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No. 52071-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

JAMES ROBINSON; SCOTT SMITH, and MICHAEL
MATTINGLY,

Appellants,

v.

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

Respondents.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

SCOTT SMITH'S REPLY BRIEF

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I. INTRODUCTION

This appeal is about RCW 23B.16.040, its purpose, and how this Court reviews fee decisions. RCW 23B.16.040(3) states the legal rule, based on common law, that corporate shareholders or members like Mr. Smith are *entitled* to fees where the entity resisted disclosure of documents to which the seeker was entitled, requiring court intervention. It also is about The American Legion Dept. Washington, Inc.'s, (“TAL-WA’s”) only substantive defense, its claimed “confusion” over its own corporate form.

The statute is a “mandatory” statute, not a “discretionary” statute like RCW 26.09.140, among others. The legal issue is whether the facts as found fit the legal requirements of the statute. Here the statute says that, after the December 15 Order, Mr. Smith gets fees, its mandatory unless Respondents *prove* good faith. Proof takes evidence and facts. The only defense TAL-WA really raises is “confusion” over its corporate form. But claimed confusion over one’s corporate identity cannot be good faith when the corporation self-defined its form with its filings to the Secretary of State.

All the response arguments are variations on the confusion theme, or try to re-argue what TAL-WA lost on summary judgment

October 18 and was not appealed (the order was entered on December 15 that TAL-WA is subject to Title 23B RCW and has to provide access to its full financial records), which are then coupled with arguing that this Court must give total deference to the trial court decision without analyzing the statutory entitlement.

Many Division II cases support Mr. Smith's position that whether the denial of fees is reviewed *de novo* or for an abuse of discretion depends on whether the statute is mandatory or discretionary, starting with *Gander v. Yeager*, 167 Wn.App. 638, 282 P.3d 1100 (2012). The statute here is mandatory. If the facts fit the statute, the party gets fees. To avoid fees, TAL-WA had to *prove* its good faith exception with evidence to overcome the presumption that Mr. Smith is entitled to fees after the court order requiring disclosure. RCW 23B.16.040(3) is not a discretionary statute where the trial court is free to "split the baby" as in other instances.

All TAL-WA really has for its defense is that "I was confused" and staff checked the wrong box. But if "confusion" gives an excuse from prompt disclosure and the ensuing fees, there will be no end to the mischief. No corporate control group ever wants to disclose its financial mismanagement to shareholders.

Since denying fees after requiring disclosure is contrary to the statute and underlying common law, which are all about *promoting* disclosure to shareholders, the denial of fees here must be reversed, the matter remanded for a calculation of the amount of fees at the trial court, and Mr. Smith awarded his fees for this appeal.

II. REPLY ARGUMENT

A. General Reply.

At the outset, Respondent TAL-WA tries to change the focus of the case by raising background facts which are, in any event, irrelevant because the trial court ruled that Title 23B, the Washington Business Corporations Act, applies to TAL-WA. What the Response lays out at pp. 1-4 thus was argued and ruled on by the trial court, which concluded TAL-WA's position was wrong. II RP 31-32; CP 386-390. The final order entered on December 15, 2017, has not been appealed and therefore is final.

Moreover, the essence of TAL-WA's argument that it was confused as to its own corporate form and status (thereby excusing it from forcing Mr. Smith to litigate to get access to the documents) does not pass the proverbial "straight-face test". As a general proposition, little is easier for a corporation than going on the

Secretary of State’s website, putting in the corporate name, and pulling up its registered status. And where, as here, the corporate entity filled out and submitted the forms to the Secretary of State, it cannot credibly contend later that it did not know its own form but was “confused” as to what its correct form is. Were this true, there would be no end to the mischief, and no ability to hold a corporate entity accountable after shirking its legal duties of access to and disclosure of records to its members.

As but one example, the Response cites in footnote 1 on page 4 the July 25, 2017, declaration of Mr. Thomas Conner, CP 574-583, for the proposition that he completed the annual report form for the Secretary of State signed by an officer, and that he completed it “in error” by checking the incorrect box. The implication is that, despite the fact the annual report forms filed in both 2007 and 2008 specified TAL-WA was a nonprofit under Washington’s Business Corporations Act, Title 23B RCW, that was wrong and excused. In essence, TAL-WA’s Response says that its administrator, Mr. Conner, was “confused” about TAL-WA’s corporate identity and just “checked the wrong box” on two annual reports filed with the Secretary of State. This is nonsense.

