ ownership interest in the corporation, to which they had transferred their property, did not give defendants’ a property interest that would be recognized for purposes of asserting a homestead privilege. *Id.* Contrary to the suggestion of OPNET in this case, this Court did not hold in that a corporate shareholder is ineligible for attorney fees in protecting his financial interest in property owned by the corporation. Appellants’ reliance on *NW Cascade* is unpersuasive.

Significantly, in the previously addressed *Huntsville* decision, the defendants/claimants were the shareholders of a corporation. *Huntsville*, 579 F.2d 1317-18. If OPNET is correct that shareholders can never be awarded attorney fees, then the district and circuit courts engaged in a completely meaningless discussion about whether attorney fees could be awarded. It is not surprising that OPNET has not pointed to any cases on

point to support this new argument on appeal. Even if they had lodged a proper objection below, OPNET is unlikely to have prevailed. Respondents request that this Court affirm the trial court's award of attorney fees to Tim Fager.

8. Appellants' challenges to the findings of fact are without merit.

Appellants raise a number of challenges to the findings of fact. Given the standard of review, these challenges are meritless at best. On appeal, a finding of fact will stand if it is supported by substantial evidence. *McDonald v. Parker*, 40 Wn.2d 987, 988, 425 P.2d 910 (1972). Evidence is substantial if it is sufficient to persuade a fair minded, rational person of the declared purpose. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P3d 162 (2010). In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Further, “[a]s an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard.” *In re Sego*, 82 Wn.2d 736, 739-740, 513 P.2d 831 (1973). Consequently, “[w]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding.” *In re Estate of Lint*, 135

Wn.2d 518, 532, 957 P.2d 755 (1998). As discussed below, most of the challenged findings are based on undisputed declarations and court records.

a. Finding of Fact No. 3.

The trial court found that “Steve Fager and the Discovery Bay Village Wellness Collective (DBVWC) own this property and filed an objection to the forfeiture.” *CP 536*. Appellants challenge this finding on the basis that this is not the correct name of the corporation. *Brief of App. at 45-46*. But both Tim and Steve Fager’s separate declarations specifically refer to the corporation by that name. *CP 163, 167*. Nor do appellants cite to a different name. Indeed, they only reference a title report for the property, which refers to the company by its initials, DBVWC. *Id. citing to CP 7, 9, 12*. Finding of Fact No. 3 is supported by substantial evidence.

The court also found that “the total value of the property seized was in excess of \$500,000.” *CP 536*. OPNET acknowledges that this is supported by Steve Fager’s declaration but argues that Steve does not have the qualifications to determine the value of the property. *Brief of App. at 46*. Not surprisingly, OPNET failed to object below as to Steve’s qualifications to render an opinion. Had OPNET done so, Steve would have been happy to explain the basis for his opinion. Failing to do so, OPNET cannot now object to Steve’s lack of qualifications. As the trier of fact, and with

no challenge to Steve Fager's declaration, the court was entitled to rely upon this evidence. *See Port of Seattle v. Equitable Capital Group*, 127 Wn.2d 202, 211, 898 P.2d 275 (1995) (As a general rule, owner may testify to the value of his property).

OPNET also argues that the court's finding should be stricken because it is irrelevant. *Brief of App. 46*. As an initial matter, relevancy is an objection to evidence, not a court's finding. *See ER 401*. Moreover, it is not irrelevant; it was one of many factors the trial court took into consideration in determining that the Fagers were more concerned about the loss of their property than a criminal conviction.

b. Finding of Fact No. 8.

The trial court found, "Based on the State's actions in this case, this Court is convinced that had the defendants brought the suppression motion in the forfeiture hearing first, the State would have required the Fagers to bring the motion at a second hearing in the criminal case." *CP 537*. OPNET argues that the trial court should not have drawn this conclusion from the evidence, claiming there is no reason to believe the State would have still pursued the criminal charges following a suppression in the civil forfeiture. In making this argument, OPNET forgets the standard of review on appeal.

Here, the court had before it substantial evidence in the record as to how OPNET and the State repeatedly forced the Fagers to needlessly go to court to obtain relief. This included OPNET's failures to produce court ordered evidence, return property, be interviewed, and the State's refusal to order an adequate record on appeal. The court had a wealth of evidence on which to base its belief that the State would not give up its prosecution of the Fagers. While OPNET may believe another judge would have ruled differently, that is not the issue before this Court on appeal. *In re Sedlock*, 69 Wn. App. 484, 491, *review denied*, 122 Wn.2d 1014 (1993) ("Our role or function is not to substitute our judgment for that of the trial court or to weigh the evidence or credibility of witnesses.")

c. Finding of Fact No. 14 e.

