

FILED

SEP 10 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 330371

**IN THE COURT OF APPEALS
STATE OF WASHINGTON**

**DEBORAH BURKSFIELD and LSL PROPERTIES, LLC,
Plaintiffs/Appellants,**

v.

**COLUMBIA ASPHALT & GRAVEL, INC., COLUMBIA
READY-MIX, INC., DELETA SALI, GAYLE SALI,
LARRY SALI and STEVEN SALI,
Defendants/Respondents.**

RESPONDENTS/CROSS-APPELLANTS' JOINT OPENING BRIEF

**JOHN A. MAXWELL, JR., WSBA 17431
PETER M. RITCHIE, WSBA 41293
Meyer, Fluegge & Tenney, P.S.
P.O. Box 22680
Yakima, WA 98907
(509) 575-8500**

**SEAN A. RUSSEL, WSBA # 34915
Stokes Lawrence Velikanje Moore & Shore
120 N. Naches Ave.
Yakima, WA 98902
p(509) 835-2927**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATUTES AND RULES	vi
I. <u>INTRODUCTION</u>	1
II. <u>ASSIGNMENTS OF ERROR/RESPONSE TO PLAINTIFFS' ASSIGNMENTS OF ERROR</u>	2
1. The trial court did not abuse its discretion in denying Plaintiffs' motion for prejudgment interest.	
2. The Trial Court did not abuse its discretion in awarding costs under RCW 4.84.185 to Defendant Columbia Asphalt and Gravel, Inc.	
3. The trial court erred in denying Defendants' motion to dismiss Plaintiffs' derivative claims for lack of evidence.	
III. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
IV. <u>COUNTER STATEMENT OF CASE</u>	3
V. <u>ARGUMENT</u>	12
A. STANDARDS OF REVIEW	12
B. PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST BECAUSE THE CLAIMS ARE NOT LIQUIDATED	13

1. Prejudgment Interest May Only Be Awarded for Liquidated Amounts 13
2. Plaintiffs' Claims Are Not Liquidated Because the Calculation of the Tonnage of Materials Relied Necessarily on a Conversion Rate from Cubic Yards to Tons, Which Was a Matter of Opinion and Discretion 17
3. Plaintiffs' Claim for Unpaid Material Was Not Liquidated Because It Required A Discretionary Estimation and Elimination of Materials Mined outside of the Allowed Statute of Limitations 20
4. The Interpretation and Use of the Geological Survey Reports Was Another Issue Upon Which Expert Opinion Was In Substantial Dispute 24
5. How to Properly Account for Credits for Direct Sales by LSL Was Another Area of Disagreement and Expert Interpretation, Rendering the Claim Unliquidated 27
6. The "Top Down Approach" by Defendants Versus the "Missing Ticket" Analysis by Plaintiffs 31
7. The Determination of Quantity Was A Credibility Battle Between Experts and Interpretations of Different Sets of Data 33
8. Plaintiffs Further Demonstrated the Unliquidated Nature of Their Claims By Asking the Trier Of Fact to Extrapolate and Add

	<u>Additional Quantities to Their Unpaid Royalty Claim</u>	35
9.	<u>By Specific Contrast, the Trial Court Did Award Prejudgment Interest on a Limited Liquidated Claim</u>	36
C.	THE TRIAL COURT’S AWARD OF \$39,000 TO CAG UNDER THE FRIVOLOUS ACTION STATUTE, RCW 4.84.185 WAS PROPER	37
D.	THE TRIAL COURT ERRED IN FAILING TO DISMISS THE DERIVATIVE CLAIM	40
1.	<u>Plaintiffs’ Complaint Was Unverified, in Violation of CR 23.1</u>	40
2.	<u>Plaintiffs Submitted No Evidence to Support the Derivative Claim</u>	40
3.	<u>Ms. Burksfield Did Not “Fairly Represent” the Interests of the Shareholders</u>	43
4.	<u>The Derivative Suit Is An Extraordinary Remedy</u>	45
5.	<u>The Reason For A Derivative Action- Judicial Economy- Was Not Present Here</u>	46
	<u>CONCLUSION</u>	48
	APPENDIX	

TABLE OF AUTHORITIES

<u>Alexander v. Sanford</u> 181 Wn. App. 135, 184, 325 P.3d 341 (2014) <u>review granted</u> , 339 P.3d 634	37
<u>Aker Verdal A/S v. Neil F. Lampson, Inc</u> 65 Wn. App. 177, 189, 828 P.2d 610 (1992)	14
<u>Blackburn v. Evergreen Chrysler Plymouth</u> 53 Wn. App. 146, 765 P.2d 922 (1989)	13
<u>Casper v. Esteb Enterprises, Inc.</u> 119 Wn. App. 759, 767, 82 P.3d 1223 (2004)	44
<u>Curhan v. Chelan Cnty</u> 156 Wn. App. 30, 37, 230 P.3d 1083 (2010)	12
<u>Dave Johnson Ins., Inc. v. Wright</u> 167 Wn. App. 758, 786, 275 P.3d 339 (2012)	12, 38
<u>Davis v. Comed., Inc.</u> 619 F.2d 588, 593-94 (6th Cir. 1980)	44
<u>Dix v. ICT Grp., Inc.</u> 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)	12
<u>Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.</u> 64 Wn. App. 661, 828 P.2d 565 (1992)	16
<u>Goodwin v. Castleton</u> 19 Wn.2d 748, 763, 144 P.2d 725 (1944)	42
<u>Gustafson v. Gustafson</u> 47 Wn. App. 272, 276-77, 734 P.2d 949 (1987)	42

<u>Haberman v. Washington Pub. Power Supply Sys.</u> 109 Wn. 2d 107, 147, 744 P.2d 1032 (1987)	45
<u>Hansen v. Rothaus</u> 107 Wn.2d 468, 473, 730 P.2d 662 (1986)	15
<u>Kearney v. Kearney</u> 95 Wn. App. 405, 416, 974 P.2d 872 (1999)	38
<u>King Aircraft Sales, Inc. v. Lane</u> 68 Wn. App. 706, 720, 846 P.2d 550 (1993)	14
<u>Layne v. Hyde</u> 54 Wn. App. 125, 134, 773 P.2d 83 (1989)	38
<u>Prier v. Refrigeration Eng'g Co.</u> 74 Wn.2d 25, 32, 442 P.2d 621 (1968)	14
<u>Rosenfeld v. Rosenfeld</u> 286 Ga. App. 61, 648 S.E.2d 399 (2007)	47, 48
<u>Scoccolo Constr., Inc. v. City of Renton</u> 158 Wn.2d 506, 519, 145 P.3d 371 (2006)	12
<u>Skimming v. Boxer</u> 119 Wn. App. 748, 754, 82 P.3d 707 (2004)	13
<u>St. Hilaire v. Food Services of America, Inc.</u> 82 Wn. App. 343, 917 P.2d 1114 (1996)	15, 17
<u>Tankersley v. Albright</u> 80 F.R.D. 441 (N.D. Ill. 1978)	44

