

FILED
Court of Appeals
Division II
State of Washington
10/24/2018 8:00 AM
STATE OF WASHINGTON

COURT OF APPEALS DIVISION II

COA NO. 52071-1-II

JAMES ROBINSON; SCOTT SMITH,

APPELLANT,

and

AMERICAN LEGION DEPARTMENT OF
WASHINGTON, INC.

RESPONDENT.

APPELLANT'S OPENING BRIEF

HALSTEAD & COMINS RICK PS
JOANNE G COMINS RICK
PO BOX 511
PROSSER WA99350
(509)786-2200
ATTORNEY FOR APPELLANT
SCOTT SMITH

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL	4
A. Assignments of Error – Statutory Interpretation of RCW 23B.16.040(3).....	4
B. Issues on Appeal – Statutory Interpretation.....	4
III. STATEMENT OF THE CASE.....	5
A. Corporate History.....	5
B. Background	7
C. Litigation	10
D. Court Order Granting Petitioners’ Motions; Ordering TAL-WA to Permit Inspection.....	14
E. Order Denying Petitioner’s Attorney Fees.....	14
VI. ARGUMENT AND LEGAL AUTHORITY.....	19
A. Standard of Review on Appeal.....	19
B. <i>Petitioners, Pursuant to RCW 23B.16.040(3) Are Entitled to a Mandatory Award of Their Costs, Including Attorney Fees</i>	23
C. Common Law.....	24
D. By Statute.....	28
E. <i>The TAL-WA Failed to Prove Its Statutory Defense and Cannot Avoid Paying The Mandatory Award of Shareholder Smith’s Costs, Including Attorney Fees, Incurred in Obtaining the Order Directing the TAL-WA To Permit Inspection</i>	37
F. <i>The TAL-WA Has Failed to Prove Its Only Only Defense Allowed By Statute, To Avoid Paying Petitioners’ Attorney Fees and Costs</i>	40
G. <i>Request For Award of Attorney Fees and Costs on Appeal Pursuant to RAP 18.1</i>	45
V. CONCLUSION.....	46

TABLE OF AUTHORITIES

WASHINGTON CASES	PAGES
<i>Cashmere Valley Bank v. Dep't of Revenue</i> , 181 Wn.2d 622, 631, 334 P.3d 1100 (2014).....	19
<i>Davis v Dept of Labor & Industries</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	21
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	20
<i>Goodman v. Bethel School Dist.</i> 403, 84 Wn.2d 120, 524 P.2d 918 (1974).....	21
<i>Nakata v. Blue Bird, Inc.</i> , 146 Wn.App. 267, 191 P.3d 900 (2008).....	31-32, 33
<i>Olympic Tug & Barge, Inc v. The Department Of Revenue</i> , 188 Wn.App. 949, 355 P.3d 1199 (Wash.App. Div. 2 2015).....	19
<i>Simpson Inv. Co. v. Dep't of Revenue</i> , 141 Wn.2d 139, 151, 3 P.3d 741 (2000).....	19
<i>State ex rel. Grismer v. Merger Mines Corp.</i> , 3 Wn.2d 417, 101 P.2d 308, (1940).....	28, 29
<i>State, Ex Rel., v Pacific Brewing Etc. Co.</i> , 21 Wash. 451, 58 Pac. 584 (1899).....	24, 26
<i>State ex rel Paschall v. Scott</i> , 41 Wash 2d 71, 247 P2d 543, 545 (1952).....	43
<i>Sylvester v. Imhoff</i> , 81 Wn.2d 637, 503 P.2d 734 (1972).....	21
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	20
 OTHER STATE CASES	
<i>Clark v. Anjackco Inc</i> , 235 Ariz. 452, 333 P.3d 779 (Ariz.App. Div. 1 2014).....	33-35
<i>Huyler v Cragin Cattle Co.</i> , 40 N.J. Eq. 392 (2 Atl. 274).....	25
<i>In Application of David L. HAMMERMAN, Petitioner-Respondent, For an Order permitting the inspection of the records of and minutes of the proceedings of BUECHE-GIROD CORP.</i> , 421 N.Y.S.2d 210; 72 A.D.2d 677.....	44-45
<i>Towle v. Robinson Springs Corp.</i> , 719 A.2d 880, 168 Vt. 226 (Vt. 1998).....	36

WASHINGTON STATUTES AND COURT RULES	PAGE
RCW 23.86.360.....	1, 6
RCW 23B.....	6, 8, 13, 18, 41
RCW 23B.16.....	2
RCW 23B.16.020.....	12, 22, 27, 29
RCW 23B.16.020(2)(b), (3).....	29
RCW 23B.16.040.....	2, 10, 18
RCW 23B.16.040(1).....	31
RCW 23B.16.040(1), (2) and (3).....	20
RCW 23B.16.040(3)3, 4, 5, 13, 14, 15, 18, 20, 23, 24, 26, 31, 32, 37, 38, 40, 44, 45	
RCW 23B.16.040(4).....	13, 40
RCW 24.03	6, 9, 13, 17, 18, 41
RCW 24.03.135.....	9, 28
RCW 24.06.....	8
Thompson, Corporations, §4406 <i>et seq.</i> §4407	25
Title XXV Corporations, Chapter III, §§3733 and 3734	
Remington's 1915 Code.....	5
Chapter III, Educational, Religious, Social and Charitable Corporations and Associations	5
Chapter IV, Corporations Not Formed For Profit.....	6
Title 23B RCW.....	1, 6
Title 23B.14.220.....	6
RAP 18.1.....	45, 46
 OTHER STATE STATUTES	
11A V.S.A. §16.02(c)(1).....	36
11A V.S.A. §16.04(c).....	36
A.R.S. § 10-1602.....	35
A.R.S. § 10-1602(B).....	34
A.R.S. § 10-1604.....	33
A.R.S. §10-1604(B).....	34
A.R.S. § 10-1604(C).....	34, 35
A.R.S. §§ 10-1601(E)-1602(A).....	34

I. INTRODUCTION

Appellant Scott Smith ["Smith"] was one of three pro se Petitioners¹ before the trial court who together filed a Complaint for expedited relief pursuant to Title 23B RCW. Petitioners requested an Order compelling The American Legion, Department of WA, Inc., to allow Petitioners to inspect and copy the corporate books and records which Petitioners had requested, and the corporation had denied. CP 4-70.

That relief was granted. Smith appeals the trial court's denial of his request for attorney's fees mandated by the statute.

James Robinson, Michael Mattingly and Scott Smith are US Military veterans who each served their country and, after being honorably discharged, joined The American Legion. Each is a member² in good standing of The American Legion, Department of

¹ "Petitioners" as used in the record before the trial court refers to James Robinson, Michael Mattingly and Scott Smith collectively. To avoid confusion, this Opening Brief will continue the same naming convention.

² "Consistent with RCW 23.86.360, the terms "shareholder" or "shareholders" as used in Title 23B are deemed to refer to "member" or "members" and the terms "share" or "shares" are deemed to refer to "vote" or Votes entitled to be cast by an member or members." CP 388 ¶8, 389 ¶14.

Washington, Inc. [hereinafter referred to as “TAL-WA”]³. Each made requests to inspect and copy the books and records of the TAL-WA, particularly as regarding the individual employees’ wages, salaries, benefits, bonuses, bank accounts, investments, credit card accounts, payroll, the General Ledgers, and similar financial account records,⁴ which requests were all summarily denied by the TAL-WA.

Smith and the other Petitioners⁵ then sought a writ from the Court ordering inspection of the TAL-WA’s records pursuant to RCW 23B.16.040, CP 4-70, which was granted and is not before the Court.