OPNET objects to two findings in number 14. First, OPNET argues that the court erred in holding that there are "a number of reasons why the total amount of attorney fees is higher than average." OPNET does not appear to object factually to this statement; rather they are lodging a general objection that any fees associated with the criminal case are not subject to reimbursement. This argument is addressed in a previous section.

OPNET also objects to the court's finding that, "This pattern continued after the appeal, when plaintiffs did not release the seized property

until claimants filed a motion for summary judgment.” *Brief of App. at 47*. But that is exactly what the evidence establishes. This Court affirmed the dismissal of criminal charges on February 10, 2015, the summary judgment was filed on April 24, 2015, and the plaintiffs did not move to dismiss the suit and release the property until May 26, 2015. *CP 107*. Further, as revealed in Mike Hass’s declaration, there were no ongoing negotiations as to the real property. *See CP 178-79*. Moreover, the declarations submitted by Steve Fager and Mike Haas also document how appellants repeatedly failed to return property until the claimants’ filed motions in court. *CP 178-79; 460-64*. The court’s finding is supported by the evidence.

d. Finding of Fact No. 15(d).

The court found that “the Fagers reasonably incurred the requested attorney fees in defending against the forfeiture.” *CP 539*. Appellants challenge this finding as “to the legal conclusion regarding whether attorney’s fees incurred in the defense of criminal proceedings are awardable.” *Brief of App. at 48*. Appellants are mistaken. This is a factual inquiry:

Was there a pending forfeiture proceeding? Yes.

Did the Fagers’ attorneys do legal work to defend against that forfeiture? Yes.

Did the Fagers incur legal fees as a result of that work? Yes.

As described above, the court's findings were well supported by substantial evidence.

e. Finding of Fact No. 15(e).

The trial court found "the attorney fees of \$293,185.64 are reasonable for the work performed." *CP 539*. Appellants object that this includes amounts relating to the criminal case. Brief of App. at 48. This is a continuation of their argument that legal work serving a dual or secondary purpose cannot be included in the total. This argument is addressed in a previous section. Significantly, appellants do not challenge the reasonableness of the fees.

f. Findings of Fact Nos. 6-11 and 14-15.

Appellant challenges findings 6-11 and 14-15 on the basis that Steve Fager is the only claimant, and that Timothy Fager is not entitled to reimbursement. Appellants do not challenge that Tim Fager's role is a major shareholder in the corporation that shares ownership of the land. Nor do appellants contest the finding that he would suffer a major economic loss if the property were forfeited. Appellants' only argument on this issue is a legal one, which was addressed in a previous section.

g. Findings of Fact Nos. 9 and 15(c).

Findings of Fact numbers 9 and 15(c) both relate to the trial court's finding that the Fagers' primary purpose in incurring attorney fees was to

prevent forfeiture of the 115 Freeman Lane Property. Appellants do not challenge the evidence supporting this purely factual finding. Instead, appellants argue that the finding should be stricken because it is “superfluous.” It is not. It explains the courts reasoning. Appellants may disagree with the reasoning, but that does not make it “superfluous” or irrelevant.

9. Respondents’ request for attorney fees on appeal.

Pursuant to RAP 18.1(a) and RCW 69.50.505(6), the Fagers request that this Court grant attorney fees for the time spent responding to OPNET’s appeal. “It is the general principle in Washington that those entitled to an award of attorney fees below are also entitled to attorney fees on appeal.” *Xieng v. Peoples Nat. Bank of Washington*, 63 Wash. App. 572, 587, 821 P.2d 520, 528 (1991) *affd*, 120 Wash. 2d 512, 844 P.2d 389 (1993). This applies to forfeiture actions as well. *Guillen v. Contreras*, 169 Wn. 2nd at 780. (“Appellant’s RAP 18.1 request for an award of attorney fee and expenses for appellate review is granted.”)

E. CONCLUSION

For the reasons stated above, respondents respectfully request this Court to affirm the trial court’s award of attorney fees.

DATED: April 25, 2016



James R. Dixon, WSBA # 18014
Counsel for Claimants

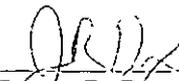
CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on April 25, 2016, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

Michael A. Patterson (X) Email
Patterson Buchanan Fobes & Leitch, Inc., P.S.
2112 Third Ave, Suite 500
Seattle, WA 98121
jcb@pattersonbuchanan.com
map@pattersonbuchanan.com

Brian Wendt (X) Email
Clallam County Prosecuting Attorney's Office
223 East Fourth St., Suite 11
Port Angeles, WA 98362
bwendt@co.clallam.wa.us

Dated this 25th Day of April, 2016 in Seattle, WA



James R. Dixon

FILED
COURT OF APPEALS
DIVISION II
2016 APR 27 AM 10:54
STATE OF WASHINGTON
BY _____
DEPUTY