STATUTES AND RULES

CR 23.1	2, 3, 11, 40, 41, 42, 44, 47, 49
RCW 4.84.185	1, 2, 3, 10, 12, 13 37, 38, 49
RCW 25.15.370	3, 11, 41, 49
RCW 25.15.385	48, 49
Principles of Governance: Analysis and Recommendations § 7.01(d) (American Law Institute 1994)	47

I. INTRODUCTION

Plaintiffs Deborah Burksfield and LSL Properties, LLC (“LSL”) appeal the trial court’s rulings (1) denying their motion for prejudgment interest and (2) awarding Defendant Columbia Asphalt & Gravel, Inc. (“CAG”) \$39,000 under RCW 4.84.185.¹

The Court should affirm both decisions. First, Plaintiffs are not entitled to prejudgment interest because their claims were unliquidated. Longstanding Washington law forecloses an award of prejudgment where, as here, the claims rely on disputed data, approximations, and expert testimony. Second, CAG was entitled to sanctions under RCW 4.84.185 because the claims against CAG were frivolous. Plaintiffs presented no debatable issues at the trial court level with regard to their claims against CAG. The trial court did not err.

On the other hand, the trial court did err in failing to dismiss the derivative claims brought by Ms. Burksfield on behalf of LSL upon Defendants’ motion. Those claims, in

¹ This is a joint opening brief/responsive submitted for all Defendants.

addition to being procedurally defective, were wholly unsupported at trial. Plaintiffs presented no evidence or testimony satisfying the requirements of CR 23.1. In allowing the claim, and awarding fees under the claim, the trial court ignored the plain language of CR 23.1. The Court should reverse the trial court's decision and the resulting award of fees.

II. ASSIGNMENTS OF ERROR/RESPONSE TO PLAINTIFFS' ASSIGNMENTS OF ERROR

1. The trial court did not abuse its discretion in denying Plaintiffs' motion for prejudgment interest on the unliquidated claims for additional material volumes on December 5, 2014, because the Plaintiffs' claims were unliquidated.
2. The Trial Court did not abuse its discretion in awarding \$39,000.00 in costs under RCW 4.84.185 to Defendant Columbia Asphalt and Gravel, Inc. (CAG) on December 5, 2014, where Plaintiffs failed to present any evidence at trial to substantiate any claims.
3. The trial court erred in denying Defendants' motion to dismiss Plaintiffs' derivative claims for lack of evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a trial court properly exercise its discretion and deny a motion for prejudgment interest on claims for additional

volumes of materials where the jury verdict necessarily required multiple discretionary determinations and expert opinions to determine the amount? [Assignment of Error No. 1].

2. Does a trial court properly exercise its discretion in granting fees and costs to a defendant under RCW 4.84.185 after dismissing that defendant from the case when the plaintiff presents no evidence or testimony at trial to support any claims against that defendant? [Assignment of Error No. 2].
3. Does a trial court err in denying a motion to dismiss a derivative claim when the plaintiff presents no evidence to support the derivative nature of the claims as required under CR 23.1 and RCW 25.15.370? [Assignment of Error No. 3].
4. Does a trial court err in denying a motion to dismiss a derivative claim when the plaintiff's complaint is unverified as required by CR 23.1? [Assignment of Error No. 3].

IV. COUNTER STATEMENT OF CASE

This case involved a dispute over the royalty rate paid by Defendant Columbia Ready Mix, Inc. ("CRM") to LSL, of which Ms. Burksfield is a 18% minority member, for materials removed from a basalt quarry known as the AK Anderson. The other two members are Ms. Burksfield's brothers, Larry and Steve Sali. In

2006, LSL signed a lease with CRM, setting the royalty rate at \$.60/ton for raw pit material removed from the quarry. LSL's management renewed the leases for the same royalty rate on April 1, 2011.

Plaintiffs sued the Salis, CAG, and CRM on April 11, 2011, claiming that CRM underpaid Plaintiffs for material removed from the pit under the lease. Plaintiffs also asserted a breach of fiduciary duty claims against CAG and the Salis. Defendants assert they paid for all materials removed.

This case was essentially a battle of expert witnesses. The core of this case represented a disagreement not only on the calculation of what volume if any had been mined between April 1, 2006 and March 2013, but how to properly calculate that volume. Defendants presented evidence they paid for all materials mined. In fact, Defendants' experts and evidence showed that had actually over-paid for 35,992 more tons of material than had actually been removed from the pit. (DE 7A;

RP at 425, Ins. 12-22).² Plaintiffs' expert Bruce Moorer opined that there was 857,582 tons of material mined for which payment had not been made. (PE 3).

In the end, while Plaintiffs claims that the jury adopted the number calculated by Mr. Moorer, the verdict only reflects that the jury came up with a number and does not explain how the jury came up with that number. (12/5/14 RP at 12). The number in the verdict form was actually less than the amount Plaintiffs asked the jury to calculate and determine in its final argument and demand. (RP at 597-598).

The difference in calculation was a matter of credibility of the experts but a number of discretionary factors and estimations ultimately had to be weighed by the trier of fact. These included, but were not limited to, differences on the following opinions where are more fully discussed under Part B, *infra*.

² There are several transcripts relevant to this appeal, including the trial transcript and hearings on Defendants' motion for a new trial. For clarity, in this brief Defendants use "RP" always to refer to the Verbatim Report of Proceedings. For the other reports of proceedings, Defendants designate the date of the hearing before "RP" (*i.e.*, "12/5/14 RP").

1. Trial Testimony

The trial occurred from October 9-17, 2014. (See RP). Mr. Moorner testified on behalf of Plaintiffs and provided Plaintiffs' damage calculations. Mr. Moorner was Plaintiffs' sole damage expert. Ms. Burksfield did not testify.

Mr. Moorner used a 2.45 tons per cubic yard conversion rate which he claimed he pulled from google. (RP at 237). He agreed that the conversion rate was a matter of opinion. (RP at 258). Defendants were able showed that even using a 2.45 conversion rate that all material had been paid for. (DE 7A). However, Defendants' expert Geologist George Bennett testified that the proper conversion rate varied between 2.0 and 2.45 or higher because not all of the materials would have uniform density. (RP at 387).