The trial court ruled in favor of Petitioners and made findings that showed the shareholder obligations under RCW 23B.16 had been met by the Petitioners, including Smith. The trial court then ordered TAL-WA, Inc. to allow shareholder inspection. That decision was not appealed by TAL-WA and is final.

However, on February 23, 2018, without making any findings, the trial court denied Smith’s motion for attorney’s fees, which are

³ “Department” as used in the record before the trial court refers to “The American Legion, Department of Washington, Inc”; which, to avoid confusion, is here referred to as “TAL-WA”.

⁴ Employee wages, salaries, bonuses, benefits and the like comprise over 50% of the TAL-WA, Inc., annual expenses. The TAL-WA income comes from donations from the public, dues from the members, and a grant from the WA Department of Veterans’ Affairs [“WDVA”], which is taxpayer dollars. II RP 36:16-20.

⁵ After the first court hearing, Smith was the only Petitioner to retain counsel. CP 111-112. Smith’s position is aligned with the other Petitioners, except for the fee request which they cannot make.

mandatory under RCW 23B.16.040(3). The statute incorporates long-standing Washington law that shareholders are entitled to *inspect and copy the corporate documents, that shareholder requests are presumed to be proper as a matter of law, and that they can recover their fees if the request is denied.* The statute thus allows a corporation that denied records to its shareholders to escape the mandatory payment of the shareholder's costs and fees **only** if it *rebutts the legal presumption the request was proper by proving "it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded."* *Id.* This requires competent evidence to support findings to rebut the presumption. No such proof of a reasonable basis was provided, much less were findings made that would support the conclusion of such proof. The record, which is complete, would not support such necessary findings.

The trial court therefore must be reversed because it did not make findings that would support its conclusion the TAL-WA had a reasonable basis for doubt. Because the record would not support such findings, *the denial of fees must be reversed, the case remanded for a determination of the reasonable fee to which Smith is entitled, and Smith awarded his fees on appeal.*

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL:

A. Assignments of Error – Statutory Interpretation of RCW 23B.16.040(3)

1. The trial court erred in entering the Order denying Appellant Smith attorney's fees and costs mandated by RCW 23B.16.040(3).
2. *The trial court erred in entering the Order that concluded the TAL-WA/Department had proven it had a reasonable basis for doubt about the right of the Shareholder Smith to inspect the records demanded, in the absence of factual findings supporting that conclusion. A recitation of the statutory language alone is insufficient to sustain that the corporate statutory defense was "so proved."*
3. The trial court erred in denying the mandatory statutory award of costs and attorney fees to Appellant Smith where the record would not support a finding it had a reasonable basis for doubt about the right of Shareholder Smith to inspect the records demanded.

B. ISSUES ON APPEAL – STATUTORY INTEPRETATION

1. Must the trial court's decision denying Smith his statutory attorney

fees and costs as mandated by RCW 23B.16.040(3) be reversed because there is insufficient evidence to support findings that *would support a reasonable basis for doubt about Smith's right to inspect the records demanded and overcome the strong legal presumption Smith's request was proper and reasonable?*

2. Must the trial court's conclusion that the Department "proved" that it refused inspection of corporate records in good faith because it *had a reasonable basis for doubt about the right of the Petitioners to inspect the records demanded be reversed and vacated because it was not based on findings of fact that support that conclusion, but was based upon nothing more than recitation of the statutory language itself be reversed?*

III. STATEMENT OF THE CASE

A. CORPORATE HISTORY⁶

In December 1919, the American Legion Department of Washington filed its Articles of Incorporation [CP 194-199] under § 3733 and § 3734 of Remington's 1915 Code [CP 194], which sections are contained within Chapter III, Educational, Religious

⁶ See CP 178-208; also CP 387-389.

Social and Charitable Corporations and Associations [CP 189-189]; separate and distinct from Chapter IV, Corporations Not Formed For Profit. CP 190-192. *The TAL-WA is a Fraternal Association and can operate For Profit businesses.* The Secretary of State received the Articles of Incorporation and issued TAL-WA a Certificate of Incorporation. CP 193.

In April 1996, the TAL-WA was administratively dissolved by the Secretary of State. In June 1996, TAL-WA filed an *Application for Reinstatement of a Domestic [Washington] NonProfit Corporation RCW 23B.14.220.* CP 200. The Certificate of Reinstatement signed by Secretary of State Ralph Munro approved its application under RCW 23B.14.220 as a Washington NonProfit Business Corporation. CP 201.

TAL-WA is not a Washington NonProfit Corporation, nor is it a charity or a public benefit corporation and is not governed under the provisions of RCW 24.03. CP 183-185, 202-208.

The American Legion Department of WA has members. CP 178-208. Consistent with RCW 23.86.360, the terms “shareholder” or “shareholders” as used in Title 23B RCW are deemed to refer to “member” or “members” and the term “share” or “shares” are deemed

to refer to “vote” or “votes”.⁷ CP 182, 387-389. The trial court found that Smith and the other Petitioners were shareholder/members of TAL-WA, Inc., and entitled to exercise shareholder rights to inspect and copy records. CP 388-389.

B. BACKGROUND:

The members/shareholders of TAL-WA, Inc., had, on numerous occasions and at varying times, made proper requests and for proper purposes, to exercise their rights as shareholder/members to inspect and copy the financial books and records of the TAL-WA. CP 13-18. To each request, including those made by Smith, Robinson and Mattingly, the TAL-WA resoundingly said “no.” CP 13-18.

Employee wages, salaries, bonuses, benefits and the like comprise over 50% of the TAL-WA, Inc., annual expenses. The TAL-WAs income is derived from donations from the public, dues from the members, and a grant from the WA Department of Veterans’ Affairs [“WDVA”], which is taxpayer dollars. II RP 36:16-20.

The petitioners have a legitimate concern to access records for purposes of determining whether the elected officers, executive committee and employees of the TAL-WA are not engaging in

⁷ The reference to “shareholder” or “member” in this Opening Brief is made interchangeably, and without distinction or significance.

financial abuse and mismanagement, such as what the conflicting and incongruent numbers reported on the IRS Form 990s filed by the TAL-WA each year suggest. CP 280-291. The Petitioners, as members have a legitimate interest in ensuring against embezzlement, misappropriation of funds, theft of funds through false accruals for retirement/vacation accounts, corruption, and that the practices are legal to allow for the survival of this tax-exempt Veterans' association. CP 280-291.

In 2011 James Robinson requested to see the TAL-WA's records. His requests were denied. CP 13-16. The 2012 Subcommittee Report [CP 20-27] made findings and recommendations to the TAL-WA's Department Executive Committee ["the DEC"]: notably, that the TAL-WA was a corporation governed by the provisions of RCW 23B and RCW 24.06 [CP 25]; and that the TAL-WA's finances needed to be organized and made available to its members. CP 20-27. Then-Commander Ken Lee *took the position that the members were "entitled to see everything – any and all the TAL-WA's books and records"*. CP 24. Those "recommendations" were largely ignored.

In 2014, two elected members of the DEC became concerned about the discrepancies in computer-generated accounting software

reports compared to the monies stated on the TAL-WA's annual Form 990s filed with the IRS. CP 28-35. They were told the TAL-WA corporation was governed by the provisions of RCW 24.03. A quick read of RCW 24.03.135 clearly shows board members responsible and liable for their votes in overseeing the TAL-WA's affairs and finances. The two DEC members asked to see "the books"; and each were denied. Paul Whitfield wrote a letter stating exactly the records he requested to inspect and "why". CP 60-61.

