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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**(Thurston County Superior
Court No. 17-2-03285-34)**

**JAMES ROBINSON, SCOTT SMITH, and MICHAEL
MATTINGLY,**

Appellants

v.

**AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC.
and WAYNE ELSTON, COMMANDER,**

Respondents.

BRIEF OF RESPONDENTS

Trevor A. Zandell, WSBA # 37210
Of Attorneys for Respondents

Phillips Burgess PLLC
724 Columbia Street NW, Ste. 320
Olympia, WA 98501
(360) 742-3500

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I. INTRODUCTION

This appeal involves the single issue of whether Thurston County Superior Court (“Superior Court”) abused its discretion when it denied Appellant, SCOTT SMITH’s (“Mr. Smith”) motion for attorneys’ fees under RCW 23B.16.040(3), after the Superior Court ordered Respondent THE AMERICAN LEGION DEPARTMENT OF WASHINGTON, INC. (“ALWA”) to provide Mr. Smith with certain records, while denying Mr. Smith access to other records he requested. The Superior Court’s order denying Mr. Smith attorneys’ fees should be affirmed because it was based on tenable grounds and reasons.

II. STATEMENT OF THE CASE

A. Corporate Structure and History of ALWA

The American Legion is a nonprofit, congressionally chartered, civilian, wartime veterans’ organization. (CP 505.) ALWA is part of The American Legion, and serves as the statewide umbrella organization for approximately 25,000 Legionnaire-members and hundreds of American Legion posts in the State of Washington. (CP 556-57; RP 10/18/17 43:18.)

ALWA has never issued any shares of stock, nor does it have shareholders. (CP 506, 567.) ALWA is governed by an elected executive committee (“EC”) comprised of members from around the state. (CP 555.) EC members are responsible for overseeing all ALWA operations,

including its finances and the salaries and benefits of its administrative staff. (CP 555, 641-42.) The presiding officers of ALWA include a commander, who is the presiding and chief executive officer of the organization, and a finance officer. (CP 555, 641.)

ALWA's headquarters are in Lacey and all of its financial records are housed there, though in various locations and formats. (CP 506, 647, 658, 701-04.) Four individuals staff its headquarters, including an adjutant, accountant, and administrator. (CP 544.)

Each American Legion post in the State of Washington is organized as its own legal entity, separate and apart from ALWA. (CP 556-57.) ALWA is affiliated with a separate organization known as The American Legion Washington Auxiliary ("the Auxiliary"). (RP 10/18/17 58:3-10.) Evergreen Veterans Post 110 The American Legion ("Post 110") is a post for American Legion members residing in the State of Washington who are not members of any other post. (CP 545-426.) Post 110 is registered as its own legal entity, independent of ALWA. (Id.)

ALWA was initially incorporated in 1919 as fraternal organization under Sections 3733 and 3734 of Remington's 1915 Code. (CP 551, 554, 560.) The Washington Nonprofit Corporation Act ("WNCA"), Chapter 24.03 RCW became effective on July 1, 1969. RCW 24.03.925. After the effective date of the WNCA, on September 22, 1969, ALWA filed a form

entitled “Original Designation of Registered Agent – Non-Profit Corporation” with Washington Secretary of State’s Office (“WSOS”), and WSOS listed ALWA’s corporation type as “NPD”, for nonprofit domestic. (CP 562.) In 1969, ALWA filed a “Non-Profit Corporation Annual Report” with WSOS, on which form WSOC also listed ALWA’s corporation type as “NPD”. (CP 564.) In 1996, the corporate status of ALWA was administratively dissolved. (CP 130-31.) ALWA applied for reinstatement as a nonprofit corporation, but did so on a form citing RCW 23B.14.220, which is a statute under the Washington Business Corporations Act (“WBCA”), Title 23B RCW. (CP 131.) ALWA was reinstated as a Washington nonprofit corporation by WSOS, but the certificate of reinstatement did not specify whether ALWA would be operating under the WNCA or the WBCA. (CP 130.)

In spite of the WBCA citation on the 1996 application for reinstatement, ALWA personnel reasonably believed ALWA was operating under the WNCA. ALWA’s operations were strictly not-for-profit and its mission was charitable. (CP 514, 518, 556.) It held Section 501(c)(3) tax status since March 14, 1946. (CP 567.) In 1971, ALWA filed a form entitled “Statement of Change of Registered Office, Registered Agent, or Both – Non-Profit Corporation” with WSOS which cited RCW 24.03.055 and 24.03.345, sections under the WNCA. (CP 605.) Multiple

years of annual reports, including those filed in 1969 and 2016 indicated that ALWA was regulated under the WNCA¹. (CP 506, 518, 564, 573.) On or about January 15, 1990, ALWA was granted the status of a Public Benefit Corporation (“PBC”) by WSOS. (CP 512, 567.) On the application for PBC status, ALWA checked “Yes” in response to the question, “Is the corporation a non-stock, nonprofit corporation incorporated under Chapter 24.03 RCW?” (CP 567.) In 2010 and 2014, ALWA filed articles of amendment with WSOS on “Washington Nonprofit Corporation” forms which cited the WNCA. (CP 506, 514, 569, 571.) In 2017, the corporate profile on WSOS’s website listed ALWA as a “non-profit corporation”, charity and PBC. (CP 506, 512, 514.)

B. Pre-Litigation Dealings and Production of Records to Mr. Smith

Mr. Smith is a member of ALWA, but he is not a member of the EC, nor is he a member of the Auxiliary or Post 110. (CP 5, 546, 618-19.) In February 2017, ALWA’s then-Commander, Wayne Elston, appointed Mr. Smith to ALWA’s Audit Commission. (CP 17, 634.) On February 16, 2017, Mr. Smith requested financial records for the 2015 and 2016 fiscal years. (CP 144.) In response, on February 24 and 25, 2017, ALWA provided Mr. Smith with the 2016 midwinter budget, 2015 and 2016 profit

¹ In 2007 and 2008, ALWA’s administrator checked boxes on the “Nonprofit Corporation Annual Report” forms indicating ALWA was not incorporated under the WNCA, but the administrator testified that he checked those boxes in error. (CP 574-83.)

and loss statements, 2015 and 2016 balance sheets, and the IRS Form 990 for 2016. (CP 144, 597.) On March 8, 2017, ALWA's finance officer, adjutant, and accountant met with Mr. Smith for approximately three hours and answered his questions on a wide range of topics dealing with ALWA's finances. (CP 17, 145, 508.)

Mr. Smith requested Post 110's Form 990 for 2016. (CP 96.) Mr. Smith asked the finance officer about the accounting practices for the Washington State Department of Veterans Affairs, and was provided with responsive transaction detail records. (Id.)

In an April 1, 2017 letter, Mr. Smith advised Mr. Elston and other officials that he had questions about the records that had been provided to him, and therefore he requested "full and unfettered access to [ALWA's] books and records". (CP 321-25.) Mr. Smith recommended to the EC that it conduct salary comparison studies, a comprehensive audit, and that it revise its budgeting procedures. (CP 17-18, 84-93.) Mr. Elston informed Mr. Smith that ALWA underwent a full financial audit in 2013. (CP 96-97.) Mr. Smith requested a copy of the 2013 audit report and Mr. Elston referred him to Paul Whitfield ("Mr. Whitfield"), who was a member of the EC, and had a copy of that audit report. (CP 107.) ALWA's adjutant also invited Mr. Smith to attend ALWA's Finance Commission meeting on June 17, 2017, but Mr. Smith chose not to attend. (CP 508.)

Mr. Smith sent Mr. Elston another e-mail on April 21, 2017, in which he cited WNCA sections RCW 24.03.135 and 24.03.005 as providing authority for his right to inspect ALWA's corporate records. (CP 93.) Mr. Elston revoked Mr. Smith's appointment to the Audit Commission. (CP 18.)