The statute of limitations precluded any claims prior to April 1, 2006. (CP at 2026, 2029). To cover the time period of 2006 to 2008, Plaintiffs had to rely on a survey which included volume changes between 2003 and 2008. (DE 2.9). This survey

did not contain any differentiation on when any particular volume was removed during the 2003 to 2008 time period. Mr. Moorer testified that 576,264 tons were deducted from the 2003 to 2006 survey to account for the statute of limitations problem. (PE 3). Mr. Moorer did not set forth any specific calculation as to how he derived that figure and clearly noted on his spreadsheet exhibit with an “*” referencing a note that it was an estimation adjusted for errors. (PE 3). Mr. Moorer claimed that number came from a missing ticket analysis but did not present those tickets or explain how he came up with that figure. (RP at 239-240). Defendants’ calculation deducted the total amount of material actually invoiced and paid for during that time period including direct sales. (RP at 422-423; DE 2.5, 2.7, 2.8, 6, 7A). In reality there was no actual measurement for the 2003 to April 1, 2006 time period, it had to be extrapolated and estimated by the experts.

Mr. Moorer testified that the survey data on volume change should only use the “cut” figures and not the “net” , cut-

less-fill figures. (PE 3; RP at 202-214). This was contrary to the plain terms of the surveys themselves. (PE 2.9, 2.10). Mr. Bennett testified that only the “net” cut less fill figures were the proper figures to use. (RP at 381-386). He demonstrated that a failure to deduct the “fill” figures would result in an improper charge for materials that never left the pit. (RP at 382-383). He further demonstrated this with a proof on a per unit basis. (DE 7; RP at 381-387).

The lease between LSL and CRM allowed LSL to make “direct sales” of materials. (DE 2.2 ¶ 6.1). These direct sales resulted in a volume change for which CRM had no liability. Defendants accounted for these direct sales by showing the invoice and payment records of what LSL told directly to a company called KLB Construction, Inc. (“KLB”). Defendants also accounted for those direct sales which occurred in the 2003 to April 2006 pre-limitation period. (RP at 329-332, 422, 424; DE 2.5, 2.7, 2.8, 6, 7A). Mr. Moorer did not factor in the direct sales that were paid. Instead he claimed that he made a

determination by analyzing missing scale tickets and claimed that he factored the KLB direct sales into that analysis. (RP at 368-369). This presented a credibility issue for the jury because the evidence was undisputed that the sales by LSL to KLB were by volume only and that there were no scale tickets. (RP at 332). Mr. Moorer did not provide a credit for KLB direct sales. (PE 3).

Thus, the parties' experts presented two completely different approaches and opinions. Defendants presented an opinion called the "top down" approach which showed that the total invoices and payments for tons of material demonstrated that all material had been paid for and in fact Defendants had actually paid for 35,992 more tons than had been removed from the pit between April 1, 2006 and March 2013. (DE 7A; RP at 402-426, 425).

Plaintiffs, on the other hand, completely ignored the records of invoices and payments and instead estimated the paid-for volume by claiming that there were missing scale tickets and simply presented an opinion on the amounts shown by scale

tickets. (DE 3). Contrary to the assertion in Plaintiffs statement of facts and Issues Pertaining to assignments of error at page 2 of their brief, Mr. Moorer never provided any testimony that there were 42,370 missing scale tickets figured at 20 tons per load.

2. Procedural History and Verdict

At the conclusion of Plaintiffs' case, CAG moved to dismiss the claims against it on the basis that Plaintiffs presented no evidence to support any claim against CAG. (RP at 296). The trial court granted the motion. (RP at 302). CAG then made a post-trial request for an award of attorney's fees and costs under RCW 4.84.185. (12/5/14 RP at 42-48; CP 2069-2071). The trial court granted this motion, assessing costs against Plaintiffs in the amount of \$39,000. (12/5/14 RP at 58, ln. 22, 59, ln. 7; CP 2245-2248).

Plaintiffs alleged both direct and derivative claims in their Amended Complaint. (CP at 1812-1829). At trial, however, Plaintiffs did not present any evidence to support the derivative

nature of the claims under CR 23.1 or RCW 25.15.370. Plaintiffs presented no evidence that Ms. Burksfield had brought the claims to the attention of LSL and that the managers had refused to bring the action or that her claims fairly represented the claims of LSL.

At the conclusion of the Plaintiffs' case, Defendants moved to dismiss the derivative claims under on the basis that there was no proof presented to support the derivative nature of the claims. (RP at 296-299). The trial court denied the motion. (RP at 315). Following the judgment and verdict, Defendants renewed the motion to dismiss the derivative claims by filing a motion for a new trial.³ The trial court denied the motion.

This appeal followed.

³ See Defendants' Second Supplemental Designation of Clerks Papers, designating Nos. 369 and 381. Defendants supplemented the Clerk's Papers on September 8, 2015 to add the motion for a new trial and order denying the same, but at the time of this filing they have not yet been transmitted to this Court. Accordingly, they are attached hereto as Appendix 1. When they are transmitted to this Court, Defendants will file an Errata indicating the correct citations to the record.

V. ARGUMENT

A. STANDARDS OF REVIEW

Appellate courts review a trial court's decision whether to award prejudgment interest on an abuse of discretion standard. Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). Further, appellate courts "review a trial court's award under RCW 4.84.185 for an abuse of discretion." Dave Johnson Ins, Inc. v. Wright, 167 Wn. App. 758, 786, 275 P.3d 339 (2012).

"Under this standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). See also Curhan v. Chelan Cnty., 156 Wn. App. 30, 37, 230 P.3d 1083 (2010) ("Discretion is abused when it is exercised on untenable grounds or for untenable reasons."). "Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination . . ." Dix, 160 Wn.2d at 833.

A trial court's award pursuant to RCW 4.84.185 for defending against frivolous claims is reviewable only for abuse of discretion. Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004).

The standard of review regarding a motion for a directed verdict is whether there is no evidence or reasonable inference from evidence that would sustain a verdict in favor of the nonmoving party, considering the evidence most favorably to the nonmoving party. Blackburn v. Evergreen Chrysler Plymouth, 53 Wn. App. 146, 765 P.2d 922 (1989).