An attorney hired by the TAL-WA provided a written response that the provisions of RCW 24.03 did not entitle a DEC member to examine employee payroll records, despite the clear statutory language and legal liability for breach of fiduciary responsibilities. CP 51-52. DEC member Bruce Rick wrote a separate letter, asking to see "the books"; and received the same written denial and circuitous explanation from the attorney. CP 42-48.

In 2017, Scott Smith accepted an appointment to the TAL-WA Audit Committee by the then-TAL-WA Commander, Wayne Elston. When Smith began asking "too many questions", asking to inspect and copy the TAL-WA's financial account records to resolve the financial irregularities and accounting practices he saw, he was denied; and then Elston removed him from the Committee and

threatened to throw him out of the Legion. CP 84-93.

C. LITIGATION

On June 6, 2017 the Petitioners sought a writ of mandamus from the Court and filed their Complaint for Court Ordered Inspection Pursuant to RCW 23B.16.040. CP 4-70.

After the first hearing held June 30, 2017 Petitioner Scott Smith retained legal counsel to represent him; who appeared on July 3RD. CP 111-112. A second show cause hearing was set for July 14th. CP 113-118. The motion [CP 113-118] attached a list of the records that Smith had previously requested to inspect and was denied by TAL-WA. CP 117-118.

Two days before the hearing, the TAL-WA finally began providing copies of some of the records that Petitioners had requested. I RP 4:21-25, 5:1-9.

Smith told the Court that his request was to inspect the financial records of TAL-WA, Inc. I RP 12:6-7.

TAL-WA, Inc. *maintained that some records were recently provided, but that other records were denied because TAL-WA contended "...we don't believe that frankly their entitled to everything..."* I RP 8: 20-21. *"...We're going to have a dispute over employee records. They want individual employee payrolls and*

individual pay records, which will be one of the items of dispute..." I
RP 9:2-4.

The Court "struck" the hearing [CP 174] and entered a written order that directed "*parties should cooperate in a good faith attempt to resolve disputes regarding the Petitioners' requests for access to all corporate documents; and if there remained disputes, parties could return the matter to the Court for rulings*". CP 175-177.

The TAL-WA produced a blizzard of records but refused to copy any financial records which included information regarding employee wages, benefits, bonuses and the like, as Petitioners had requested.

Its attorney, Mr. Zandell, sent an email explaining what records were provided and what records were not being provided, including TAL-WA, Inc.'s reasoning for denying allowing inspection:

Employee Wage, Salary & Benefit Data: The Department objects to providing any record that sets forth any individual employees' wage, salary and/or employment benefits. We believe we will prove to the court that the Department is regulated under chapter 23.04 RCW. But even if you convince the court that the Department is regulated under the for-profit Corporation Act, chapter 23B RCW, and that the petitioners are "shareholders" as defined there, we do not believe the records inspection provisions under that statute entitle the petitioners to inspect records containing individual employee's wage, salary and/or employment benefits. 23B RCW expressly allows shareholders to inspect several categories of records, but none of them are payroll records. Of all the records that shareholders are entitled to inspect under 23B RCW, the only category that comes close to payroll records is "accounting statements". There is no definition of "accounting statements" in the statute, and I find no case law interpreting that phrase. Nevertheless, we believe that the court would rule "accounting statements" are things like profit and loss

statements, balance sheets, and accounts payable and accounts receivable ledgers. Additionally, the other financial records that have been provided to the petitioners set forth the total amount the Department paid out for salaries and wages to its employees.

Neither corporate statute is designed to allow even shareholders unfettered access to all of a corporation's financial records. Individual employee's salaries and wages are disclosed to and approved by the Department Executive Committee (DEC). If the petitioners are concerned about wages and salaries being paid to Department employees, they have every right to seek election to the DEC. CP 228

Smith submitted a declaration, refuting each reason for denying inspection. CP 228-233. Smith move to have the Court order TAL-WA, Inc., to allow inspection.

At the October 18, 2017 hearing, TAL-WA, Inc., argued that many requested records had been provided, but refused to disclose any records that contained individual employee salaries and wage information [II RP 41:17-25, 42:1-8] and alleged that Smith wasn't entitled to inspect those. The TAL-WA, Inc. asserted it could not find a definition of "accounting records" as used in RCW 23B.16.020 in any case law and therefore, contended "*...so we must figure it out for ourselves, and we believe it's appropriate to draw the line at individual employee records...*" II RP 42:16-25, 43:1-2. TAL-WA, Inc. also argued allowing inspection of employee salary records would be an invasion of privacy and could subject the corporation to

lawsuits from its employees.⁸ II RP 44:1-15.

The Court rejected the TAL-WA arguments⁹, allowing inspection of records by “imposing reasonable restrictions on the use or distribution of records by the demanding shareholder” as authorized under RCW 23B.16.040(4). II RP 44-46. The Court orally ruled in favor of the Petitioners on the issue of accounting records, directing TAL-WA, Inc. to allow inspection of the records requested, including employee payroll and wage records, and the like. II RP 56-57.

Prior to hearing argument on awarding Smith his statutory attorney fees, the Court made the following prefatory comments:

I will tell the parties, and just so your arguments can be focused, the court is looking at RCW 23B.16.040(3) that *if the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholders' costs including reasonable counsel fees incurred to obtain the order unless the corporation proves that it has -- that it refused inspection in good faith because it had reasonable basis for doubt about the right of the shareholder to inspect the records demanded.*

I will tell you that based upon my ruling I think it's obvious I think there was a legitimate legal dispute in this case as to whether RCW 24.03 applied or whether RCW 23B applied, and so what I would ask is the parties to keep that in mind as they make their

⁸ The record before the trial court does not include evidence to support these contentions; for example, no employee of TAL-WA filed a declaration objecting to Smith's inspection of its individual payroll records; arguments of counsel are not evidence and the evidence is otherwise lacking to show TAL-WA, Inc. had reasonable basis in good faith to doubt the shareholder's right to inspect these records, so as to avoid the payment of Smith's mandatory statutory attorney fees.

⁹ The Court asked TAL-WA: *So your position is that the petitioners aren't entitled to know what member --- what employees and officers of the Department are paid?* II RP 45:7-9.

argument about whether costs and counsel fees should be ordered by the court. II RP 59.

TAL-WA argued:

“...Your Honor’s pointed out there was a good faith dispute as to which statute applied. But, once that’s decided, then there’s a good faith dispute over whether payroll records are included within appropriate accounting records. We in good faith did not believe they were. Your Honor has now ruled on that, but I think it was a legitimate dispute and so my clients were well within their rights not to provide the records...” II RP 63:11-20.

The Court’s oral ruling denied awarding attorney fees to Smith as mandated by RCW 23B.16.040(3), but “without prejudice” so that the issue could be brought back for further hearing. II RP 64:12-25.

**D. COURT ORDER GRANTING PETITIONERS’ MOTIONS;
ORDERING TAL-WA TO PERMIT INSPECTION:**

At the December 15, 2017 hearing [IV RP 1-26] for presentment and entry of a written order based on its October 18th oral rulings and decision, the Court heard objections from parties as to the proposed written language, and its rulings were incorporated into the written Order Granting Petitioners’ Motions [hereinafter “December 15th Order”], signed and entered that day. CP 386-390. The Order has not been appealed and is therefore final.

E. ORDER DENYING PETITIONERS’ ATTORNEY FEES:

On February 2, 2018 the Court heard Appellant Smith’s follow-up motion for award of mandatory attorney fees under RCW

23B.16.040(3), as permitted under the December 15th Order. VI RP 1-38. CP 389-390.