C. Commencement of Lawsuit

On June 6, 2017, Mr. Smith, along with ALWA members, James Robinson ("Mr. Robinson") and Michael Mattingly ("Mr. Mattingly") ("Petitioners" or "Co-Petitioners"), filed a petition against ALWA in Superior Court seeking a writ of mandamus to compel ALWA to allow them to inspect and copy unspecified corporate records. (CP 4-70.) None of the Petitioners were represented by an attorney at the time the petition was filed. (CP 19.) Immediately after filing the petition, Mr. Smith and his Co-Petitioners obtained and served an order on ALWA requiring ALWA to appear and show cause why a writ of mandamus should not be issued requiring it to provide unspecified corporate records. (CP 522.)

D. Smith Records Request

Prior to the show cause hearing, Mr. Smith delivered to ALWA's counsel a list of records he demanded to inspect ("Smith Records Request"). (CP 597-98.) The Smith Records Requested was massive in scope. (Id.) It included 31 separate categories of records, many for each

year going back seven years, and in some cases, going back more than a decade. (Id.) The Smith Records Request sought governance documents, including bylaws and articles of incorporation, human resources records, including employee complaints and personnel policy and procedure manuals, litigation records, including employee lawsuits and monies spent on a prior legal dispute, financial reports, such as Forms 990 and balance sheets, and also primary source financial records, such as bank statements and copies of cancelled checks. (Id.) Mr. Smith did not include the 2013 audit report in the Smith Records Request, however. (Id.)

E. ALWA's First Production of Records in Response to the Smith Records Request

As of June 29, 2017, the date ALWA received the Smith Records Request, ALWA's small administrative staff was preparing for the state American Legion convention in July 2017, and the national American Legion convention in August 2017. (CP 544-45, 646-47.) ALWA was about to undergo a substantial leadership change. (CP 505, 545, 574, 646, 652, 658, 701.) Its commander was set to be replaced at the state convention, and its adjutant, accountant, and administrator, all of whom had served in their respective positions for several years, were retiring at the end of July 2017. (Id.)

Immediately after receiving the Smith Records Request, ALWA

personnel began compiling and copying records in fulfillment of the same. (CP 545.) Some of ALWA's financial records are stored electronically, and others, particularly older records, are stored in hard-copy format at ALWA's headquarters. (CP 506, 647, 658, 701-04.)

After two continuances of the show cause hearing, on July 3, 2017, attorney Joanne Comins Rick appeared in the action for Mr. Smith only, and not for any other party. (CP 111-12, 549.)

On July 12, 2017, ALWA provided Mr. Smith with its current articles of incorporation and bylaws, employee policy manual, operating procedures, six years of Forms 990, six years of profit and loss statements, five years of balance sheets, five years of EC meeting minutes, 10 years of minutes from state conventions, Finance Commission and Audit Commission meetings, and every document regarding ALWA that was on file with WSOS dating back to ALWA's initial incorporation in 1919. (CP 536-37, 549-50.)

F. 60-Day Stay of Superior Court Proceedings

Notwithstanding the substantial production of records, on July 14, 2017, Mr. Smith asked the Superior Court to issue a writ of mandamus commanding ALWA to immediately provide him with additional corporate records. (CP 128.) ALWA advised the Superior Court about the records production that had been made and requested additional time to

provide additional records to Mr. Smith considering the impending conventions and leadership changes that were sure to cause delays. (CP 538, 544-545, RP 7/14/17 9:15-24.) The parties also had disputes regarding which statute, the WNCA or the WBCA, applied to the case, and the records to which Mr. Smith was legally entitled. (CP 538-43.) At the July 14, 2017 hearing, the Superior Court denied Mr. Smith's request for a writ of mandamus and entered an order prohibiting Mr. Smith from taking any action in the case until a period of 60 days had elapsed, to give ALWA time to continue to fulfill the Smith Records Request and also attempt to resolve some of its disputes with Mr. Smith. (CP 175-177.)

In spite of the Superior Court's order staying all proceedings for 60 days, in early August 2017, Mr. Smith filed a motion for contempt against ALWA. (See CP 623-30.) Mr. Smith did not immediately schedule a hearing on his motion for contempt, however. (*Id.*)

G. ALWA's Second Production of Records in Response to the Smith Records Request and Response to Balance of Request

After the 60-day stay, ALWA provided Mr. Smith with five years of bank statements and reconciliations and investment account statements, post-closing trial balances, summary annual trial balances, accounts payable and receivable ledgers, employee travel and expense vouchers, operating procedures, personnel policy and procedure manuals, and

additional years' versions of Forms 990, meeting minutes, bylaws, profit and loss reports, and balance sheets, all in fulfillment of the Smith Records Request. (CP 275, 588-89, 592-93, 600-01, 658-60.) ALWA's administrator estimated she spent 80 hours compiling and copying that batch of records for Mr. Smith. (CP 658-60.) The records were provided even though fulfilling such a large records request was taxing staff time and hampering ALWA's ordinary functions. (CP 638, 658-60.) Including the records ALWA provided to Mr. Smith in July 2017, ALWA had, as of September 2017, provided Mr. Smith with over 12,000 pages of its corporate records. (CP 607.)

At that time, ALWA also provided a response to each category of records contained in the Smith Records Request for which ALWA had not provided records. (CP 228-33.) ALWA advised Mr. Smith that some of the records he requested no longer existed and others could not be found. (CP 228-33, 642, 647.) ALWA did not provide records from the fiscal year that had recently ended, as those records had not yet been reconciled, but it advised Mr. Smith that said records would be provided after they were reconciled. (CP 228-33, 642.) ALWA declined to provide records showing individual employee's salaries and benefits because it had privacy and liability concerns with providing Mr. Smith, who was not a member of the governing EC, with such records, and because it did not

believe Mr. Smith was entitled to copies of such records under the WNCA or the WBCA. (CP 228-33, 615-16, 618-19, 647.) ALWA further advised Mr. Smith that it was not providing him with copies of employee complaints and records from a prior lawsuit because it did not believe the same were included in the categories of records that the statutes entitled Mr. Smith to inspect. (CP 228-33.) Finally, ALWA advised Mr. Smith that it was not providing him with records related to Post 110 and the Auxiliary because he was not a member of those organizations. (Id.)

H. Superior Court's Ruling on Corporate Status, Records in Dispute, and Mr. Smith's First Motion for Attorneys' Fees

Thereafter, Mr. Smith noted a hearing on his motions for writ of mandamus to compel ALWA to provide additional records, for contempt², and for attorneys' fees. (RP 10/18/17.) Mr. Smith argued in his briefing that ALWA was regulated under the WBCA, but he simultaneously asserted that one section of the WNCA, RCW 24.03.127, which entitles directors to rely on advice of professionals, permitted him to obtain corporate records on behalf of certain members of the EC. (CP 171-73.) In support of his motions, Mr. Smith publically filed one of ALWA's investment account statements, and three of its cancelled checks, without redacting account or routing numbers. (CP 337, 340-42, 693-96.) ALWA

² Mr. Smith voluntarily withdrew this motion for contempt before the court ruled. (RP 10/18/17 33:2-3.)

responded to Mr. Smith's motions arguing the WNCA governed and that it should not be required under the WNCA or WBCA to supply Mr. Smith with copies of certain categories of records, particularly records containing individual employees' salaries and benefits. (CP 606-23.)