B. PLAINTIFFS ARE NOT ENTITLED TO PREJUDGMENT INTEREST BECAUSE THE CLAIMS ARE NOT LIQUIDATED

1. Prejudgment Interest May Only Be Awarded for Liquidated Amounts

It is hornbook law in this State that prejudgment interest may only be awarded on a claim for a liquidated amount (one that can be calculated with exactness and without reliance on opinion or discretion) or an amount that is provided in a contract

without reliance on opinion or discretion. A trial court may only award prejudgment interest:

(1) when an amount claimed is “liquidated” or (2) when the amount of an “unliquidated” claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

Prier v. Refrigeration Eng’g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (citation omitted) (emphasis added). See also Aker Verdal A/S v. Neil F. Lampson, Inc., 65 Wn. App. 177, 189, 828 P.2d 610 (1992) (“Thus, prejudgment interest may not be awarded when the damages are unliquidated.”).

A claim is not liquidated if it requires expert opinion or jury discretion: “A claim is liquidated if it may be readily determined by a fixed standard without the exercise of discretion or reliance on expert opinion.” King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 720, 846 P.2d 550 (1993). Thus, when a party relies on expert testimony to prove the method of calculating damages, the damages are unliquidated.

The rationale for this rule is based on the concept of fairness: as stated by the Supreme Court, “[a] defendant should not, however, be required to pay prejudgment interest on damages when he is unable to ascertain the amount he owes to the plaintiff.” Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). Indeed, it is reversible error to award prejudgment interest on a claim unless it can be calculated without an expert and with exactness.

For example, in St. Hilaire v. Food Services of America, Inc., 82 Wn. App. 343, 917 P.2d 1114 (1996), this Court held that the trial court’s award of prejudgment interest was reversible error where the parties’ experts disagreed on the price of apples at issue. Id. at 354. The plaintiffs argued that so long as the measure of damages is certain, prejudgment interest is proper. Id. This Court disagreed, holding that “jurors necessarily used opinion and discretion in deciding what amount to award each grower.” Id.

Similarly, in Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc., 64 Wn. App. 661, 828 P.2d 565 (1992), the Court of Appeals reversed an award of prejudgment interest on damages for equipment costs because the plaintiff used an expert to prove its method, and “contrary expert testimony had been presented on the proper method for deriving the equipment rates. This claim was therefore unliquidated.” Id. at 691. It was irrelevant that the trial court awarded the plaintiff exactly what he requested, because the judgment necessarily relied on the expert’s opinion:

The trial court awarded O’Brien precisely what he requested on this claim. There was disputed testimony here concerning the proper computation method for deriving hourly equipment rates, with experts for both sides giving their opinions. The trial court was thus forced to rely on opinion testimony, and a measure of discretion was involved. This claim was not liquidated.

Id. at 692 (emphasis added).

Here, as noted below, Plaintiffs are not entitled to prejudgment interest because the amount of the judgment was not liquidated. Both parties presented competing expert

testimony on the proper method determining the volume of materials removed from the quarry. The amount of the judgment depended on the jury's discretion after hearing expert opinion. All of the numbers presented by Plaintiffs' expert, Mr. Bruce Moorer, were the subject of disputed expert opinion, and as in St. Hilaire, the jury had to weigh this disputed opinion.

2. Plaintiffs' Claims Are Not Liquidated Because the Calculation of the Tonnage of Materials Relied Necessarily on a Conversion Rate from Cubic Yards to Tons, Which Was a Matter of Opinion and Discretion

The first point to note is that Plaintiffs' claim that royalties were not paid for any particular quantity of material and required determination and use of a discretionary conversion rate to convert from cubic yards to tons. This was because the geologic survey data they used expressed quantity differences in cubic yards and not in tons. The lease called for payment at the rate of \$.60 (sixty cents) per ton for materials removed from the property. (DE 2.2 ¶ 3).

Mr. Moorer testified that he used a conversion figure of 2.45 tons per cubic yard as a conversion factor. (RP at 237). However, in actuality he simply obtained this figure from Google and had no specific knowledge or experience in determining the specific gravity of the quarry materials. (RP at 235). He never made any specific measurements of specific gravity to determine whether this was the correct conversion rate. (RP at 257). Further, he agreed the correct conversion rate was a matter of opinion. (RP at 258). He merely claimed that he was entitled to rely on that conversion factor to calculate the total tonnage extracted.

He then used this conversion factor to determine the total amount of tons which he claimed was extracted and removed claiming to use the surveys (DE 2.9, DE 2.10) and the opinion of Surveyor Darryl Witter that the surveys should be interpreted as showing 1,040,416 cubic yards of material were extracted between 2003 and 2013, (RP at 228), even though Exhibits DE

2.9 and DE 2.10 themselves showed the total cubic yards removed was only 872,444.70.⁴

Defendants used Mr. Moorer's conversion rate. While Defendants did not agree that all the rock in the quarry would be subject to a conversion rate of 2.45, Defendants' accounting of materials invoiced and paid for showed they had paid for more materials than actually removed from the pit even if that conversion rate was used. (See DE 2.5 [summary presented by Robert Jones showing total overpayment of 35,819.25 tons and 173.08 tons for the time periods covered by the Aerometric and White Shield Surveys], DE 7A [summary by John Rothenbueler showing the same total of \$35,992.33 tons of materials invoiced and paid for but not removed]; DE 7A; RP at 425).

At the same time, Defendants presented testimony by expert Geologist George Bennett that the actual conversion rate would be highly variable and that every mine is different. The

⁴ This is another opinion upon which Plaintiffs claim was based which is discussed in a following section of this brief. See Part B.2.

conversion rate would vary between 2.0 and 2.45 or higher because not all of the materials would have the same density. (RP at 387, lns. 1-16).

Because the conversion factor to be used was a factor involving discretion and opinion as to whether it would be 2.0 or 2.5 or higher or lower and that conversion factor would be used to convert cubic yards to tons, Plaintiffs' claims based on alleged volumes were not liquidated and the trial court properly denied prejudgment interest.

3. Plaintiffs' Claim for Unpaid Material Was Not Liquidated Because It Required A Discretionary Estimation and Elimination of Materials Mined outside of the Allowed Statute of Limitations

It should also be noted that Plaintiffs' claims for unpaid materials were limited to the time period after April 1, 2006 due to the statute of limitations. (CP at 2026, 2029). The problem that Plaintiffs faced with the statute of limitations was that the Aerometric Survey covered the time period of 2003 through 2011 (broken into two surveys for the time period 2003 to 2008

and from 2008 to 2011). (DE 2.9). Thus, it encompassed part of the time period excluded by the statute of limitations. The first survey time period had to be adjusted in some manner to eliminate the volume of materials outside the statute of limitations. In doing so, the parties' experts used completely different approaches and relied on completely different factors.