The Court looked to give meaning to the statutory language as to what the corporation had to prove to avoid paying mandatory attorney fees to Smith who had successfully obtained the Order compelling TAL-WA, Inc. to allow inspection of records previously requested and denied, as provided in RCW 23B.16.040(3).

During oral argument, the Court asked Smith several inquiries:

THE COURT: When you said regarding the statute the good faith is whether or not the petitioners' purpose was proper, I'm reading directly from 23B.16.040(3). "If the court orders inspection and copying of the orders demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded."

Where is the interpretation that you have read into that that goes to – the language of the statute... IV RP 14:25-15:1-16.

###

What if there was a record that you asked for that, let's say, you conceded wasn't governed by the statute? Would the department be justified under the language that in good faith they had a reasonable basis for doubt? And if so, would they then have to pay the other side's attorney fees for fighting that issue in court? VI RP 19:14-19.

###

What if the reason that they refused inspection was because they had a reasonable basis for doubt about the right of the shareholder that made that request to inspect those records that were being demanded? I mean, again, I'm seeing that you're focused on this purpose, but I don't see that in the language of the statute, and that's what I'm trying to get at... VI RP 20:8-15.

TAL-WA's argued that Smith had been provided records before filing the litigation, but

Then he asked for full and unfettered access to the books and records. Now, whether it's a member under the nonprofit act or a shareholder under the corporation act, they are not entitled to full and unfettered access to the books and records so it was appropriate for the department to deny that request. VI RP 6:23-25, 7:1-4.

After the Complaint was filed, TAL-WA concedes it still denied Smith's access to employee payroll records.

Now, the court did rule against the department on the payroll data issue. But the department had a good-faith and reasonable basis for initially believing Mr. Smith was not entitled to those records. The department reasonably believed it was governed by the Nonprofit Corporation Act, ... The department had already provided Mr. Smith with its bank account and investment account statements, plus there was no definition or case law to guide the department in its interpretation of the phrase at issue, plus the department had reasonable concerns over confidentiality and incurring liability for invasion of privacy. This meets the statutory test. The department had a reasonable basis to doubt Mr. Smith's right to inspect the records, plus, as soon as the court resolved the dispute over the payroll records, the department provided the rest of the records requested by Mr. Smith that contained payroll data. VI RP8:12-25, 9:1-4.

Smith argued that Petitioners had no choice but to seek a court order; that the Verified Complaint proved TAL-WA had been denying access to corporate records for the past seven years; and only after the Complaint was filed did TAL-WA begin permitting inspection of some records, but continued to deny payroll records, employee wages, salaries and related records. VI RP 11-13.

Relying on the case law cited in Smith's pleadings, the argument was made to the Court that a corporation having a "good faith" belief that a particular type of record, based on the nature of that record, was properly denied to inspection by a shareholder misconstrued the interpretation of the statutory defense given to corporations by these Courts: that instead, the corporation could only avoid paying the shareholder's attorney fees if it proved that the purposes for which the shareholder sought inspection were improper,

It is whether or not the corporation has a reasonable basis to doubt. The shareholder has a right to inspect the record demanded is not the purpose. However, in the Nakata case Ms. Comins Rick correctly points out the reason to deny the records in that case was an improper purpose. So an improper purpose can be the reason to doubt, but there can be other good-faith reasons to doubt such as you've requested a category of record that's not provided to you under statute. Again, at the time the department was looking at 24.03, statement of accounts, statements of finances. Is a paycheck a statement of account or a statement of

finances? I think it's not, and that is why it was a reasonable basis to doubt... VI RP 25:4-18.

The TAL-WA provided no legal authority to support its interpretation of the statutory corporate defense. Smith's attorney responded that TAL-WA repeatedly stated that it didn't matter whether it was governed under RCW 23B or RCW 24.03, TAL-WA would not permit inspection of employee payroll and salary records by anyone for any reason; and if Smith had not come to Court, TAL-WA would still be withholding inspection of those records. VI RP 26:8-16.

The Court prefaced its oral ruling:

...the Court, as the parties know, has encouraged since the beginning of this case back in June 2017, has encouraged these parties ...It looks at this organization as one that's filled with good people ... who have done things, and its why this Court has consistently tried to encourage parties to work together, which I think the parties have. In many respects they have. And going back and going through a large number of the pleadings from June, the Court was reminded of how this case has progressed ...VI RP 26:17-25; 27:1-4.

The Court then ruled:

The issue is whether attorney fees should be ordered under RCW 23B.16.040 to the petitioners, and if so, in what amount. The court looking at 23B.16.040(3) -- and I've read it into the record, but I'll read it again. *"If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused*

inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded."

I am finding that the corporation has so proved, and I know that is a huge point of contention for the parties, but when I review everything in this case, and also I reviewed a number of the transcripts of hearings along the way, the court is convinced that is the right legal answer. VI RP 27:7-23.

A recitation of the statutory language alone is insufficient to sustain that the corporate statutory defense was "so proved."

The written order denying a mandatory award of Smith's statutory attorney fees and costs was entered February 23, 2018. CP 494-495. This appeal followed.

IV. ARGUMENT AND LEGAL AUTHORITY:

A. STANDARD OF REVIEW ON APPEAL:

As explained by the Court in Olympic Tug & Barge, Inc v. The Department Of Revenue 188 Wn.App. 949, 954, 355 P.3d 1199, (Wash.App. Div. 2 2015)

[¶6] Statutory interpretation is a question of law we review de novo. *Cashmere Valley Bank v. Dep't of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014). We endeavor to effectuate the legislature's intent by applying the statute's plain meaning, considering the relevant statutory text, its context, and the statutory scheme. *Cashmere*, 181 Wn.2d at 631. When a statute includes general terms in conjunction with specific terms, we deem the general terms "only to Page 953 incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3

P.3d 741 (2000). Only if the statute remains ambiguous after this plain meaning analysis do we proceed to look at other sources of interpretation, such as legislative history. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). We avoid reading a statute in a way that produces absurd results. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007).

The central issue to this appeal regards the statutory interpretation of RCW 23B.16.040(3) which provides:

If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

The statute embodies long-standing Washington law that shareholders are entitled to review the records of their companies, that there is a presumption they recover their fees and costs when denied this basic right by the company, and that the corporation has the heavy burden to prove with admissible evidence that it was acting in "good faith" when denying its shareholder this basic right.

It is undisputed that the Petitioners prevailed, as the Court ordered the TAL-WA to permit inspection and copying of the records demanded by Petitioner, pursuant to RCW 23B.16.040(1), (2) and (3). The December 15, 2017 Order Granting Petitioners' Motions

[hereinafter “December 15th Order”] has not been reconsidered, nor appealed by the TAL-WA. Therefore, the findings and provisions of that unchallenged December 15th Order are verities on appeal.

As the WA State Supreme Court held in *Davis v Dept of Labor & Industries*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980):

On appellate review, this court is firmly committed to the rule that a trial court's findings of fact will not be disturbed if they are supported by "substantial evidence." See, e.g., *Sylvester v. Imhoff*, 81 Wn.2d 637, 503 P.2d 734 (1972). As a corollary to this rule, we note that unchallenged findings of fact become verities on appeal. As such, it is unnecessary for us to search the record to determine whether there is substantial evidence to support them. They are the facts of the case. *Goodman v. Bethel School Dist.* 403, 84 Wn.2d 120, 124, 524 P.2d 918 (1974). Here, *124 Davis has assigned no error to any finding of fact except No. 26. Thus, we have no concern with the remaining 26 findings of fact, other than to ascertain that they support the conclusions of law and the judgment.

Here it is unnecessary for the appellate court to search the record to determine whether there is substantial evidence that Smith met his statutory burden to inspect and copy TAL-WA, Inc. records. The December 15th Order is unchallenged and is “the law of the case.”