Mr. Conner did not sign either of those reports. Mr. Dale Davis, the adjutant/secretary, signed them (*see* CP 579 & 582) and necessarily submitted them as correct under threat of the gross misdemeanor penalty provision of State Law, 24.03 RCW (RCW 24.03.027) (Ch. 24.03 is referenced on the report form signed by Mr. Davis) and in RCW 23B.01.290, and in the general requirement to file “current” reports, *i.e.*, accurate and correct reports. *See* RCW 23B.16.220; RCW 23.95.255. No corporate officer wants to jeopardize his organization’s existence and standing with the Secretary of State by falsifying the entity’s annual report.

Since Mr. Conner did not sign the filings himself, his alleged “confusion” is irrelevant. Nor does his declaration show that Mr. Davis was “confused” on the date of filing, particularly because TAL-WA did not file “corrected” or “amended” reports with the Secretary of State.

What is pertinent from the history is that TAL-WA placed itself under Title 23B by its own hand. As the trial court specifically found on December 15, 2017, TAL-WA is a “corporation [which] has” members or shareholders “and can operate For Profit businesses.” CP 389, ¶ 14. Along with that right to operate For

Profit businesses is the obligation under RCW 23B.16 to permit its members/shareholders such as Mr. Smith “to inspect and copy any of the books and records of the [Respondent] corporation, including those records Petitioners previously requested and were denied inspecting” which include “all records related to the income and expenses of the [Respondent] corporation. ...” CP 389, ¶ 15.

As noted *supra*, all of TAL-WA’s arguments are either refrains on its “we were confused” defense, or attempts to re-litigate the underlying ruling it lost on December 15. There is no need to answer in this Reply Brief each and every argument TAL-WA has thrown out in its Response. Those arguments are either addressed in the Opening Brief, addressed implicitly in this Reply, or simply need not take up any more of the Court’s or Mr. Smith’s time. The main issue is the statute.

B. Mr. Smith Is Entitled To Attorney's Fees Under The Mandatory Provision Of RCW 23B.16.040(3).

First and foremost, analysis must begin with the full statute, not just the fee portion. The statute provides, in full:

RCW 23B.16.040 - Court-ordered inspection.

(1) If a corporation does not allow a shareholder who complies with RCW 23B.16.020(1) to inspect and copy any records required by that subsection to be available for inspection, the superior court of the county where the corporation's principal office, or, if none in this state, its registered office, is located may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder.

(2) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with RCW 23B.16.020 (2) and (3) may apply to the superior court of the county where the corporation's principal office, or, if none in this state, its registered office, is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(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.

(4) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

The text of the full statute makes evident its central purpose, which is to insure access to all key corporate records, including financial records as specified in RCW 23B.16.010(d) and .020. Particularly when read against the background of the earlier common law on which the statute is based, it is plain that all presumptions for disclosure and enforcement of disclosure lie with the shareholder, including presuming the shareholder is acting properly and that if access and disclosure has to be ordered by the court, the shareholder will be compensated his or her fees.

1. Review of Mr. Smith’s entitlement to a fee award is reviewed *de novo* to determine whether the legal standard is met by the facts.

TAL-WA’s primary argument is that the trial court’s denial of fees is reviewed for an abuse of discretion, relying on Division III and other decisions in different postures than this case. *See* Response, pp. 15-19; 41-45. The problem is that the Response fails to understand the normal two-part analysis for fee awards and tries to shoe-horn the legal requisites for awards under the *mandatory* statute here into the case law providing for review for an abuse of discretion of fee rulings under *discretionary* statutes. This Court has taken the lead in helping to understand this distinction.

Careful review of RCW 23B.16.040(3) shows that awards under it are *mandatory* unless there is the requisite finding of good faith to doubt the right to inspect. If there is no such finding *and* evidence to support it, the trial court has no discretion but is required to award fees to the requesting shareholder. This is consistent with long-established common law and the policies underlying the statute reflected in its text and in other parts of the corporation statutes, and with the law on fee awards this Court has recently explained.

It is long established that a party's *entitlement* to fees is a question of law which is reviewed *de novo*, as the Supreme Court has stated. "The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity." *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). Whether a trial court is authorized to award attorney fees is a question of law which is reviewed *de novo*. *Gander v. Yeager*, 167 Wn.App. 638, 646, 282 P.3d 1100 (2012).