For instance, Mr. Moorer used a figure of 576,264 tons in his summary calculations which has the notation "Deducted because of time barred statute limitations." (PE 3). It was also market with an "*" with the reference: "Used some information of defendants that I gave them benefit of doubt but adjustment for errors was still necessary." (PE 3). It is evident a great deal of discretion and conjecture was used in arriving at this figure.

Mr. Moorer claimed this figure came from scale tickets for that time period and that he deducted all of the tons shown on the scale tickets. (RP at 239-240). Later in his calculations Mr. Moorer claimed he relied on missing tickets but never accounted for the impact of missing tickets in the pre-April 1, 2006 time

period. Yet Plaintiffs never introduced any scale tickets or missing ticket evidence which totaled up to that number to justify his opinion. That number was purely Mr. Moorer's opinion.

In addition, and as will be shown in a later section of this brief which addresses the deduction of "KLB direct sales", it is clear that direct sales by Plaintiff LSL to a third party KLB were sales by volume for which there were no weight tickets. (RP at 332). Therefore, Mr. Moorer could not have properly deducted that material because there were no scale tickets.

On the other hand, Defendants presented a completely different theory to account for and eliminate quantities of materials outside the statute of limitations in as contained in the 2003 to 2008 Aerometric Survey time period. This approach used a different set of data and came up with a different offsetting calculation. This calculation appears in DE 7A in the amount of 1,048,480.39 tons of materials extracted 2003 to March 31, 2006, which was used in the testimony of Mr. Rothenbueler. (RP at 422-423).

The subtotal figures were obtained by taking the total amount invoiced from LSL to CRM and fully paid for during that same time period as well as the direct sales from LSL to KLB which were invoiced and paid. (RP at 422-423). Exhibit DE 2.5 showed the complete payment history. Exhibit DE 2.7 contained all of the invoices for materials. Exhibits DE 2.8 and DE 6 contained all of the bank records showing the payments made. These records of quantities invoiced and paid for were presented in the testimony of Robert Jones. (RP at 318–367).

The two different approaches resulted in a different opinions regarding the quantity that had to be properly credited due to the statute of limitations problem which differed by 472,216.39 tons depending on which opinion the jury found more credible or which data set interpretation the jury relied upon to arrive at its ultimate conclusion.

Under such circumstances, the trial court did not abuse its discretion in determining the quantity claims were not liquidated

and that prejudgment interest would not be awarded. (12/5/15 RP at 54–55).

4. The Interpretation and Use of the Geological Survey Reports Was Another Issue Upon Which Expert Opinion Was In Substantial Dispute

Prior to application of a conversion rate from volume to tons, both experts used as a starting point the two Aerometric Surveys covering the time period of 2003 to 2008 and 2008 to 2011 and the White Shield survey covering the time period of 2011 to 2013. (DE 2.9, DE 2.10). However, they disagreed how the survey data was to be interpreted.

Mr. Moorer contended that only the “cut” numbers from the surveys should be used except that the “cut” from the last survey should adjusted by the fill in the last survey. The result was that he testified that they used only the “cut” volumes from the first two Aerometric surveys and the net “cut” less “fill” from the final White Shield Survey. (RP at 202-214). In review of the Aerometric surveys, it is clear that the 2003 to 2008 time period does not use the same baseline as the 2008 to 2011 survey and

that at each measurement there is a new surface with decreases in elevations “cuts” and increases in elevations “fills” from which each previous baseline is compared and that the 2013 “cuts” and “fills” are measured against the 2011 surface and not the 2008 or 2003 surfaces as they existed at that time.

Only by expert opinion could Plaintiff have presented and claimed the change in volume from 2003 to 2008 was 741,847 cubic yards when the survey actually listed the change in volume as “703,395 cuyd Cut (i.e. There is less material in 2008 than 2003).” (DE 2.9 at 6).

Similarly Mr. Moorer testified the change in volume from 2003 to 2008 was 207,400 cubic years when the survey listed the net volume change was “110,895.79 cuyd Cut (i.e. There was less material in 2011 than 2008).” (DE 2.9 at 5). Whether this was a matter of opinion or just physically incorrect demonstrates that even the initial starting volumes calculated by Plaintiffs were based on the opinions of experts and not physical facts. Each of the surveys (D.E. 2.9 and 2.10) clearly and unequivocally

described the changes in volume for each of the three separate time periods measured by calculating the “Net Cut” which was the difference between the total “cut” (decrease in elevations) and the “fill” (increases in elevations) from the previous baseline.

Defendants’ expert testified that the “net cut” figures were the proper figures to use. Mr. Bennett further explained the importance of using the “net cut” figures to determine the correct volume change because to do otherwise would result in an incorrect charge for materials that were simply moved from one location on the property to another location on the property resulting in both a “cut” change in elevation (a hole) and a “fill” change in elevation “a pile.” (RP at 381-386).

To do otherwise would result in an improper charge for material that never left the site unless the “fill” elevation changes were properly subtracted. (RP at 382-383). Mr. Bennett further demonstrated this with a fill/cut diagram showing this proof on a per unit basis. (DE 7; RP at 381-387).

Plaintiffs necessarily had to have experts interpret and extrapolate how to determine the volume change in the three separate time periods in the three surveys. Defendants' experts and the surveys themselves presented a completely different answer. The claim was not liquidated because the trier of fact could not have reached any conclusion without the expert opinions and exercising their discretion on who to believe and how to interpret the survey reports.

5. How to Properly Account for Credits for Direct Sales by LSL Was Another Area of Disagreement and Expert Interpretation, Rendering the Claim Unliquidated

During the same time period that Plaintiffs claimed that LSL was selling materials to CRM, the lease also allowed LSL to directly sell materials directly to third parties. Those sales are referred to as "direct sales." (DE 2.2 ¶ 6.1).

The volume of those direct sales needed to be credited against the total volume of material that left the pit because CRM would not have owed royalty payments to LSL on the volume of

those direct sales by LSL. During the time periods of 2003 to 2008 and 2008 to 2011 (represented in the Aerometric Surveys shown in DE 2.9) there were substantial sales by LSL directly to KLB Construction, Inc. (“KLB”). (RP at 329-332, 422,424; DE 2.5; DE 7A). Additionally, a portion of those sales had to be extrapolated to determine the correct offset for the time period outside the statute of limitation in the 2003 to 2008 period since only sales after April 1, 2006 were included in the claims.⁵

An additional statute of limitations extrapolation needed to be done to account for the direct sales to KLB outside the statute of limitations as well as the direct sales to KLB which occurred after April 1, 2006, since that volume change had to be properly credited when considering the fact that the first survey data contained volume changes that were outside the statute of limitations.