Smith properly requested to inspect records for purposes and the records requested were consistent with those purposes; the TAL-WA denied inspection, and the Court ordered TAL-WA to allow Smith's inspection of the records.

TAL-WA had never allowed its members to inspect records related to employee salary, wages, benefits and the like. Even

members of the DEC, who owed a fiduciary duty to the members, were denied inspection. CP 28-32, 33-35, 41-43, 45-46, 48, 50-52, 54-58, 60-61.

The Court rejected TAL-WA's arguments that employee wages and benefits data were protected by privacy and confidentiality doctrines; and/or fell beyond the scope of "accounting records"; instead, the Court found that "accounting records" as used in RCW 23B16.020 refers to all records related to income and expenses of TAL-WA, including employee wages, benefits, salaries, etc.; and ordered TAL-WA to permit Smith to inspect all such records.

The Court's December 15th Order is conclusive evidence that Smith met his statutory threshold and is entitled to a mandatory award of costs and attorney fees by statute.

The TAL-WA failed to present sufficient evidence for the Court to make findings that would support a good faith conclusion, but it had every opportunity, particularly in the second hearing. Thus, because of TAL-WA's failure, there was insufficient evidence for the Court to rule that the TAL-WA had met its statutory burden to *avoid* the award of costs and fees. Thus, since on this record Appellant Smith is **legally entitled** to fee award, the remand would only be for purposes of determining the amount of the fee, for which hearing Smith would

submit a proper itemized fee application, which was not done before when entitlement had not been established.

B. PETITIONERS, PURSUANT TO RCW 23B.16.040(3) ARE ENTITLED TO A MANDATORY AWARD OF THEIR COSTS, INCLUDING ATTORNEY FEES.

RCW 23B.16.040(3) allows a corporation to avoid the mandatory payment of costs and fees for its denying inspection:

...unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded

The oral argument presented at the October 18th hearing regarding the award of costs and fees focused as to whether there was a “good faith dispute” between the parties regarding the governing corporate statutes and the scope of what records were included as “accounting records” or “statements of account”.

A “good faith dispute” about governing corporate statutes and the parameters of what is meant by “accounting records” however, is *not* the criteria by which the TAL-WA can avoid the mandatory award of fees under the statute at issue. Rather, “good faith” refusal is limited to whether the TAL-WA denied inspection because it had a reasonable basis to doubt the right of the shareholder to inspect the records. Whether the request to inspect is “contrary” to the asserted

best interests of the corporation is irrelevant under the statute and longstanding Washington law.

The shareholders' right to inspect corporate records is founded in common law, in statute and in case law.

C. COMMON LAW:

The seminal case regarding the common law rights of shareholders in Washington is *State, Ex Rel., v Pacific Brewing Etc. Co.*, 21 Wash. 451, 58 Pac. 584 (1899). As shown *infra*, *Pacific Brewing* stands for the proposition that a shareholder's request is **presumed** to be proper as a matter of law. It is that legal presumption that the corporation must overcome with objective evidentiary proof to avoid liability for fees. And it is this long-standing case law that is incorporated into the statute at issue, RCW 23B.16.040(3).

The Court states:

The stockholders of a corporation have at common law, for a proper purpose, and at seasonable times, a right to inspect any and all books and records of the corporation... But [p.458]... the courts disagree as to what is a proper purpose or, rather, as to what facts are sufficient to warrant the court in directing by mandamus permission to inspect, where the stockholder has been refused such by the officers of the corporation.

Pacific Brewing, 21 Wash. at 457-458. The opinion presents

extensive analysis of the prior caselaw addressing this issue, beginning with cases arising in England and spreading across the United States from the east to west coasts. The Court refers to *Huyler v Cragin Cattle Co.*, 40 N.J. Eq. 392 (2 Atl. 274) where it is said:

“Stockholders are entitled to inspect the books of the company for proper purposes at proper times...And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection...Oftentimes frauds are discoverable only by examination of the books...The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders...”

And at page 463 considers §4407 from Thompson, Corporations, §4406 *et seq.*:

“In corporate management, or mismanagement, no more frequent or more aggravated species of outrage exists than the refusal of those in possession of the corporate books to disclose to the stockholders the written evidences of their stewardship; and in many cases nothing short of severe pecuniary forfeitures, followed by imprisonment as for crime, will afford an adequate protection to minority stockholders.”

Based upon the foregoing analysis, the Court held [p. 463-464] that, where it comes to corporations and protection of the interests of the public in dealing with them:

“...the courts adopt the rule which will most largely conduce to

honesty in their management. We believe that these interests will be better protected by holding that the stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation, so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation; and, when it is charged to be otherwise, the burden should be on the officers refusing such request, or the corporation, to establish it..." [emphasis, mine].

Under the holding of *Pacific Brewing*, at common law, Petitioners have the right to inspect the TAL-WA's books and records; and their purpose for inspection is **presumed** to be proper. It is the TAL-WA that must provide proof with competent evidence that overcomes the heavy legal presumption, which is embodied in RCW 23B.16.040(3).

The December 15th Order at ¶19 states:

The Petitioners are members in good standing; and made proper requests to inspect records for purposes of investigating corporate management of the affairs and finances of the Department, which requests Petitioners claim were denied... CP 388.

The Petitioners' purposes here are presumed, and were held by the Court, to be proper.

The burden then shifts to the TAL-WA to prove it denied inspection in good faith because it had a reasonable basis to doubt

that the purposes to inspect were proper. The TAL-WA did not meet this burden.

The Dec 15th Order at ¶ 9 continues:

After Petitioners filed this Petition for Mandamus, the Department produced copies of some corporate records, but denied inspection of other records, including records related to employee wages, salaries and benefits. CP 388.

And ¶ 11 provides:

The Court finds, in looking at RCW 23B.16.020, that the accounting records of the corporation refers to all records related to the income and expenses of the Department corporation, and would include, but is not limited to:

- *Records that are related to moneys that are paid to individual employees, but not employee complaints. That should answer much of the dispute that remains between the parties on that issue;*
- *Expenditure of legal fees in a prior dispute fall within the accounting records of a corporation as those are moneys expended by the corporation for legal defense or legal action, but not records of lawsuits;*
- *Financial relations between the Department and the American Legion Auxiliary: The moneys that are shared between the Auxiliary and the Department. The Department's side of the financial records of those interactions are ordered by the court to be disclosed;*
- *Post 110 records: the court takes a similar tack as it did with the Auxiliary. The Department's side of those records will be disclosed; and*
- *The General Ledgers are accounting records of the Department. CP 388-389.*

The TAL-WA never doubted that the Petitioners' **purposes** [to investigate corporate management of the affairs and finances of the

corporation] in asking to inspect and copy records were proper. The TAL-WA denied inspection because it contended that no circumstance or purpose [proper or not] would exist to permit Petitioners to inspect “accounting records” related to the individual employee salaries, wages, benefits, payroll, and the like; these were records available exclusively to the privileged few that run the TAL-WA’s affairs and finances.

The TAL-WA argument is counter-intuitive to the fundamentals of corporate law: the shareholders are the owners of the corporation; and the request to inspect corporate records is a request for a shareholder to inspect his own records.

D. BY STATUTE:

The Petitioners’ common law right to inspect is codified by the Washington state corporate statutes.

“It is the generally accepted rule that statutes ... do not abridge, restrict, or repeal, but enlarge, extend, and supplement, the common law rule...” State ex rel. Grismer v. Merger Mines Corp., 3 Wn.2d 417, 422, 101 P.2d 308, (1940).