On October 18, 2017, the Superior Court ruled that ALWA was regulated under the WBCA. (RP 10/18/17 32:11-12.) Even after the Court's ruling that the WBCA applied, however, Mr. Smith's attorney continued to argue that RCW 24.03.127 under the WNCA entitled Mr. Smith to obtain corporate records on behalf of certain EC members. (RP 10/18/18 35:23-25.) Under the WBCA, the Superior Court ruled that ALWA was required to provide Mr. Smith with copies of records showing individual employee's salaries and benefits. (RP 10/18/17 56:14-15.) The Superior Court ruled that ALWA was only required to provide copies of records showing its "side" of financial transactions with Post 110 and the Auxiliary, and not Post 110 or the Auxiliary's records generally. (RP 10/18/17 58:15-17, 19-22.) The Superior Court also ruled that ALWA was not required to provide Mr. Smith with copies of employee complaints and litigation records. (RP 10/18/17 57:15-20.) The Superior Court made no ruling as to whether ALWA had to provide records from the recently ended fiscal year before they were reconciled. (RP 10/18/17, CP 386-90.)

At ALWA's request, and pursuant to RCW 23B.16.040(4), the

Superior Court ruled that the records produced to Mr. Smith and his Co-Petitioners would be for their eyes only, and that a court order would be required to provide copies of the records to any other party. (RP 10/18/17 56:19-25.) Finally, the Superior Court denied Mr. Smith's first motion for attorneys' fees without prejudice, in part based on the good faith dispute between the parties as to which corporate records statute applied. (RP 10/18/17 59:5-21, 64:16-25.)

I. ALWA's Third and Fourth Production of Records in Response to the Smith Records Request

Very soon after an order reflecting the Superior Court's October 18, 2017 ruling was entered, in response to the Smith Records Requests, ALWA provided Mr. Smith with its general ledger reports (a/k/a "trial balances" (RP 10/19/17 39:9-11)) for 2012 through 2017, other categories of records containing individual employee's salary data³, and records of ALWA's transactions with the Auxiliary and Post 110. (CP 615, 697-98, 701-04, 718-19, 723-24, 743-46). On December 20, 2017, Mr. Smith requested copies of ALWA's general ledgers for fiscal years 2009 through 2012, which had not been included in the Smith Records Request. (CP

³ Payroll registers, employee timesheets, employee sick and vacation leave records, payroll adjustment sheets, all documentation regarding payments to Service Officer William Powell in FY 2015, and all documentation regarding payments charged to account 502-700 Outreach Training Personnel in FY 2015. (CP 615.)

710, 719.) ALWA provided those additional records to Mr. Smith on January 4, 2018. (Id.)

J. Subsequent Motion Practice, ALWA's Fifth Production of Records in Response to the Smith Records Request, and Denial of Mr. Smith's Second Motion for Attorneys' Fees

When ALWA's counsel objected at the hearing on October 18, 2017, to Mr. Smith's filing un-redacted copies of one of ALWA's investment account statements and three of its cancelled checks, Mr. Smith's counsel indicated she would file a motion to redact the records. (RP 10/18/17 43:3-19; 50:1-18.) Mr. Smith did not follow up with such a motion, however, burdening ALWA with having to file a motion seeking redactions. (CP 693-96.) Mr. Smith did not respond to ALWA's motion, not even to express his support, and the motion was granted. (Id.)

In January 2018, Mr. Smith filed a second motion for contempt against ALWA because it had provided copies of its general ledgers in PDF format, as opposed to Microsoft Excel. (RP 1/26/18; RP 2/2/18 3:24-5:3, 10:16-19; CP 707-17.) Then, for the second time, Mr. Smith voluntarily withdrew his motion for contempt before the court ruled, but only after ALWA had responded. (Id.) ALWA also provided Mr. Smith with eight years of its general ledgers (2009-2017) in Microsoft Excel format on January 30, 2018, even though it had provided those same records earlier in PDF format. (CP 739, 746.)

Mr. Smith renewed his motion for attorneys' fees (CP 416) and a hearing on his second motion was held on February 2, 2018. (RP 2/2/18.) The court denied Mr. Smith's second motion for fees, holding that ALWA had shown it denied inspection of certain records included in the Smith Records Request based on a reasonable and good faith doubt about the right of Mr. Smith to inspect the records demanded. (RP 2/2/18 19:14-19, 27:7-28:5; CP 494-95.) Central to the Superior Court's ruling were that the WBCA did not clearly define which categories of records Mr. Smith was entitled to inspect, and the court had denied Mr. Smith's request to inspect certain categories of records. (Id.)

III. ARGUMENT

A. The Standard of Review For a Trial Court's Denial of Attorneys' Fees is Abuse of Discretion.

Mr. Smith incorrectly claimed in his brief that the standard of review for awards or denials of attorneys' fees is de novo because this matter presents an issue of statutory interpretation. (Brief of Appellant at 4, 19, Smith v. The American Legion Dept. of Wash., Inc., Docket No. 52071-1-II, (October 24, 2018).) This appeal does not present an issue of statutory interpretation, however, it presents an issue of the application of a statute to a particular set of facts. Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 276, 191 P.3d 900, 905 (Div. III 2008) is the lone, reported

Washington case regarding a motion for attorneys' fees under RCW 23B.16.040(3) that has been found by either party. In Nakata, the court held that the standard of review of a trial court's denial of attorneys' fees under RCW 23B.16.040 is the abuse of discretion standard. Nakata, 146 Wn. App. at 276 (citing, Emmerson v. Weilep, 126 Wn. App. 930, 940, 110 P.3d 214 (Div. III 2005)). It is noteworthy that in his briefs below, Mr. Smith correctly argued to the Superior Court that the standard of review for attorneys' fee rulings was abuse of discretion. (CP 397 (quoting, Nakata), CP 403 (quoting, Berryman v. Metcalf, 177 Wn. App. 644, 312 P.3d 745 (Div. I 2013), CP 422 (quoting, Daugherty v. Doyle, M2013-02509-COA-R3CV, 2014 WL 6453770 (Tenn. Ct. App. Nov. 17, 2014) (unpublished⁴)).) However, on appeal, Mr. Smith is incorrectly arguing that the de novo standard of review applies. (Br. of Appellant at 4, 19.)

In addition to Nakata, Emmerson and Berryman, several other Washington decisions have held that appellate courts review a discretionary decision to award or deny attorneys' fees and the reasonableness of any attorneys' fee award for an abuse of discretion. See, Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (Div. II 2012); Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 666, 935 P.2d 555

⁴TN R A CT Rule 12.

(1997); Progressive Animal Welfare Soc. v. Univ. of Washington, 114 Wn.2d 667, 688, 790 P.2d 604 (1990).

A trial court abuses its discretion when it bases its denial on untenable grounds or reasons. Emmerson, 126 Wn. App. at 940; Nakata, 146 Wn. App. 276; In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The policy behind the abuse of discretion standard has been explained in terms of the positions held by different judicial officers:

The abuse of discretion standard...recognizes that deference is owed to the judicial actor who is “better positioned than another to decide the issue in question.” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403, 110 S. Ct. 2447, 2459, 110 L. Ed. 2d 359 (1990) (Quoting, Miller v. Fenton, 474 U.S. 104, 114, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985)). ...If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court’s willingness to impose...sanctions.’

Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quoting, Cooper v. Viking Ventures, 53 Wn. App. 739, 742-43, 770 P.2d 659 (Div. III 1989). Under the abuse of discretion standard, the trial court commits reversible error only when it takes a view that no reasonable person would take or applies the wrong legal standard:

...[A]buse [of discretion] occurs when the trial court takes a view no reasonable person would take or applies the

wrong legal standard to an issue.

Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 775, 275 P.3d 339, 350 (Div. II 2012) (citing, Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000)).

A party can recover attorneys' fees when a statute authorizes them. Dayton v. Farmers Ins. Group, 124 Wn. 2d 277, 280, 876 P.2d 896 (1994). Here, Mr. Smith asserts that RCW 23B.16.040 entitles him to an award of attorneys' fees. (Br. of Appellant at 4-5.) That statute provides:

23B.16.040. Court-ordered inspection

...
(3) 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.