⁵ The statute of limitation extrapolation opinion issue was covered previously but is mentioned here because it demonstrates the layers of discretionary determinations that had to be made.

In order to account for this volume change Defendants produced and relied upon the invoices and payment records directly from LSL to KLB to account for this volume. (DE 2.7 [which contains invoices from LSL to KLB as well as invoices from LSL to CRM], DE 2.8 [bank deposit records showing all payments], DE 6 [summary of all bank deposits]). Because the sales from LSL to KLB were by volume (by load) there were no scale tickets and the volume measurement was taken from the invoices. (RP at 332). Defendants then subtracted those pre-limitation period sales and post-April 1, 2006 sales to make an appropriate adjustment to volume. (DE 7A; DE 2.5; RP at 318-367, 395-428).

Mr. Moorer, on the other hand, did not offset any KLB direct sales. (RP at 266, 424). Even though he failed to demonstrate any specific calculation, he claimed that he had accounted for those direct sales in his analysis of missing scale tickets.(RP at 368-369). Neither Plaintiffs nor their expert ever produced any physical exhibit or measurement other than Mr.

Moorer's opinion that he had somehow accounted for the KLB direct sales.

In addition, Mr. Moore never provided any credit for KLB sales which occurred outside of the statute of limitations even though his total volume figures included pre-April 1, 2006 volume changes. (PE 3).

On this accounting the trier of fact had to rely purely the opinion of Plaintiff's expert that he had accounted for the KLB direct sales in his analysis of scale tickets because there was no physical evidence or document produced to be able to make that calculation. It was purely an opinion that was also not logically possible since the KLB direct sales were by volume and there was never any scale tickets which weighed those sales. (RP at 332). Therefore, at best this opinion that was factored into his calculation was false and ignored the actual physical evidence of direct sales and payments from KLB for materials which did occur. (DE 6; DE 2.5; DE 2.8; DE 2.7).

The opinion testimony presented by Plaintiffs which completely ignored the volume of direct sales required the trier of fact to use their discretion in deciding whether or not the direct sales demonstrated by the invoices and payment records presented by Defendants should even be considered as an offsetting calculation. This is another reason the claim is not liquidated.

6. The “Top Down Approach” by Defendants Versus the “Missing Ticket” Analysis by Plaintiffs

Defendants took the net cut less fill volume change contained in the surveys, credited the volume of sales prior to April 1, 2006, and credited the KLB sales for which actual payments and bank deposits made at \$.60 per ton. Defendants demonstrated that they had not only paid for all the materials but had overpaid. Defendants referred to this as the “top down” approach which essentially calculated the total dollars paid for tons of materials converted to cubic yards was equal to or exceeded the volume differences in the surveys. (RP at 401-

426). The resulting conclusion was the Defendants had actually over paid for 35,992 more tons of material than had actually been removed. (RP at 425, lns. 12-22).

Plaintiffs, on the other hand, took the total cut only volume change, did not credit any KLB direct sales and then gave credit for scale tickets, estimated the pre-statute of limitation period, but did not factor in what was actually paid. This required the jury to determine whether there was a difference in the volume change tons and ticket tons for which Plaintiffs claimed a royalty payment was owed. This resulted in an estimation that there were 857,582 tons for which Mr. Moorner could not find scale tickets and therefore asked the jury to conclude those tons had not been paid for.

This was a conflict between two sets of experts with two different approaches one of which concluded that CRM paid for all of the material removed by showing the total dollars paid on a per ton basis. The other opinion was that there were tons which were not paid for because they could not find tickets to account

for that tonnage. The trier of fact had to exercise their discretion to determine whether missing tickets actually translated to missing volume for which no payment was made against the actual payment records.

7. The Determination of Quantity Was A Credibility Battle Between Experts and Interpretations of Different Sets of Data

The experts not only testified to different quantity numbers in their opinions, but used completely different approaches and different sets of data. Ultimately the trier of fact had to use discretion on which expert to believe. In this credibility determination, the trier of fact also had credibility issues relating to the experience and relationship each of the witnesses had with the parties.

Defense expert John Rothenbueler had substantial experience in construction operations. (RP at 396-398). He also had a long term relationship with Defendants as their accountant. (RP at 398). Conversely, Mr. Moorer had no experience in mining or constructions operations. He claimed experience in

accounting for trucking operations. (RP at 230-232, 252). His credibility and bias was questioned because he was the employer and worked closely with Ms. Burksfield. (RP at 252).

His credibility was also questioned because he previously made statements indicating his bias to establish the “most” amount of material possible. (RP at 252-253). He also demonstrated a lack of credibility because he admitted that had previously testified under oath in support of claims in this case which he did not think were valid claims. (RP at 254-2).

All of these factors, and subcomponents of the opinions, in addition to choosing which opinion or result the trier of fact would latch onto meant that the trier of fact had to exercise considerable discretion in determining which expert to ultimately believe in order to determine which sets of numbers or approaches the trier of fact would apply. This reliance on expert opinion and the imbedded credibility issues also made the quantity claims unliquidated.

8. Plaintiffs Further Demonstrated the Unliquidated Nature of Their Claims By Asking the Trier Of Fact to Extrapolate and Add Additional Quantities to Their Unpaid Royalty Claim

Plaintiffs further demonstrated the unliquidated nature of the missing volume claims in closing argument in the request that the trier of fact extend and make additional extrapolations to add additional quantities which they claimed were mined between the time of their last survey and September 2013. This was not a calculation Plaintiffs supported with any expert opinion but simply an argument that the trier of fact should interpret the data further and award royalties on additional quantities.

While the trier of fact appears to have believed to a large degree the Plaintiffs' theories and expert opinions, there is no specific records how the jury came to its ultimate conclusion. (12/5/14 RP at 12). It is, however, clear that the final figure the jury awarded was less than the total amount Plaintiffs claimed should be awarded in the final argument. (RP at 597-598).

9. By Specific Contrast, the Trial Court Did Award Prejudgment Interest on a Limited Liquidated Claim

In addition to the unliquidated volume claims, Plaintiffs made a specific claim for a \$.10 (ten cent) royalty difference on tons sold from LSL to CRM between April 1, 2006 and January 2007. Interestingly, and only as to this claim, Plaintiffs completely relied upon the invoice and payment records of Defendants for tons sold during the time period. Plaintiffs did not attempt to claim during this time period any volume difference over what Defendant claimed it paid for. Only in this instance was there no dispute at all between Plaintiffs and Defendants over the tons of material involved. The only issue was whether it was owed or whether Ms. Burksfield signed a release of that claim.