RCW 24.03.135 requires nonprofit corporations to keep...

(3) Correct and adequate statements of accounts and finances; members are entitled to inspect such records, but “...Any such member must have a purpose for inspection

reasonably related to membership interests..."

RCW 23B.16.020 allows inspection of records by shareholders, including...

(2)(b) Accounting records of the corporation... so long as, under .020(3): ... The shareholder/member's demand is made in good faith and for a proper purpose...

Under either statute, the gravamen to allowing members to inspect these records flows from their ownership interest in the corporation [as shareholders] and therefore, inspecting records as owners is equivalent to inspecting their own records. The books and records of the corporation are not the private property of the DEC or its employees; but they are the property of the members.

The TAL-WA Department Executive Committee has a fiduciary relationship to the members; and in the exercise of that "trust", the DEC's conduct and management of the affairs and finances of the TAL-WA are embodied and/or memorialized in the financial books and records. The right of members to inspect corporate records is presumed to be for a proper purpose, and in furtherance of the best interests of the corporation.

The Washington State Supreme Court in *Grismer, supra*, at pages 420-421, addressed the prevailing rule in this state:

*“... the common law right of a stockholder to examine the books and records of the corporation at proper times and for proper purposes remains. [citations omitted, mine] And, under the common law rule, as it prevails in most states... statute, **the burden of showing improper motives on the part of the shareholder in demanding [3 Wn.2d 421] an inspection of the books and records of the corporation is upon the defendant. It is presumed, until the contrary is shown, that the shareholder seeks the information for a proper purpose...** [citations omitted, mine]... **This is the rule that prevails in this state.** [emphasis added, mine].*

The burden shifted; and the TAL-WA here did not present evidence to prove Smith's motives to inspect were improper; the TAL-WA did not challenge Smith's motives in seeking to inspect records was anything but proper. The December 15th Order finds that Smith made proper requests for proper purposes and is entitled to inspect the records that were requested and denied, including the accounting records. The TAL-WA was ordered to permit inspection and copying to the Smith. The December 15th Order finds:

The Court notes that Ms. Comins Rick filed, as part of her affidavit, an estimated amount of attorney fees; but no break-down. The Court, in going through this record again in preparation of today's hearing does not find a basis to award attorney fees. *The court will today deny without prejudice that request and allow petitioners to renew that request by future motion.* CP 389 ¶14.

This finding does not articulate facts upon which the Court relies in concluding it *“...does not find a basis to award attorney fees.”* Absent

findings of fact, the conclusions of law and decision denying Smith's mandatory attorney fees by statute is unsupportable.

The TAL-WA denied inspection and copying without any reason or basis to doubt that Smith wasn't entitled to inspect the records requested: the TAL-WA did not prove, and never challenged, that the members' requests were inimical and contrary to the TAL-WA's interests.

Therefore, the trial court erred in denying the statutory award of attorney fees to Petitioners.

In contrast to the trial court here, the Court of Appeals, Division III, in *Nakata v. Blue Bird, Inc.*, 146 Wn.App. 267, 276, 191 P.3d 900 (2008), upheld the trial court's decision that denied the statutory award of attorney fees under RCW 23B.16.040(3). *Nakata* claims she requested to inspect the corporate records and was refused; she sued to obtain an order to compel the inspection pursuant to RCW 23B.16.040(1). The Court ordered the corporation to produce records. *Nakata* requested award of costs incurred to obtain the records under RCW 23B.16.040(3).

*Blue Bird responds that the fee award in RCW 23B.16.040(3) does not apply when a cooperative proves that it refused inspection in good faith because it had a reasonable basis for doubting the shareholder's right to inspect the cooperative's records. **Blue Bird claims that it denied Ms. Nakata's requests***

to inspect its records because she was not a member of the cooperative and held a position that was contrary to Blue Bird's purposes-to provide for the survival of the cooperative and serve and protect all members equally.

...But a shareholder is not entitled to fees if "the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." RCW 23B.16.040(3). Here, the court found the reasons advanced by Blue Bird reasonable: "the Court finds that Blue Bird had a reasonable basis for doubt as to [Ms. Nakata's] right of access to inspect the records demanded."

During oral argument, counsel for the TAL-WA admitted:

"...In the Nakata case Ms. Comins Rick correctly points out the reason to deny records in that case was an improper purpose. So, an improper purpose can be the reason to doubt..." VI RP 25.

However, TAL-WA did not articulate any facts showing that Smith's request was denied because TAL-WA in good faith believed Smith's motives to inspect were for "an improper purpose." Nor did TAL-WA present legal authority or evidence in support of its contentions.

The trial court's findings and conclusions in the December 15th Order are exactly opposite of the facts and holdings of the *Nakata* court; and logically, should result in a decision that is wholly opposite, that the TAL-WA did not have a reasonable basis for doubt as to Petitioners' right of access to inspect the records demanded, because there are no facts articulated where the Court found TAL-WA denied inspection having a good faith belief Smith was seeking

to inspect records for a improper purpose.

The Court entered findings in the December 15th Order, without material objections from the TAL-WA: that petitioners are

“members in good standing”; and “made proper requests to inspect records for purposes of investigating corporate management of the affairs and finances of the Department... After Petitioners filed this Petition for Mandamus, the Department produced copies of some corporate records, but denied inspection of other records, including records related to employee wages, salaries and benefits.

Under *Nakata*, the trial court’s denial of Smith’s attorney fees cannot be sustained.

Other states, having similar statutory schemes for inspection of corporate records, have ruled imposing the mandatory award for costs and attorney fees under facts and circumstances consistent with the case at bar.

The Arizona Court of Appeals discussed and ruled in *Clark v. Anjackco Inc*, 235 Ariz. 452, 333 P.3d 779 (Ariz.App. Div. 1 2014):

¶1 Anjackco, Inc., appeals from the superior court's award of attorneys' fees to Margaret Hurley Clark on Clark's complaint seeking inspection of certain corporate records. Anjackco contends that Clark was not entitled to an award of fees under A.R.S. § 10-1604, which requires a corporation to pay a shareholder plaintiff's fees if the court grants the plaintiff's request for an order to permit inspection and copying of records. ...

###

¶13 Anjackco argues that Clark is not entitled to costs or fees because the corporation produced the documents voluntarily and the only orders entered were expressly based on the parties' agreement. Anjackco contends that the cost and fee statute, §10-1604(C), applies only "[i]f the court orders inspection and copying of the records demanded."

¶14 The interpretation and application of a statute present questions of law, which we review de novo. (citations omitted). The goal in interpreting a statute is to give effect to legislative intent. (citations omitted). To that end, we look first to the plain language of the statute. (citations omitted). Where statutory language is unambiguous, we give effect to that language. (citations omitted) Where a statute provides for a mandatory award of attorneys' fees, we consider whether sufficient evidence exists to support the court's decision, viewing the evidence in the light most favorable to upholding the court's ruling. (citations omitted) We accept the court's findings of fact unless clearly erroneous. *Id.* at 244, 934 P.2d at 808.

¶15 A shareholder is entitled to inspect and copy certain records of a corporation upon notice. A.R.S. §§10-1601(E), -1602(A). ... If a shareholder has complied with these requirements, and a corporation "does not allow" that shareholder to inspect and copy the records identified in §10-1602(B)" within a reasonable time, "the shareholder may ask the court for "an order to permit inspection and copying of the records demanded." §10-1604(B). "If the court orders inspection and copying of the records demanded," the court must order the corporation to pay the shareholder costs, including reasonable attorneys' fees, "incurred to obtain the order, unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." §10-1604(C).