RCW 23B.16.040 (emphasis added). Although the Superior Court ordered ALWA to provide certain categories of records to Mr. Smith, it also held that ALWA proved it refused Mr. Smith's inspection of those particular records in good faith because it had reasonable bases for doubt about Mr. Smith's right to inspect the records demanded. (RP 10/18/17 56:19-25; RP 10/18/17 59:5-21, 64:16-25; RP 2/2/18 19:14-19, 27:7-28:5; CP 494-95.) Accordingly, unless this Court finds that the Superior Court based its denial on untenable grounds or reasons, took a view no reasonable person

would take, or applied the wrong legal standard in making its decision, the judgment below must be affirmed.

B. The Trial Court Has Discretion to Determine Whether ALWA Met Its Statutory Burden Under RCW 23B.16.040(3).

Mr. Smith infers that because the Superior Court ordered ALWA to provide certain records to him, the Superior Court was necessarily required to award him his attorneys' fees and costs. (Br. of Appellant at 4 ("The trial court erred in entering the Order denying Appellant Smith attorney's fees and costs *mandated* by RCW 23B.16.040(3) (emphasis added).) Once again, Mr. Smith is arguing for a standard of law that does not apply in this instance.

If a trial court orders a corporation to provide records to a shareholder and does *not* also find that the corporation proved 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, then the trial court must award attorneys' fees and costs to the shareholder per the plain language of RCW 23B.16.040(3). However, also per the plain language of RCW 23B.16.040(3), the trial court has discretion to decide the question of whether the corporation proved 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. See also, Nakata, 146 Wn.

App. at 276. If the trial court finds that the corporation has proven its statutory burden, the trial court is actually prohibited from awarding attorneys' fees and costs to the shareholder under RCW 23B.16.040(3). *Id.* (“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.”” (emphasis added).) Since the Superior Court in this case found ALWA met its burden under RCW 23B.16.040(3), it appropriately denied, in full, Mr. Smith’s motion for an award of attorneys’ fees and costs.

C. **Improper Purpose Is One Of, But Not Nearly the Only Potential Good Faith and Reasonable Basis for Doubt About the Right of a Shareholder to Inspect Corporate Records.**

Mr. Smith’s position on appeal is that if a trial court orders a corporation to permit a shareholder to inspect records under RCW 23B.16.040(1), it must also award the shareholder attorneys’ fees and costs incurred unless the corporation proves the shareholder demanded to inspect the records for an improper purpose. (Br. of Appellant at 32, 37). Since ALWA did not call his purposes into doubt, Mr. Smith claims the Superior Court was required to award him attorneys’ fees and costs under RCW 23B.16.040(3). (*Id.*) Contrary to Mr. Smith’s contentions though, improper purpose is just one of, but not nearly the only potential good faith reasonable basis a corporation might have to doubt the right of a

shareholder to inspect certain records. As indicated in the sections above, any tenable basis which the trial court finds to be reasonable and in good faith supports the denial of attorneys' fees under RCW 23B.16.040(3).

1. WBCA Requires Corporations to Keep Certain Records and Outlines Procedures for Shareholder Inspections.

For the period of time applicable to the Smith Records Request, the Superior Court ruled ALWA was operating under the WBCA. (CP 389.) The WBCA requires a corporation to maintain several different categories of records. RCW 23B.16.010 – .020. Some of those records must be maintained at the corporation's principal office ("Principal Office Records"):

23B.16.010. Corporate records

...

(5) A corporation shall keep a copy of the following records at its principal office:

(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(b) Its bylaws or restated bylaws and all amendments to them currently in effect;

(c) The minutes of all shareholders' meetings, and records of all corporate actions approved by shareholders without a meeting, for the past three years;

(d) The financial statements described in RCW 23B.16.200(1), for the past three years;

(e) All communications in the form of a record to shareholders generally within the past three years;

(f) A list of the names and business addresses of its current directors and officers; and

(g) Its initial report or most recent annual report delivered to the secretary of state under RCW 23.95.255.

RCW 23B.16.010(5). The “financial statements described in RCW 23B.16.200(1)” are: (a) a balance sheet showing in reasonable detail the financial condition of the corporation as of the close of its fiscal year, and (b) an income statement showing the results of its operation during its fiscal year. RCW 23B.16.200(1).

The WBCA also requires a corporation to maintain a few other categories of records, though not necessarily at its principal office (“Other Corporate Records”):

23B.16.010. Corporate records

(1) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all corporate actions approved by the shareholders or board of directors by executed consent without a meeting, and a record of all corporate actions approved by a committee of the board of directors exercising the authority of the board of directors on behalf of the corporation.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each. ...

RCW 23B.16.010(1-3) (emphasis added).

The WBCA then establishes separate procedures for shareholder requests to inspect Principal Office Records and Other Corporate Records.

RCW 23B.16.020(1), (3). For Principal Office Records, the procedure is

straightforward: the shareholder only need give the corporation five-days' notice. RCW 23B.16.020(1). With respect to the Other Corporate Records, however, (a) the shareholder's request to inspect the records must be made in good faith and for a proper purpose, (b) the shareholder must describe with reasonable particularity the shareholder's purpose in requesting to inspect the records, and (c) the records must be directly connected with the shareholder's purpose. RCW 23B.16.020(3).

2. WBCA Provisions Contain Bases to Doubt the Right of a Shareholder to Inspect Records Other Than Improper Purpose.

A review of the applicable statutes alone reveals several potential reasonable and good faith bases on which a corporation might doubt the right of a shareholder to inspect a record, other than having an improper purpose. The corporation could refuse to provide the record if (a) it was not one of the categories of records defined as Principal Office Records or Other Corporate Records, (b) it was requested in bad faith, (c) if the shareholder failed to describe his purpose with particularity, or (d) the records requested were not connected with the shareholder's purpose. RCW 23B.16.010 – .020.

3. Privacy Concerns Are a Good Faith and Reasonable Basis to Doubt the Right of a Shareholder to Inspect Records.

Concerns over the privacy of individuals within an organization

has been held to constitute a good faith and reasonable basis to doubt the right of a shareholder to inspect records demanded, even though the corporation was ordered to produce the records. Wilcher v. Int'l Envtl. Techs., Inc., 168 S.W.3d 58 (Ky. Ct. App. 2005). In Wilcher, a shareholder requested to examine certain corporate records. Wilcher, 168 S.W.3d at 59. The shareholder and corporation agreed on a production date but the shareholder, unsatisfied with the progress of the production, filed an action pursuant to a Kentucky statute that was virtually identical to the WBCA requesting that the court order an inspection and award him attorneys' fees. Id. The corporation voluntarily produced many records, but withheld tax form K-1's for all the shareholders, as well as the stock subscriptions executed by shareholders other than the petitioner, due to privacy concerns the corporation had for the other shareholders. Id. The trial court ordered the corporation to provide the shareholder K-1's and stock subscriptions, but it denied the petitioner's request for attorneys' fees due to the corporation's legitimate privacy concerns. Id. at 60. The Kentucky Court of Appeals affirmed Id. at 60-62.

4. Concerns Regarding Membership and Alignment with a Corporation's Purpose Are Good Faith and Reasonable Bases to Doubt the Right of a Shareholder to Inspect Certain Records.

The Washington Court of Appeals has held that a corporate

entity's concerns over whether the petitioner was a member of the entity and whether she held a position contrary to the entity's purpose were sufficient to deny the petitioner an award of attorneys' fees, even though the court ordered the entity to provide many categories of records that the petitioner had requested. Nakata, 146 Wn. App. at 276. In Nakata, Ms. Nakata was a member of an agricultural cooperative that merged with another collective. Id. at 271-72. After the merger, Ms. Nakata demanded the cooperative pay her dividend and the cooperative refused. Id. at 271. Ms. Nakata demanded copies of various corporate records, from both before and after the merger, which request the cooperative also refused. Id. at 272, 275. Ms. Nakata sued under RCW 23B.16.040, seeking an order compelling the cooperative to provide the records and an award of her attorneys' fees. Id. The cooperative defended asserting that there were questions over whether Ms. Nakata was a member of the cooperative, whether she was entitled to all of the records she demanded, and whether she held a position contrary to the cooperative's purpose, which was to serve and protect all of its members equally. Id. at 276.