To put it simply, all that Plaintiffs did was to take the total volume during that time period at \$.60 (sixty cents) per ton. On that limited claim, prejudgment interest was allowed. (12/5/14 RP at 54).

C. THE TRIAL COURT’S AWARD OF \$39,000 TO CAG UNDER THE FRIVOLOUS ACTION STATUTE, RCW 4.84.185 WAS PROPER

Plaintiffs appeal the trial court’s award of \$39,000 under RCW 4.84.185 in relation to the dismissal of their claims against CAG. The trial court’s decision was appropriate and should be affirmed under the abuse of discretion standard. See Alexander v. Sanford, 181 Wn. App. 135, 184, 325 P.3d 341 (2014) review granted, 339 P.3d 634 (“We review a trial court’s decision under RCW 4.84.185 for an abuse of discretion.”).

RCW 4.84.185 reads, in pertinent part, “[i]n any civil action, the court . . . may, upon written findings by the judge that the action . . . 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.”

“The purpose of RCW 4.84.185 is to ‘discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases.’” Kearney v.

Kearney, 95 Wn. App. 405, 416, 974 P.2d 872 (1999). A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law.” Wright v. Dave Johnson Ins., Inc., 167 Wn. App. 758, 785, 275 P.3d 339, review denied, 175 Wn.2d 1008, 285 P.3d 885 (2012).

An award under RCW 4.84.185 is appropriate where the plaintiff presents no debatable issues to the trial court. Kearney, 95 Wn. App. at 416. See also Layne v. Hyde, 54 Wn. App. 125, 134, 773 P.2d 83 (1989) award appropriate where the allegations in the complaint are not supported by affidavit or case law; affirming trial court’s award of fees under RCW 4.84.185).

Plaintiffs’ lawsuit against CAG was frivolous in its entirety. There were no debatable issues presented to the trial court with regard to that claim. Critically, Plaintiffs never supported that claim, factually or legally, at trial. Plaintiffs never provided evidence or testimony establishing that CAG breached any fiduciary duty.

The only claim that was tried was whether CRM underpaid for material removed from the pits under the leases. The only parties to the leases are CRM and LSL. It was established that CAG has no ownership interest in the pits and has no connection whatsoever to the leases. There was never any evidence presented that CAG owed a duty to Plaintiffs or had any relationship with Plaintiffs that would justify Plaintiffs expecting CAG to look after their interests with regard to the leases. Notwithstanding this, CAG incurred substantial attorney's fees and costs, including a \$39,000 copy bill when it was ordered to produce copies of all of its job files.

In short, there is no basis to say that the trial court abused its discretion in awarding costs. The trial court had tenable grounds for making the award. The decision of the trial court should be affirmed.

D. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE DERIVATIVE CLAIM

The trial court erred in failing to dismiss the derivative claims brought by Ms. Burksfield on behalf of LSL. As noted below, the claims were both procedurally improper and wholly unsubstantiated by evidence presented at trial.

1. Plaintiffs' Complaint Was Unverified, in Violation of CR 23.1

Derivative claims are governed by CR 23.1. Under CR 23.1, a plaintiff must bring a derivative action by a verified complaint: "the complaint shall be verified." The rule does not permit for exceptions. Here, the Complaint was not verified. (CP at 1812-1829). Thus, the derivative claim was never properly before the trial court and should have been dismissed.

2. Plaintiffs Submitted No Evidence to Support the Derivative Claim

Even assuming Plaintiffs properly pleaded the derivative claim (which they did not), to maintain the action they were

required to show by substantial evidence that they met the requirements of RCW 25.15.370, which state as follows:

A member may bring an action in the superior courts in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

RCW 25.15.370.

CR 23.1 sets forth similar requirements:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (a) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (b) that the action is not a collusive one to confer jurisdiction on a court of this state which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders

or members similarly situated in enforcing the right of the corporation or association

CR 23.1 (emphasis added). See also Gustafson v. Gustafson, 47 Wn. App. 272, 276-77, 734 P.2d 949 (1987) (holding that absent all elements, a claim derivative claim is properly dismissed).

A showing under CR 23.1 is necessary to maintain a derivative action. While there are no reported cases addressing the ultimate proof requirements regarding limited liability companies, the Supreme Court has long required both pleading and proof at trial in corporate derivative claims: “The lone stockholder or the stockholders bring such action not only have the burden of proving the material charges entitling the corporation itself to recover, but they must also establish the grounds entitling them to sue in place of the corporation.” Goodwin v. Castleton, 19 Wn.2d 748, 763, 144 P.2d 725 (1944).

At trial, Plaintiffs rested without any testimony from Ms. Burksfield. She presented no evidence that her derivative suit fairly and adequately represents LSL’s interests. She presented

no evidence that she (*i.e.*, the minority member) had brought the complaint to the managing members and that the managers failed to act on the complaint. Plaintiffs also offered no evidence establishing that Ms. Burksfield was advancing the interests of LSL rather than her own interest in obtaining money for herself from Defendants.

3. Ms. Burksfield Did Not “Fairly Represent” the Interests of the Shareholders

In determining whether the interests of other shareholders are fairly and adequately represented, courts have considered several factors. These include:

(1) economic antagonism between the plaintiff and other shareholders; (2) the magnitude of the plaintiff’s personal interests as compared to her interest in the derivative action itself; (3) plaintiff’s vindictiveness toward defendants; and (4) the degree of support plaintiff receives from the shareholders she purports to represent.

Davis v. Comed., Inc. 619 F.2d 588, 593-94 (6th Cir. 1980) (addressing FRCP 23.1, which is nearly identical to CR 23.1).⁶

In the present case, Ms. Burksfield failed each one of these factors. In light of the fiduciary nature of a shareholder derivative action, economic antagonism between the derivative plaintiff and other shareholders is fatal to a shareholder derivative suit: “A major ‘type of antagonism requiring denial of certification is clear economic antagonism between representative and class.” Davis, 619 F.2d at 593-94. In other words, if the plaintiff’s economic interests are different from those of the other partners, the plaintiff is unlikely to be considered as the adequate plaintiff for the derivative action. See Tankersley v. Albright, 80 F.R.D. 441 (N.D. Ill. 1978). Generally, an action is derivative when the wrong sought to be redressed is primarily against the entity, the whole body of stock or corporate property. On the other hand, where it appears that the injury is directly suffered by an

⁶ “Where a Washington civil rule is identical to its federal counterpart, federal cases interpreting the federal rule are highly persuasive.” Casper v. Esteb Enterprises, Inc., 119 Wn. App. 759, 767, 82 P.3d 1223 (2004).

individual shareholder or relates directly to an individual's stock ownership, the action is personal. Id.