Judge Worswick explained in *Gander* that, while some decisions appear to apply an abuse of discretion standard of review to fee awards, in fact the correct analysis is a two-part review in

which the entitlement to fees under the given statute, contract, or equitable provision is a question of law reviewed *de novo*, while the amount of any fees awarded is reviewed for an abuse of discretion, as is an award that, unlike the statutory award here, is discretionary (such as the fee statute for dissolutions, RCW 26.09.140), as opposed to a mandatory statute such as RCW 23B.16.040(3). *Id.*

In *Gander*, the parties' "interpretation of Washington case law reveals an apparent discrepancy in the standard under which we review a trial court's initial decision whether there is a legal basis upon which to grant or deny attorney fees." 167 Wn.App. at 646.

The Court's full analysis demonstrates why Mr. Smith's appeal must be granted here.

¶ 15 On first blush, two September 2010 Washington Supreme Court cases appear to apply different standards of review. *In re Marriage of Freeman*, 169 Wn.2d 664, 676, 239 P.3d 557 (2010), states that appellate courts review a trial court's decision granting or denying attorney fees for an abuse of discretion while *Sanders*, 169 Wn.2d at 866, 240 P.3d 120, states that the decision whether to award attorney fees is a question of law that appellate courts review *de novo*. The Court of Appeals has similarly applied both abuse of discretion and *de novo* review to a trial court's threshold decision to grant or deny attorney fees. *See Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn.App. 110, 120, 231 P.3d 219 (2010) (reviewing the trial court's ruling on attorney fees for an abuse of discretion); *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn.App. 229,

277, 215 P.3d 990 (2009) (reviewing a trial court's grant or denial of attorney fees *de novo*).

¶ 16 The cases applying *de novo* review agree that the trial court's threshold determination on whether there is a statutory, contractual, or equitable basis for attorney fees is a question of law that we review *de novo*. See *Unifund [CCR Partners v. Sunde]*, 163 Wn.App. 473, 483–84, 260 P.3d 915 [(2011)]. For example, we recently held that, after applying *de novo* review to the initial question of whether there is a legal basis for attorney fees, we then review the amount of any attorney fee award for an abuse of discretion. *Unifund*, 163 Wn.App. at 484. Also, Division Three of this court recently concluded that, because making the initial determination of whether a particular statute or contractual provision authorizes an award of attorney fees is a question of law, we review that narrow question *de novo*. *Bank of New York v. Hooper*, 164 Wn.App. 295, 303, 263 P.3d 1263 (2011). **Both *Unifund* and *Hooper* applied *de novo* review to the threshold question of whether there was a contractual or statutory basis for attorney fees**, but the analysis is the same for equitable attorney fees because whether there is a recognized ground in equity authorizing an award of attorney fees is a question of law subject to *de novo* review. *Deep Water Brewing*, 152 Wn.App. at 277; *In re Riddell Testamentary Trust*, 138 Wn.App. 485, 491, 157 P.3d 888 (2007). Thus, we apply a two-part review to awards or denials of attorney fees: (1) we review *de novo* whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) **we review a discretionary decision to award or deny attorney fees** and the reasonableness of any attorney fee award **for an abuse of discretion**.

Gander v. Yeager, 167 Wn.App. at 646-647 (emphasis added).

Judge Worswick points out in *Gander* that the key to an abuse of discretion review is whether the governing statutory or contractual

provision gives the court discretion to award fees, or requires an award if the legal threshold is met. Here the statutory provision on fees requires an award of fees if the legal threshold is met.

(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(3) (emphasis added).

Gander has been followed by many cases, including *Cook v. Brateng*, 180 Wn.App. 368, 375-377, 321 P.3d 1255 (2014); *Wixom v. Wixom*, 190 Wn.App. 719, 724-726, 360 P.3d 960 (2015) (re viewing *de novo* the basis for a fee award and then limiting its review “to determining if the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment.”).

In *Wixom*, the trial court’s award of fees for intransigence and as CR 11 sanctions was upheld because the trial court had made the detailed findings showing the claimed intransigence and CR 11 violations, and the evidence in the record supported those findings. Even though the award of fees was discretionary under the statute at

issue, the trial court made findings to support its award. Here, the statute requires findings supported by substantial evidence to deny the fees that are otherwise mandated. In contrast to the trial court in *Wixom*, the February 23, 2018, Order denying fees made no findings, much less detailed ones, which specified a good faith basis for TAL-WA's refusal to provide the financial records required by statute to Mr. Smith. As pointed out in the Opening Brief, no such findings could have been made.