The trial court ordered the cooperative to provide Ms. Nakata with only those records implicated by the "business judgment rule", but not all the records she requested, and not any records from prior to the merger. Id. at 272, 277. The trial court denied Ms. Nakata's request for attorneys' fees

and merely wrote in the order, “the Court finds that [the cooperative] had a reasonable basis for doubt as to [Ms. Nakata’s] right of access to inspect the records demanded.” Id. at 276. The Court of Appeals affirmed, holding the trial court had tenable grounds to deny the motion for fees. Id.

The Nakata decision demonstrates that reasonable grounds other than questioning the petitioner’s purpose exist for denying a records inspection request, such as concerns over whether the petitioner is a member of the corporation for which he is requesting records. Nakata, 146 Wn. App. at 276; See also, RCW 23B.16.020 (right of corporate document inspection limited to a “shareholder of [the] corporation”).

5. The Out-of-State Cases Cited by Mr. Smith Do Not Stand for His Contention that Attorneys’ Fees Must be Awarded Under RCW 23B.16.040(3) Unless the Corporation Proves the Shareholder Had an Improper Purpose.

The out-of-state cases cited by Mr. Smith do not support his contention that the trial court may deny attorneys’ fees only if the corporation has a reasonable basis to doubt the shareholder’s purpose in demanding records. Similar to his incorrect characterization of Nakata, Mr. Smith claims Towle v. Robinson Springs Corp., 719 A.2d 880, 168 Vt. 226 (Vt. 1998) stands for the proposition that the sole good faith and reasonable basis for a corporation to deny a corporate records request is if the petitioner requested the records for an improper purpose. (Br. of

Appellant at 37.) As an initial matter, the Towle court’s analysis is focused entirely on whether the trial court appropriately ordered production of the requested record in the first instance under a Vermont statute equivalent to the WBCA.⁵ Towle, 168 Vt. at 229–30. The sole analysis in the opinion regarding attorneys’ fees, and specifically on the question of whether the corporation met its burden in refusing the inspection is the following sentence: “The court concluded that [the corporation] did not meet this burden, and we discern no clear error.” Id. at 230. More fundamentally, however, the Towle opinion says nothing about the scope of rationales a corporation may rely on in good faith to deny a corporate records request. Id. The opinion simply affirms the obvious: a corporation may deny a records inspection request if the shareholder has an improper purpose in making the request.

Mr. Smith also cites Clark v. Anjackco Inc., 235 Ariz. 452, 333 P.3d 779 (Ariz. App. Div. 1 2014) for his contention that an attorneys’ fee award in this case was mandatory. (Br. of Appellant at 33.) But the Anjackco decision is also wholly inapplicable to the present case—it does not even discuss the question of whether the corporation refused

⁵ In fact, the Towle court’s analysis revolved almost exclusively around the corporation’s challenge of whether the shareholder’s “reasons for seeking to inspect the records...[were] reasonably relevant to his interests as a shareholder.” Towle, 168 Vt. at 229–30.

inspection in good faith because it had a reasonable basis for doubt about the shareholder's right to inspect under analogous Arizona statutes. See Anjackco, 235 Ariz. at 456–57; See also, A.R.C. § 10–1604(C) (analogous to RCW 23B.16.040(3)). In Anjackco, the corporation appealed the award of attorneys' fees to the petitioner solely on the basis that the corporation never denied the records request in the first instance, and instead produced all documents by agreement, not by court order. Anjackco, 235 Ariz. at 456–57. As a result, the issue in Anjackco was whether the petitioner was entitled to an award of attorneys' fees in the first place—not whether the corporation had met its burden to prove it properly denied the request. The corporation simply never argued, and the Arizona Court of Appeals never discussed, the applicability of the good faith reasonable basis for doubt exception. Anjackco is therefore inapplicable to the issue in this appeal.

Mr. Smith also cites to Hammerman v. Bueche-Girod Corp., 72 A.D.2d 677, 421 N.Y.S.2d 210 (1979). (Br. of Appellant at 44-45.) In that case, an appellate court merely remanded the case to the trial court to determine which records a shareholder was entitled to inspect. Hammerman, 72 A.D.2d at 678. In issuing the remand, the appellate court expressly stated that the corporation could withhold records containing business secrets and names and addresses of customers. Id. Also in issuing the remand, the appellate ruled that the trial court would not hold any

hearing on whether the shareholder requested the records in good faith. Id. As with the other out-of-state cases cited by Mr. Smith, not only does Hammerman not support his claim that improper purposes is the only reasonable and good faith reason to doubt a shareholder's right to a record, Hammerman supports ALWA's position that there are some categories of records to which a shareholder is not entitled under the WBCA, and sensitive records, such as records containing business secrets and names and addresses of customers as in Hammerman, may reasonably be withheld.

D. Mr. Smith Did Not Request to Inspect Records Before He Filed Suit.

Mr. Smith filed his petition in the underlying action before he clearly requested copies of specific corporate records from ALWA. Prior to filing his petition, the only records that Mr. Smith clearly requested and had not been provided to him were a 2013 audit report and a 2016 Form 990 for Post 110. As for the audit report, Mr. Smith had been referred to an EC member who had a copy. Later Mr. Smith evidently abandoned his request for a copy of the 2013 audit report because he did not include the same in the Smith Records Request. As for the 2016 Form 990 for Post 110, ALWA reasonably did not believe Mr. Smith was entitled to that record as he was not a member of Post 110, and the Superior Court's

decision in this case affirmed the same. (CP 388-90.)

Mr. Smith's premature filing of suit was similar to the shareholder in Wilcher who filed suit before an agreed deadline for the corporation to produce records. Wilcher, 168 S.W.3d at 59. The premature filing of suit was one of the factors the court took into account in denying that shareholder an award of attorneys' fees. Id. at 61. Mr. Smith's premature filing of suit in this case likewise supports affirming the Superior Court's denial of attorneys' fees. If Mr. Smith had provided the Smith Records Request to ALWA prior to filing suit and afforded it a reasonable time to respond to the same, ALWA would have voluntarily provided him with many of the records he sought and both parties would have avoided a substantial amount of attorneys' fees and litigation costs.

E. ALWA Voluntarily Provided Mr. Smith with a Substantial Amount of Records in Response to the Smith Records Request.

Within days after receiving the Smith Records Request, ALWA began producing records to Mr. Smith voluntarily. It provided current articles of incorporation and bylaws, employee policy manual, operating procedures, six years of Forms 990, six years of profit and loss statements, five years of balance sheets, five years of EC meeting minutes, 10 years of minutes from state conventions, Finance Commission and Audit Commission meetings, and every document regarding ALWA that was on

file with WSOS. Those records supplemented other year's budgets, profit and loss statements, balance sheets, and Forms 990 that ALWA provided to Mr. Smith before he filed suit.

After the initial records were provided in response to the Smith Records Request, ALWA staff had to access its electronic archives and databases because multiple categories of records over several years were being sought. ALWA had to order copies of its bank statements and cancelled checks. In the midst of responding to the Smith Records Request, the four employees who work in ALWA headquarters were preparing for and attending state and national American Legion conventions. Three of the four employees at ALWA headquarters also retired and its commander was replaced while ALWA was responding to the Smith Records Request. In spite of those challenges, ALWA provided Mr. Smith with over 12,000 pages of records included in the Smith Records Request. The records provided were both global records, such as accounts payable and receivable ledgers, and primary source records, such as bank statements and cancelled checks. With those records in hand, Mr. Smith was able to get a very clear and detailed picture of the financial health of ALWA, including data showing total monies spent by the company on salaries and benefits for its employees.