¶16 Anjackco argues that it voluntarily produced its records to Clark and that Clark could have obtained the records without filing suit. But Anjackco had the opportunity to produce the records before the lawsuit was filed and did not do so. ... Anjackco produced some, but not all the records Clark sought. [333 P.3d 784]

¶17 ... Having complied with the threshold requirements of A.R.S. §10-1602, Clark was entitled to an award of costs and fees if she showed that Anjackco did not allow inspection and if she obtained an order directing Anjackco to produce the documents. The court entered such an order.

###

¶23 Clark presented sufficient evidence demonstrating that she was entitled under A.R.S. §10-1604(C) to receive payment for the costs and reasonable attorneys' fees incurred to obtain the inspection order. The superior court thus did not err in awarding Clark attorneys' fees.

Here, it is undisputed that: Petitioners were entitled to inspect the records; that the TAL-WA refused to permit Petitioners' inspection and copying; and that Petitioners obtained an order directing the TAL-WA to produce the records. The Court entered such an order on December 15, 2017. Furthermore, the TAL-WA cannot avoid paying Smith's fees and costs by contending that it voluntarily produced records to Smith, and that Smith could have obtained records without filing the petition.

The TAL-WA had the opportunity to produce records before the Complaint was filed and did not do so. Even after filing the Complaint, the TAL-WA produced some of the records, but not all. The Court's December 15th Order contradicts the TAL-WA's argument. Shareholder Smith is entitled to award of costs and attorney fees incurred in obtaining the December 15th Order directing

the TAL-WA to permit Shareholder Smith's inspection.

The Supreme Court of Vermont also analyzed a similar corporate records inspection statute. In *Towle v. Robinson Springs Corp.*, 719 A.2d 880, 168 Vt. 226 (Vt. 1998), the Court considered facts and held:

Tooley was a shareholder of RSC, a closely held Vermont corporation. In 1995, he requested to inspect RSC's books and records in order to examine its accounting practices and allegedly excessive expenses. RSC denied this request...

The court found that Tooley had made the request in good faith and for a proper purpose. See 11A V.S.A. §16.02(c)(1) (requiring such showing as prerequisite to inspection rights). The court also found that RSC had no reasonable basis to deny the request because **it had failed to meet its burden to prove that the request was made for an improper purpose**. The court then ordered RSC to produce specific corporate records for inspection, and, pursuant to 11A V.S.A. §16.04(c), to pay all costs, including Tooley's reasonable attorney's fees. RSC appeals.

I. The Shareholder's Right to Inspection:

...There is little guidance from Vermont case law on what constitutes a proper purpose. ... but ... case law from other states to provide guidance in interpreting Vermont's law. (citations omitted) To be proper, a purpose must be reasonably relevant to one's interests as a shareholder. See *id.* Proper purposes include the valuation of shares, ascertaining the possibility of mismanagement, and determining the performance and condition of the company. ...

Once a shareholder asserts a proper purpose, the burden then shifts to the corporation to prove that an improper purpose is the primary purpose for inspection... (citations omitted: "[W]hen a stockholder complies with the [168 Vt. 229] statutory requirements as to form and manner of making a demand, then

the corporation bears the burden of proving that the demand is for an improper purpose."); (citations omitted: the trend is to presume a proper purpose and shift the burden to defendant to prove an improper purpose) (citations omitted). ...

###

III. Attorney's Fees

... Under the Business Corporation Act, "[i]f the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable counsel fees) incurred to obtain the order." (citations omitted). The award may be avoided if "the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." *Id.* **The court concluded that RSC did not meet this burden...**

Here, the TAL-WA does not argue that it denied inspection of records because it **doubted** that the Petitioners' **purposes** were **proper**. Instead, it presents "other reasons" why inspection of records was reasonable and done in good faith. A "good faith" belief must be judged by objective standards, not subjective criteria. The TAL-WA's conclusion that, absent case law interpretation or statutory definition, "...we have to figure it out for ourselves..." is not a legal standard of statutory interpretation.

E. THE TAL-WA FAILED TO PROVE ITS STATUTORY DEFENSE AND CANNOT AVOID PAYING THE MANDATORY AWARD OF SHAREHOLDER SMITH'S COSTS, INCLUDING ATTORNEY FEES, INCURRED IN OBTAINING THE ORDER DIRECTING THE TAL-WA TO PERMIT INSPECTION:

The "good faith" language used in RCW 23B.16.040(3) is limited

to the statutory defense that the purpose for inspection was not proper; whether the TAL-WA denied inspection in good faith where, *as here, TAL-WA did not prove there was any reasonable basis to doubt that petitioners' were entitled to inspect the accounting records for the proper purposes of "investigating corporate management of the affairs and finances of the TAL-WA"*.

This specific measure of "good faith" under RCW 23B.16.040(3), *which regards the denial of records by a corporation because there was a reasonable basis to doubt the request for inspection was made for a proper purpose, cannot and should not be expanded to a general consideration of whether parties' actions before the Court in this cause have been conducted "in good faith."*

The *prefatory remarks to hearing oral argument on the issue of attorney fees and costs, where the Court observed there existed a good faith dispute regarding the TAL-WA's corporate identity, are inapposite to the statutory criteria of whether TAL-WA denied inspection of records in "good faith" because it had a reasonable doubt about whether petitioners' request to inspect was made for proper purposes.*

At the October 18th hearing, the TAL-WA's oral argument opposing the mandatory award of Shareholder Smith's attorney fees

and costs focused on whether the TAL-WA's "confusion" as to its corporate governing statutes was made in "good faith"; and whether the TAL-WA's limited view of "accounting records" was a "good faith" interpretation of the statutory language.

At page 63 of the transcript of that hearing, the TAL-WA argued:

Now, Your Honor's pointed out that there was a good-faith dispute as to which statute applied. But not only that, once it's decided that the Washington Business Corporation Act applies, then there's a good-faith dispute over whether payroll records are included within appropriate accounting records. We in good faith did not believe they were. Your Honor has now ruled on that, but I think that that was a legitimate dispute and so my clients were well within their rights to not provide the records. II RP 63

The TAL-WA's arguments that a "good faith dispute" exists about corporate governing statutes or about the documents that are included within the term accounting records to defend is misplaced. It is also not supported by the record before the Court.

The Court rejected the TAL-WA's argument that it properly denied Shareholder Smith's inspection of the records regarding employee wages, salaries, payroll, based on the TAL-WA's belief that these were "private and confidential records", the disclosure of which would subject the TAL-WA to potential liability and litigation.

Instead, the Court inquired whether the privacy issues would be properly addressed if the Court imposed reasonable restrictions on

dissemination of the information to others, as provided under RCW 23B.16.040(4). Ultimately, the Court ruled to impose such *reasonable restrictions*, but ordered the TAL-WA to permit Petitioners to inspect and copy the records.

Therefore, the denial of an award of attorney fees and costs to Smith as mandated by statute, cannot be sustained where the TAL-WA's reasons for denying inspection of employee payroll records and the like was not based upon the language in the statute, but instead, premised on the TAL-WA's self-asserted belief to privacy, which was not held to be a reasonable basis upon which to deny Petitioner's inspection, since the Court rejected this as the TAL-WA's explanation for its denial.

F. THE TAL-WA HAS FAILED TO PROVE ITS ONLY DEFENSE ALLOWED BY STATUTE, TO AVOID PAYING PETITIONERS' ATTORNEY FEES AND COSTS:

RCW 23B.16.040(3) allows the TAL-WA to avoid paying petitioners' costs and reasonable attorney fees *ONLY IF*: "...it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded."