As noted *supra*, TAL-WA's real claim of "good faith" was that it was unsure of its own corporate form, even though it had self-identified its form to the Secretary of State and could have verified that with a simple review of the SOS website.

The Response argues Division III's decision in *Nakata v. Blue Bird, Inc.*, 146 Wn.App. 267, 191 P.3d 900 (2008), controls the standard of review, as it states that the standard was an abuse of discretion for RCW 23B.16.040(3). Mr. Smith suggests that decision is not controlling for many reasons.

First, the standard of review was not directly at issue in *Nakata* and it made no difference which standard of review was used. The dispositive point was the competent evidence the trial

court relied on when finding the defendant corporation had met the good faith burden: “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.” *Nakata*, 146 Wn.App. at 276. There is no similar finding that TAL-WA denied Smith's requests for specific, appropriate reasons, such as that he was not a member. Unlike Blue Bird, TAL-WA knew that Smith *was* a member of its organization, that he was a member in good standing, and did not contend he was asserting a position contrary to TAL-WA's. To the extent it now contends otherwise, when it lost that issue on summary judgment where there was no dispute of material fact and did not appeal that ruling, it has no ability to challenge that ruling in this appeal. Moreover, Mr. Smith had a proper motive: seeking to insure it followed its responsibilities to him and other fellow Veterans members while continuing its mission to serve Veterans in Washington State – a clear implication of the summary judgment ruling.

Second, to the extent it addressed the standard of review, *Nakata* was decided four years before *Gander v. Yeager*, which is highly cited for its careful analysis of trial court decisions on fees

and sorting out the seemingly contradictory case law on *de novo* review and review for an abuse of discretion. The panel in *Nakata* did not have the advantage of Judge Worswick’s thorough analysis.

Third, the appellate courts in Washington have the goal of applying the law correctly to each case before it. If there is an erroneous earlier appellate decision from another division, or even another panel in the same division, there is no requirement the decision be followed, as there is no “horizontal *stare decisis*.” *In re Personal Restraint of Arnold*, 190 Wn.2d 136, 410 P.3d 1133 (2018). Instead, the underlying goal of the appellate rules, embodied in RAP 1.2(a), applies to reinforce that the correct analysis of the statute be applied in the case at hand. *Id.*

In this case, Mr. Smith has consistently argued, correctly, that the statute makes a fee award mandatory and there is no discretion for the trial court to deny fees where the defendant corporation fails to prove with competent evidence that it had a reasonable basis for doubt about the right of the shareholder to inspect the record.

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 rebuts the strong legal presumption that the

request was proper by *proving* “it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.” This requires competent evidence to support findings to rebut the presumption. No such proof of a reasonable basis for doubt as to Mr. Smith’s request 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. A fee award was required under the statute.

2. The long-standing public policy underlying the statute confirms why fees should be awarded to Mr. Smith.

The courts will pay “particular attention to the legislative purpose behind attorney fee provisions.” *Guillen v. Contreras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010), citing to *Brand v. Dep’t of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999). Both *Guillen* and *Brand* held that full compensation for the fees incurred was required under the statutes at issue, no matter what the recovered amount or degree of success was, because the purpose of the fee provisions in the underlying schemes was to insure adequate representation of the claimant in vindicating the rights at issue.

In *Guillen*, the purpose of the fee statute, which is part of the property forfeiture scheme, is “to provide greater protection to people whose property is seized” so that, where “citizens’ rights [are] threatened by the State’s power [under the forfeiture statute], the statute should be read as granting fees when the claimants receive substantial *relief*—something more than nominal—as opposed to receiving half or more than what they sought”, as would be the case in a prevailing party analysis. *Guillen*, 169 Wn.2d at 777-780. This principle applies to the fee statute here, substituting “corporation’s power” for “State’s power”, and applies both as to Mr. Smith’s entitlement to fees and to the full measure of the fees.

Similarly in *Brand*, the Court held the fee provision in the Labor and Industries statutes must be liberally applied because “[t]he purpose behind the award of attorney fees in workers’ compensation cases is to ensure adequate representation for injured workers who were denied justice by the Department.” 139 Wn.2d at 667. Thus the Court held:

[W]e hold that reducing attorney fees awards to account for a worker’s limited success is inappropriate in this [statutory] context. Under the statute, the worker’s degree of overall recovery is inconsequential. This holding is consistent with the purposes behind RCW 51.52.130. Awarding full attorney

fees to workers who succeed on appeal before the superior or appellate court will ensure adequate representation for injured workers.