F. ALWA Had Good Faith Bases to Doubt Mr. Smith's Right to Inspect the Records it Withheld.

In denying his request for records containing individual employee payroll data, litigation records, and Post 110 and the Auxiliary's financial records, ALWA had good faith and reasonable bases to doubt that Mr. Smith was entitled to inspect the records demanded. ALWA's reasonable doubt was based on (a) a dispute over whether the WNCA or the WBCA controlled, and different provisions under each statute, (b) a dispute over whether records of individual employee's payroll records were "accounting records", (c) the lack of a statutory definition of "accounting records" or Washington case law interpreting that phrase, (d) privacy concerns for its employee's personal information, (e) concerns regarding Mr. Smith's potential misuse of the records, and (f) the fact that Mr. Smith was not a member of Post 110 or the Auxiliary.

1. ALWA Had Reasonable and Good Faith Doubts About Whether the WBCA Governed.

ALWA had substantial evidence that led it to conclude it was operating under the WNCA, and not the WBCA. Virtually every form filed with WSOS regarding ALWA in and after 1969 identified ALWA as a nonprofit corporation. Nonprofit corporations are regulated under the WNCA. See, RCW 24.03.005(6), 24.03.010. Many of the forms on file with WSOS regarding ALWA cited the WNCA. ALWA also held

501(c)(3) tax status, and was registered with WSOS as a charity and PBC. PBC's are exclusively regulated under the WNCA. See, RCW 24.03.490, et seq. ALWA was not the only one confused as Mr. Smith claimed sections of the WNCA applied to his records request before he filed suit and in the underlying action.

Materially different statutory provisions would have applied if the Smith Records Request had been considered under the WNCA, as opposed to the WBCA. Instead of "accounting records" (WBCA), Mr. Smith would merely have been entitled to "*statements* of accounts and finances" (WNCA). RCW 24.03.135(3) (2004) (emphasis added). While the phrase "accounting records" might be viewed broadly as the Superior Court viewed that phrase in this case, "statements of accounts and finances" necessarily has a narrower meaning due to the use of the modifier "statements". In order for the shareholder to be entitled to the record demanded under the WNCA, not only must the record relate to the entity's accounts or finances, it must also be considered a "statement".

RCW 24.03.135 clearly did not entitle shareholders to all corporate records because that provision had previously been much broader in scope. Here is the language of that statute before it was amended in 1986:

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and

committees having any of the authority of the board of directors; and shall keep at its registered office or principal office in this state a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time.

RCW 24.03.135 (1986), amended by Laws 1986, ch. 240, § 24 (1986) (emphases added). Prior to the amendment, therefore, RCW 24.03.135 required a corporation to maintain, and allowed members to inspect, *complete* books and records of account. In the current version of RCW 24.03.135, the word “complete” was replaced with “adequate”. Clearly with this change the legislature was permitting a shareholder to inspect something less than complete, or all, of a corporation’s books and records of account. Also, the word “books” was removed and replaced with “statements”, signaling that a corporation need only retain a record memorializing its transactions, rather than the primary source records. With these changes, the legislature eased the records retention duties under the WNCA, and thereby also reduced the types and categories of records that members were entitled to inspect.

Another critical difference between the records inspection provisions under the WNCA and the WBCA is that the latter provides for an award of attorneys’ fees, whereas the former does not. Had it been clear to ALWA that it was operating under the WBCA, it may have elected to

take different positions in response to the Smith Records Request in order to avoid potentially having to pay Mr. Smith's attorneys' fees.

2. There Were No Statutory Definitions and No On-Point Cases to Guide ALWA as to Precisely What Records Mr. Smith was Entitled to Inspect.

The key statutory terms that were in dispute below, "accounting records" (WBCA) and "statements of accounts and finances" (WNCA), are not defined under the respective statutes. The only reported case under either RCW 23B.16.040 (WBCA) or RCW 24.03.135 (WNCA) is Nakata, which was decided under the WBCA. Therefore, before the Superior Court ruled that "accounting records" under the WBCA was the controlling standard, and that essentially all of ALWA's financial records of any type were implicated, ALWA had very little legal guidance as to the types of records to which Mr. Smith was entitled.

Without guidance from the statutes or case law, it was reasonable for ALWA to take the position that records containing individual employee's salary or wage data are not implicated under the records inspection provisions of the WBCA or WNCA. Such records are, at least arguably, not "accounting records" or "statements of account or finances". Take, for example, an employee's paystub that lists that person's gross pay, benefits, taxes and other withholdings. The paystub may not be considered a record or statement of the corporation's accounts or finances

because the paystub itself is not part of an “account” of either the corporation or the employee. Further, while the paystub contains financial information, it may not itself be a statement of the corporation’s finances, but rather a statement of one individual’s pay. Rather, documents that list a company’s total expenditures to all of its creditors, such as profit and loss statements and accounts payable ledgers, are clearly “accounting records” and/or “statements of finances”.

Another example is an invoice from a vendor. The vendor’s invoice may not be an “accounting record” or a “statement of account or finances” as to the corporation. However, the balance sheet showing the payment of the invoice is an “accounting record” or “statement of finances” for the corporation.

3. Privacy and Liability Concerns Were Good Faith and Reasonable Bases to Doubt Mr. Smith’s Right to Inspect Records Containing Individual Employee Payroll Data.

ALWA initially declined to provide Mr. Smith with records containing individual employee’s payroll data out of legitimate concerns over its employees’ privacy and its own liability. If employee payroll data had been provided to Mr. Smith and he released that information to others, ALWA could have been subject to invasion of privacy claims by allegedly damaged employees. Washington recognizes causes of action for invasion of privacy based on unwarranted intrusion into a person’s private affairs

and public disclosure of private facts. See e.g., Fisher v. State ex rel. Dep't of Health, 125 Wn. App. 869, 879, 106 P.3d 836 (Div. III 2005); Adams v. King Cty., 164 Wn.2d 640, 661, 192 P.3d 891, (2008). Any employee who felt aggrieved by the public disclosure of their compensation could have sued ALWA for releasing the information to an individual who may not have been legally entitled to the same. Plus, ALWA did not feel that Mr. Smith's oversight of individual employee's salaries was necessary because those salaries were reviewed and approved by the EC, the multi-member governing body comprised of members of the corporation.

Privacy rights of others within the corporation was the precise reason the corporation in Wilcher refused to provide certain records to that petitioner, and although the corporation was ordered to provide the sensitive records in that case, an award of attorneys' fees was denied because the initial refusal was out of a reasonable and good faith concern for privacy interests. Wilcher, 168 S.W.3d at 60. As in Wilcher, the Superior Court here ordered ALWA to provide some of the records withheld, but it also believed ALWA's privacy concerns were legitimate because it ordered the records provided to be for Mr. Smith and his Co-Petitioners' eyes only, and it held in its order redacting sensitive records filed by Mr. Smith that ALWA had important privacy interests that were worthy of protection. (RP 10/18/17 50:23-25, 51:1-5, 56:19-25; CP 693-

96.)

4. The Fact that Mr. Smith Was Not a Member of Post 110 or the Auxiliary Constituted a Good Faith and Reasonable Basis for ALWA to Doubt Mr. Smith Had a Right to Inspect Those Entities' Records.

ALWA had a reasonable and good faith basis to doubt Mr. Smith's right to the financial records of Post 110 and the Auxiliary because Mr. Smith was not a member of either of those entities. The court in Nakata ruled that doubts as to whether a person is a member of a corporate entity provided a good faith and reasonable basis to doubt the right of the person to inspect corporate records. Nakata, 146 Wn. App. at 276. Here, there were more than doubts; it was known that Mr. Smith was not a member of Post 110 or the Auxiliary. Mr. Smith did not even claim that he was a member of Post 110 or the Auxiliary. Therefore, it was reasonable and in good faith for ALWA to doubt that Mr. Smith had a right to inspect those entity's records.