The right of the Petitioners to inspect is defined by: a request to inspect made for proper purposes and at reasonable times, and the

records demanded to be inspected must be related to the purpose. This is presumed to have been shown by Petitioners. For the TAL-WA to prove its burden, it must prove those purposes were IMPROPER; and the analysis of the TAL-WA's proof includes whether it's "doubt" of "proper purpose" was "reasonable", such that it refused inspection "in good faith."

That is to say: the "good faith" analysis is limited to whether TAL-WA had a reasonable basis to doubt that Petitioners' **purposes** in requesting inspection were improper. In this case, the TAL-WA has **never questioned or doubted** that the Petitioners' requests to inspect records were made for improper purposes.

The statutory defense avoiding the award of petitioners' attorney fees and costs is not proven by whether TAL-WA had a "good faith belief" that it was governed by RCW 24.03 rather than by RCW 23B. Nor is it proven by whether the TAL-WA "in good faith" interpreted the meaning of "accounting records" to be limited, excluding employee wages, salaries, payroll records, or the General Ledgers and such.

The TAL-WA has never asserted that its refused inspection in good faith because it had a reasonable basis for doubt that the

purposes for which Petitioners' sought to inspect records were improper.

The TAL-WA did not refuse the Petitioners' right to inspect and copy on the basis that it had a reasonable basis to doubt the purpose of the Petitioners' motives were improper. It refused inspection because the TAL-WA contended that no member ever possessed the right to inspect these records [i.e., employee salary, wages, bank statements, the general ledgers, etc.]. The TAL-WA urged that "surely there was a line to be drawn in defining account records that excluded employee records, general ledgers, etc." This is not an argument by one who has a reasonable doubt as to the Petitioners' motives seeking to inspect the records; the TAL-WA fails to articulate how inspection of these records by the members would be "contrary to the interests of the corporation." The TAL-WA's argument that to allow inspection of such records puts the TAL-WA at risk of being sued for "invasion of privacy" was spurious, as there is no expectation of privacy between an employee and its employer when it comes to justifying how much the employee is entitled to be paid.

The Court rejected each of the TAL-WA's arguments in its December 15th Order that ordered TAL-WA to permit inspection of all records related to income and expenses of the corporation, of all

corporate records including those requested by Smith and previously denied.

The trial court's decision subject to this appeal, is inconsistent with case law decisions previously made by Washington Courts persuasive in interpreting the meaning of the language regarding the statutory defense allowed to corporation to avoid paying attorney fees and costs for denying records to the shareholder.

Succinctly stated in State ex rel Paschall v. Scott, 41 Wash 2d 71, 74, 247 P2d 543, 545 (1952):

When the corporation sustains its burden and proves that the shareholder seeks inspection "for her own interests rather than in the best interests of the corporations" and that the shareholder's reasons for inspection "are inimical to the best interests of the trustee and the corporations," the court will uphold the corporation's refusal to permit inspection.

Equally, then, where the corporation fails to prove improper motive, the corporation's refusal to permit inspection must be denied. It is undisputed that Shareholder Smith's request for inspection was *for proper purposes and therefore, the court cannot sustain the TAL-WA's refusal to permit inspection.*

The trial court erred in its effort to expand the statutory corporate defense to include "reasons other than the proper purposes of the shareholder", such as the parties' "good faith dispute" regarding the

corporate identity of the TAL-WA. Such an expansion is contradictory to the Legislative intent and to the statutory scheme *within which context the language of RCW 23B.16.040(3) should be interpreted.*

Whether there exists “a good faith dispute” about corporate identity governing statutes or records included within “accounting records” does not satisfy the requirements for TAL-WA to assert a *statutory defense avoiding the paying the mandatory award of petitioners’ costs, including attorney fees, under RCW 23B.16.040(3).* “A good faith dispute” about governing statutes and accounting records does not prove that TAL-WA denied inspection of records in “good faith” because there was a reason to doubt that *the purposes for which Petitioners sought inspection of records was “proper”;* nor has the TAL-WA ever articulated such a defense in any of its pleadings or oral arguments.

Other courts across the nation have analyzed the same statutory language as presented in Washington. *In Application of David L. HAMMERMAN, Petitioner-Respondent, For an Order permitting the inspection of the records of and minutes of the proceedings of BUECHE-GIROD CORP.,* 421 N.Y.S.2d 210; 72 A.D.2d 677, the New York Court held:

It has been repeatedly held that a stockholder cannot be deprived of the right to inspect and examine corporate books and records for a proper purpose unless the corporation can prove the stockholder's bad faith. ... (citations omitted) Furthermore, the *good faith of the petitioning stockholder is presumed* and the burden is on the corporation to show bad faith. (citations omitted).

It is undisputed that the TAL-WA had no intention of allowing Petitioners to inspect the records to which the Court has now ordered the TAL-WA to permit and copy and provide to the Petitioners. It is undisputed that, ***but for the Court's order***, the TAL-WA would have never recognized Petitioners' rights to inspect and copy all these records related to investigating the TAL-WA's management of the affairs and financial matters of the TAL-WA... including accounting records.

G. REQUEST FOR AWARD OF ATTORNEY FEES AND COSTS ON APPEAL PURSUANT TO RAP 18.1

Pursuant to RCW 23B.16.040(3), Appellant Smith was entitled to fees below from Respondent TAL-WA, as set out *supra*, for his costs, including reasonable attorney fees, incurred in obtaining the Order directing Respondent TAL-WA to permit inspection of the corporate documents. Pursuant to RAP 18.1, Smith's entitlement to fees below per the statute also entitles Smith

to an award of his reasonable attorney's fees and costs on appeal. Smith therefore respectfully requests that the Court award him is reasonable fees and costs for this appeal.

V. CONCLUSION:

The trial court's decision should be reversed for the reasons stated *supra* and the case remanded for a determination of Smith's fees below. Appellant Smith should be awarded his reasonable attorney's fees and costs for this appeal based on the underlying statute and RAP 18.1.

DATED THIS 23 DAY OF OCTOBER 2018.

HALSTEAD & COMINS RICK PS



JOANNE G COMINS RICK WSBA NO. 11589
ATTORNEY FOR APPELLANT SCOTT SMITH

CERTIFICATE OF SERVICE

The undersigned here by certifies under penalty of perjury of the laws of the state of Washington, that I am over the age of 18 years, and on the date indicated below, I caused a true and correct copy of the foregoing document to be served upon the following below-listed persons in the manner indicated below:

Attorney for Respondents: TREVOR ZANDELL PHILLIPS BURGESS PLLC 724 COLUMBIA STREET NW SUITE 320 OLYMPIA WA 98501	<input type="checkbox"/> U.S. Mail, postage pre-paid, Prosser WA <input checked="" type="checkbox"/> by Email: tzandell@phillipsburgesslaw.com
--	---

DATED ON THIS 23 DAY OF OCTOBER 2018

SIGNED: 

HALSTEAD & COMINS RICK PS

October 23, 2018 - 11:37 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52071-1
Appellate Court Case Title: James Robinson; Scott Smith, Appellant v. American Legion Department,
Respondent
Superior Court Case Number: 17-2-03285-6

The following documents have been uploaded:

- 520711_Briefs_20181023233536D2198677_7518.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was SMITH.OPENING.BRIEF_20181023_0001.pdf

A copy of the uploaded files will be sent to:

- tzandell@phillipsburgesslaw.com

Comments:

correcting non-conforming brief filed 10/9/2018

Sender Name: JOANNE COMINS RICK - Email: jgcrick@gmail.com
Address:
PO BOX 511
1221 MEADE AVE
PROSSER, WA, 99350-0511
Phone: 509-786-2200

Note: The Filing Id is 20181023233536D2198677