Brand v. L & I, 139 Wn.2d at 670. These principles in *Brand* also apply equally to the fee provision in RCW 23B.16.040(3), both as to the strength of Mr. Smith's entitlement to a fee award, as well as to the full measure of fees to be awarded.

Applying these principles from both *Guillen* and *Brand* to the statutory scheme here requires reversal and remand with specific instructions to provide for full compensation for the legal work required to obtain the relief from court, as well as fees on appeal.

The public policy of the statute is evident in its text: fees are to be awarded, absent compelling proof of good faith refusal, to encourage corporations to disclose financial and other corporate documents without shareholders having to resort to the legal process. The statute's manifest purpose from its text is two-fold: 1) to insure proper disclosure of internal corporate and financial documents to a corporation's members; and 2) to give the internal corporate guardians of the records a financial incentive to do the right thing and disclose early and with minimal fuss. This is consistent with the

underlying common law requiring disclosure to corporate shareholders and members from which the statute was derived.¹

The Supreme Court pointed out that statutes specifying shareholders' rights of inspection of corporate books and records generally "enlarge, extend, and supplement, the common law rule" of shareholders' right of inspection. *State ex rel. Grismer v. Merger Mines Corp.*, 3 Wn.2d 417, 422, 101 P.2d 308 (1940). RCW 23B.16.040 is no exception. Rewarding corporate operators for resisting or stonewalling is contrary to the statute and its purposes, and to the underlying common law principles it embodies and expands upon.

The failure to award fees here absent findings supported by clear, substantial proof of the good faith reasons for the refusals undercuts the fundamental policy of the statute. This Court should reverse with strong language instructing corporations and future

¹ See, e.g., *State Ex Rel., v Pacific Brewing & Malting Co., et al.*, 21 Wash. 451, 464, 58 Pac. 584 (1899); *State v. Guarantee Mfg. Co.*, 103 Wash. 151, 157, 174 P. 459, 461 (1918) ("So the rule in this state is that, to the extent of rights given by statute or the by-laws of a corporation, the right of a stockholder to inspect the books, records, and documents of the corporation may not be abridged or denied, except in protection of necessary trade secrets, or to combat some evil purpose, alleged and proved, such as the theft or destruction of records, or similar improper purpose.").

courts of that high proof requirement, that such proof must be backed by competent evidence, and embodied in written findings. Because there are no findings of fact showing TAL-WA's good faith denials, and because there is no substantial evidence in this record that could support such findings, the denial of fees must be reversed and the case remanded for a determination of the proper fee award for work in the trial court.

C. Mr. Smith's Appeal Is Not Frivolous; He Should Be Awarded His Fees On Appeal And Respondents Denied Any Fees.

Mr. Smith's appeal has merit and should be granted to insure that the purpose of the records disclosure requirements of Washington's statute are adhered to by corporations rather than having a new means for stonewalling – the “I'm confused about my corporate form” dodge. The appeal is not frivolous and no fees should be awarded to Respondents. It truly is sad to see a corporation fight its own members so long and hard to keep them from getting the information to which they are entitled. One fears the corporation has something to hide.

As noted, *supra*, the purpose of the statute, and particularly the mandatory fee provision, is to insure fast and full disclosure of

corporate records to shareholders and members who seek them. It is only by having sure and ready access to such disclosure when needed that they can be full participants in the corporation, whether that be voting on directors, on mergers or acquisitions, or even playing the statutory role of a dissenter in a major decision. Proper corporate governance is dependent on that access, which is why there is an especially high burden on a corporation seeking to avoid the fees. After all, it is the corporation which has the records and, typically as here, the resources to engage in protracted struggle over the information. Those reasons are why the common law has sided with shareholders, why the statutory provisions exist to expand those rights, and why Mr. Smith should have been awarded fees below.

III. CONCLUSION

The trial court must be reversed because it did not make findings that would support its conclusion the TAL-WA had a reasonable basis for doubting Mr. Smith's request. Because the record would not support such findings, Appellant Scott Smith respectfully asks the Court to reverse the trial court's denial of fees, remand for a determination of the fees for Mr. Smith's representation in the trial court, and award Mr. Smith his fees on appeal.

Respectfully submitted this 20th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 20th day of February, 2019.

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