5. The Superior Court in This Case Had Stronger Grounds to Deny Mr. Smith's Motion for Attorneys' Fees Than Did the Trial Court in Nakata.

In this case, the Superior Court had even stronger grounds for its denial of Mr. Smith's request for attorneys' fees than had the trial court in Nakata. In Nakata, Ms. Nakata made clear demands for specific corporate records before she sued (Nakata, 146 Wn. App. at 272, 275) unlike Mr.

Smith, who did not make a clear demand for specific records until after he filed suit. In Nakata, the corporation refused to provide Ms. Nakata with any records (Id.), unlike here where ALWA produced tens of thousands of pages of records to Mr. Smith without any court order. As in Nakata, there were questions over whether Mr. Smith was entitled to some records because he was not a member of the subject entity (Id. at 276), but there were no concerns in Nakata about the privacy of employees or which corporate records statute applied, as there were here. Since the Court of Appeals affirmed the trial court's denial of fees in the Nakata case, given that ALWA had even more reasonable and good faith bases to doubt Mr. Smith's entitlement to the records he demanded, the Superior Court's decision in this case should be affirmed.

G. The Superior Court Ruled ALWA Did Not Have to Provide Mr. Smith with Some of his Requested Records and It Placed Use Restrictions on the Records Provided to Him.

While the Superior Court ruled that ALWA had to provide Mr. Smith with copies of some of the records in dispute, it also ruled that ALWA did not need to provide Mr. Smith with litigation records, employee complaints, or the underlying financial records for Post 110 or the Auxiliary because the same were not categories of records to which he was entitled under the WBCA. (CP 386-90.) The Superior Court's decision on these records affirmed that Mr. Smith was not entitled to all

categories of corporate records included in the Smith Records Request. Then the Superior Court ruled that all records it was requiring ALWA to provide to Mr. Smith would be for he and his Co-Petitioners' eyes only due to the privacy concerns raised by ALWA and the fact that Mr. Smith had already publically filed ALWA's financial records without redacting account or routing numbers. (RP 10/18/17 50:23-25, 51:1-5, 56:19-25; CP 386-90, 693-96.) The Superior Court's ruling denying Mr. Smith some categories of records, and its restrictions placed upon the use of the records produced showed that the Superior Court found ALWA's initial refusal to provide those records was reasonable and in good faith.

H. ALWA Immediately Provided All the Records the Court Ordered it to Provide

The very day that an order was entered reflecting the Superior Court's substantive ruling in this case, ALWA provided Mr. Smith with full and complete copies of all of the records that it had theretofore withheld. Had ALWA resisted production of the records after the Superior Court had ruled, perhaps the Superior Court would have ordered it to pay some of Mr. Smith's attorneys' fees. But since ALWA acted promptly to produce the additional records, the same factored into the Superior Court's finding that an award of fees was inappropriate. (RP 1/26/18 16:9-12, 20:11-14; RP 2/2/18 26:22-25, 27:1-2.)

I. The Superior Court's Finding that ALWA Had a Reasonable Basis for Doubt Was Based on Tenable Grounds and Applied the Correct Legal Standard.

The Superior Court's finding that ALWA had proven it initially refused to provide certain records to Mr. Smith based on a reasonable and good faith doubt about Mr. Smith's right to inspect the same was based on tenable grounds and the correct legal standard, and therefore was not an abuse of discretion. First, ALWA's privacy concerns and its concerns that Mr. Smith was not a member of some of the corporations for which he was requesting records (Post 110 and the Auxiliary) have been held in other cases to be proper bases to deny a request for attorneys' fees under the WNCA. See Nakata and Wilcher, *supra*. But just because a reported case has not held that something constitutes a reasonable and good faith basis for doubt, does not mean it is not a tenable ground for a trial court to deny an award of attorneys' fees. The Superior Court here also felt that the uncertainty as to whether the WNCA or the WBCA applied, and whether there was even a statutory basis for attorneys' fees, justified the initial withholding of some records.

In order for a Superior Court's denial of an award of attorneys' fees to be held an abuse of discretion, this Court must find that no reasonable person could have taken the view of the Superior Court. Dave Johnson Ins., 167 Wn. App. at 775. For example, in Pagett v. Westport

Precision, Inc., 82 Conn. App. 526, 540, 845 A.2d 455 (2004), the appellate court reversed the trial court's denial of attorney fees in a corporate records case. When explaining the reason for its denial, the trial court stated: "I'm not going to order attorney's fees. I think this situation is very much like a divorce situation. I don't believe in attorney's fees in these kinds of cases, unless somebody really does not comply." Pagett, 82 Conn. App. at 541. Because the trial court's denial was not based on the applicable statute, the appellate court reserved. Id.

This case is distinguishable from Pagett. Here, the Superior Court carefully considered ALWA's objections for providing some of the requested records in light of the applicable statutory provision and exercised its discretion in holding ALWA met its burden to avoid an award of attorneys' fees. The Superior Court also considered the facts that Mr. Smith did not make a clear request for specific records prior to filing suit, that ALWA quickly provided Mr. Smith with tens of thousands of pages of records in response to the Smith Records Request, and that ALWA provided the balance of records requested immediately after the court's ruling. It certainly cannot be said that no reasonable person would take the view the Superior Court did in this case, and as such, its decision should be affirmed.

The Superior Court's decision could be held an abuse of discretion

if it applied the wrong legal standard. Dave Johnson Ins., 167 Wn. App. at 775. However, here, Mr. Smith does not even argue that the Superior Court applied the wrong legal standard. The Superior Court correctly stated on the record the burden ALWA was required to prove under RCW 23B.16.040(3), as affirmed in Nakata, in order to avoid an award of attorneys' fees during the hearings on both of Mr. Smith's motions for attorneys' fees. (RP 10/18/17 59:5-14; RP 2/2/18 16:14-25, 17:1, 27:7-17.) As such, the Superior Court's order may not be held an abuse of discretion due to a failure to apply the correct legal standard.

J. The Superior Court Did Not Have to Include Findings of Fact in its Order.

Mr. Smith asserts that the Superior Court's denial of attorneys' fees must be reversed because that court failed to include written findings of fact in the final order supporting its conclusion of law that ALWA met its statutory burden to avoid an award of attorneys' fees. (Br. of Appellant at 4, 5.) This claim is incorrect because the Superior Court's order was made in response to Mr. Smith's motion for attorneys' fees under RCW 23B.16.040(3). CR 52(a)(5)(B) expressly provides that findings of fact and conclusions of law are not necessary on decisions of any motions, except decisions under CR 41(b)(3) (defendant's motion to dismiss after plaintiff rests) and CR 55(b)(2) (entry of default judgment when amount

uncertain). CR 52(a)(5)(B); see also, In re Marriage of Treseler and Treadwell, 145 Wn. App. 278, 290-91, 187 P.3d 773 (Div. I 2008). Mr. Smith's motion was not made under CR 41(b)(3) or CR 55(b)(2), and therefore written findings and conclusions were not required.

Additional authority indicating written findings are not necessary is found in Nakata where the trial court denied Ms. Nakata's request for attorneys' fees and merely wrote in the order, "the Court finds that [the cooperative] had a reasonable basis for doubt as to [Ms. Nakata's] right of access to inspect the records demanded." Nakata, 146 Wn. App. at 276. That order was affirmed by the Court of Appeals. Id.

Plus, the Superior Court made it clear in its oral comments and in its written orders the bases on which it was holding that ALWA met its burden to avoid an award of attorneys' fees. During the first hearing on Mr. Smith's motion for attorneys' fees on October 18, 2017, the Superior Court indicated in its oral ruling that it was denying the motion in part based on the good faith dispute between the parties as to which corporate statute applied. (RP 10/18/17 59:5-21; 64:16-25.) During the second hearing on Mr. Smith's motion for an award of attorneys' fees on February 2, 2018, the Superior Court indicated in its oral ruling that it was denying the motion in part based on ALWA's reasonable and good faith basis for doubt about Mr. Smith's right, under the WBCA, to inspect some

of the categories of records he demanded. (RP 2/2/18 19:14-19, 27:7-28:5.) Finally, the Superior Court indicated that ALWA's privacy concerns about the payroll data of its staff were reasonable and asserted in good faith as it ruled the records would be for Mr. Smith and his Co-Petitioners' eyes only and it redacted private information from records filed by Mr. Smith. (RP 10/18/17 50:23-25, 51:1-5, 56:19-25; CP 693-96.) The Superior Court's decision was clearly based on tenable grounds.

If this Court believes that written findings were required to support the Superior Court's conclusion that ALWA met its statutory burden to avoid an award of fees, this matter should be remanded to the Superior Court to amend its order to include the necessary findings.

K. The Common Law Cases Cited By Mr. Smith Do Not Entitle Him to an Award of Attorneys' Fees.

Mr. Smith asserts that cases of State v. Pac. Brewing & Malting Co., 21 Wash. 451, 58 P. 584 (1899), State ex rel. Grismer v. Merger Mines Corp., 3 Wn.2d 417, 101 P.2d 308 (1940), and State ex rel. Paschall v. Scott, 41 Wn. 2d 71, 247 P.2d 543 (1952), which deal with a shareholder's common law right to inspect corporate records, support his position on appeal that he is entitled to an award of attorneys' fees. (Br. of Appellant at 24-30, 43.) While Pac. Brewing & Malting Co., Grismer and Paschall may still be good law with respect to a shareholder's common

law right to inspect records of a corporation, those opinions did not recognize any ground in equity for an award of attorneys' fees for a corporation's refusal to allow access to records. Also, because Pac. Brewing & Malting Co., Grismer and Paschall⁶ were decided before RCW 23B.16.040 was adopted in 1989, those opinions did not apply that statute.

In Washington, attorneys' fees may be awarded as costs of litigation only when authorized by contract, statute, or recognized ground of equity. Union Bank, N.A. v. Blanchard, 194 Wn. App. 340, 364, 378 P.3d 191 (Div. I 2016) (citation omitted). RCW 23B.16.040(3) under the WBCA is the only ground for attorneys' fees claimed by Mr. Smith in this appeal. Because Pac. Brewing & Malting Co., Grismer and Paschall were decided prior to the adoption of that statute, they are not controlling authority on the issue of whether the Superior Court abused its discretion in holding that ALWA met its statutory burden to avoid an award of fees.

Plus, Pac. Brewing & Malting Co., Grismer, Paschall and Huyler v. Cragin Cattle Co., 40 N.J. Eq. 392, 2 A. 274, 275 (Ch. 1885), rev'd sub nom. Huyler v. Cragin Cattle Co., 42 N.J. Eq. 139, 7 A. 521 (Ch. 1887), which is cited by the court in Pac. Brewing & Malting Co. and Mr. Smith

⁶ Paschall was decided under RCW 23.36.120, which provided that a shareholder had a right to examine certain corporate records for any reasonable purpose, but did not contain an attorneys' fee provision. RCW 23.36.120 was later re-codified as RCW 23A.08.500, and then repealed by Laws of 1989, ch. 165, § 204. eff. July 1, 1990.

in his brief (Br. of Appellant at 25), are not on point with the present case. In Pac. Brewing & Malting Co., the corporation denied the shareholder access to any of the corporation's books or records, and it took the position in court that shareholders had no right to inspect any corporate records for any purpose. Pac. Brewing & Malting Co., 21 Wash. at 453, 465. Similarly in Grismer, a shareholder asked to inspect the share register and was flatly denied by the company. Grismer, 3 Wn.2d at 418. In Paschall, the corporation completely refused to provide requested records to a shareholder because it believed she had motivations for requesting the records that were inimical to the corporation. Paschall, 41 Wn. 2d at 73. Finally, in Huyler, the corporation refused to provide its shareholders with copies of any of the books that were kept out of state. Huyler, 40 N.J. Eq. at 393. In contrast to those cases, here ALWA promptly provided Mr. Smith with copies of tens of thousands of pages of corporate records as soon as was reasonably possible after receiving the Smith Records Request. ALWA did not dispute Mr. Smith's right to inspect corporate records generally, but rather merely disputed his entitlement to a few categories of records on privacy and other legitimate grounds. The Pac. Brewing & Malting Co., Grismer, Paschall and Huyler cases, therefore, do not provide any basis for an award of attorneys' fees to Mr. Smith.

L. The Other Individuals Mentioned in Mr. Smith's Brief Are Not Involved in This Appeal.

In his brief, Mr. Smith mentions his Co-Petitioners from the underlying action, and also non-parties to this matter, Mr. Whitfield and Bruce Rick. (Br. of Appellant at 1, 8-9.) ALWA has not addressed these individuals or any alleged records requests they made because none of them are parties to this appeal. Messrs. Whitfield and Rick never even filed suit, much less had a court order ALWA to provide them with records, and therefore, there can be no argument that they are entitled to attorneys' fees under the WBCA. With respect to Messrs. Robinson and Mattingly, they were not represented by an attorney in the underlying action and they did not file any notice of appeal regarding any of the Superior Court's rulings. Accordingly, they too are not entitled to any relief in this appeal.

M. ALWA Requests Attorneys' Fees on Appeal Because Mr. Smith's Appeal is Frivolous.

Pursuant to RAP 18.1(b), ALWA request an award of it attorneys' fees and costs on appeal because Mr. Smith's appeal is frivolous. RCW 4.84.185 provides for an award of attorneys' fees and costs to a litigant forced to defend against a frivolous action:

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4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. ...

RCW 4.84.185. An appeal is “frivolous,” as basis for award of appellate attorney fees under RCW 4.84.185, if there are no debatable issues on which reasonable minds can differ and the appeal is so totally devoid of merit that there was no reasonable possibility of reversal. In re Recall Charges Against Feetham, 149 Wn. 2d 860, 872, 72 P.3d 741 (2003). Here, given that the standard of review is abuse of discretion and that the Superior Court had several different tenable grounds on which it based its order, there was no reasonable possibility that this Court would reverse the order. Accordingly, Mr. Smith’s appeal was frivolous and ALWA should be awarded its attorneys’ fees for having to defend against the same.

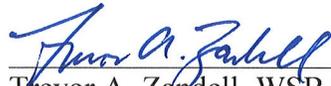
IV. CONCLUSION

ALWA respectfully requests that this Court affirm the Superior Court’s denial of Mr. Smith’s motion for attorneys’ fees because the Superior Court did not abuse its discretion in denying the motion, and also

that this Court award ALWA its reasonable attorneys' fees and expenses for defending against Mr. Smith's appeal.

DATED this 26th day of November, 2018.

PHILLIPS BURGESS PLLC



Trevor A. Zandell, WSBA #37210
Of Attorneys for Respondents

DECLARATION OF SERVICE

I, Krista Davis, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am over the age of 18, I am competent to give testimony in court, and I make this declaration based on personal knowledge.

On November 26th, 2018, I served the foregoing **Brief of Respondents** in the above-referenced case on the following individuals and in the manner indicated below:

Joanne G. Comins Rick Halstead & Comins Rick, P.S. P.O. Box 511 Prosser, WA 99350 <i>Of Attorneys for Appellant Scott Smith</i>	<input checked="" type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> E-mail: jgcrick@gmail.com <input type="checkbox"/> Certified Mail <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Electronic Service via e-file
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DATED this 26th day of November, 2018.



Krista A. Davis
Paralegal to Trevor Zandell

PHILLIPS BURGESS PLLC

November 26, 2018 - 3:11 PM

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