At the heart of this dispute is Ms. Burksfield's belief that she is receiving less money than what she should be receiving. Ms. Burksfield's claims are direct claims against her brothers, the only other members of LSL. Ms. Burksfield is interested in recovery for no one other than herself. Accordingly, the derivative claim is improperly antagonistic and should have been dismissed.

4. The Derivative Suit Is an Extraordinary Remedy

Even if Ms. Burksfield had presented evidence that she could "fairly and adequately" represent other members, her claim was still misplaced because she could obtain all necessary relief through her direct claims. Derivative actions "may be brought only in exceptional circumstances"; when relief is available through a direct claim, a derivative action is improper. See Haberman v. Washington Pub. Power Supply Sys., 109 Wn. 2d 107, 147, 744 P.2d 1032 (1987).

Under the circumstances of this case, only Ms. Burksfield's direct personal claims were the proper route for relief, not the duplicative, exceptional derivative claims. There are only three members of LSL, and all of them were also parties to this lawsuit. Therefore, there was no risk that another member's interest would be disregarded, such as is normally the case with derivative suits. All relief afforded to Ms. Burksfield necessarily affected all members, and all interests would have been adequately represented in the direct claims. Because redress was possible under the direct claims, the "exceptional" relief of a derivative claim was not necessary and should not have been allowed.

5. The Reason for A Derivative Action—Judicial Economy—Was Not Present Here

The American Law Institute, articulating the majority rule, has explained that derivative actions are inappropriate in the context of closely held corporations because the central reason for derivative suits (judicial economy in avoiding separate lawsuits by each similarly situated shareholder) does not exist:

In the case of a closely held corporation . . . the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.

Principles of Governance: Analysis and Recommendations, § 7.01(d) (American Law Institute 1994).

In keeping with the American Law Institute’s reasoning, in Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 648 S.E.2d 399 (2007), a Georgia appellate court addressed a derivative action by a wife against her husband. The wife was a minority shareholder who brought a derivative claim under a statute substantially similar to Washington’s CR 23.1. See O.C.G.A. § 14-2-741. The court held that the reasons for a derivative suit simply did not apply when the husband and wife were the only shareholders: “Since the wife and husband were the only shareholders to this close corporation, there was no threat of

multiple suits nor any concern that a recovery would prejudice the rights of other shareholders.” Rosenfeld, 286 Ga. App. at 65.

Here, Ms. Burksfield’s personal claims overlap with the derivative claims and could afford Ms. Burksfield complete relief. In keeping with the American Law Institute and the majority rule, her correct course was a direct action, not a derivative action, and certainly not a derivative action brought in a suit where she is already seeking cumulative direct relief.

In short, the trial court should not have allowed the derivative claim and should have dismissed that claim upon Defendants’ motions to dismiss and motions for a new trial. Accordingly, the trial court’s award of attorneys’ fees and costs under RCW 25.15.385 should be reversed and vacated.

VI. CONCLUSION

The trial court did not abuse its discretion in its denial of prejudgment interest on the claims for additional volumes of materials for which Plaintiffs claimed no royalties were paid. Those claims were not liquidated and required expert testimony,

opinions and estimations on which the trier of fact had to exercise discretion. This Court should affirm the decision of the trial court.

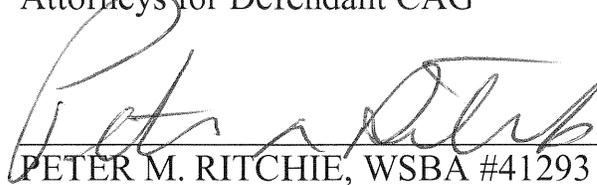
The trial court did not abuse its discretion in awarding \$39,000.00 to Defendant CAG under RCW 4.84.185 for defending frivolous claims when no evidence whatsoever was presented at trial supporting any claims against that defendant. This Court should affirm the decision of the trial court.

The trial court erred in failing to grant Defendants' motion to dismiss the derivative claims. Plaintiffs presented no evidence at trial to from which the trial court could conclude that a derivative claim was proper under CR 23.1 and RCW 25.15.370. This Court should reverse and remand to correct that error granting a new trial or limiting the relief to Plaintiffs' direct claims and vacating the award of fees and costs under RCW 25.15.385.

Respectfully submitted this 8th day of September,
2015.



JOHN A. MAXWELL, JR., WSBA # 17431
Meyer, Fluegge & Tenney, P.S.
Attorneys for Defendant CAG



PETER M. RITCHIE, WSBA #41293
Meyer, Fluegge & Tenney, P.S.
Attorneys for Defendant CAG



SEAN A. RUSSEL, WSBA # 34915
Stokes Lawrence Velikanje Moore & Shore
Attorneys for Defendants CRM and Larry
Sali and Steve Sali

APPENDIX

1. Defendants' Motion for New Trial or Remittitur dated December 15, 2014; and
2. Order Denying Defendants' Motion for New Trial or Remittitur dated February 6, 2014.

FILED
COUNTY CLERK

HONORABLE MICHAEL G. MCCARTHY

'14 DEC 15 P 4 34

11 pages

SUPERIOR COURT
YAKIMA CO WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

DEBORAH BURKSFIELD, a single individual; LSL PROPERTIES, LLC, a Washington limited liability company,

Plaintiff,

v.

LARRY SALI and GAYLE SALI, husband and wife; STEVEN SALI and DELETA SALI, husband and wife; COLUMBIA READY-MIX, INC., a Washington corporation; COLUMBIA ASPHALT & GRAVEL, INC., a Washington corporation; JOHN ROTHENBUELLER, an individual; ALEGRIA & COMPANY, P.S., a Washington professional service corporation,

Defendants.

No. 11-2-01268-8

DEFENDANTS' MOTION FOR NEW TRIAL OR REMITTITUR

I. INTRODUCTION AND MOTION

Pursuant to CR 59, RCW 4.75.030, and its inherent powers, the Court should either grant a new trial or remit the verdict of the jury and lower it by at least \$250,000.00. A new trial or remitter is required because the jury's verdict is not supported by the evidence. The

1 evidence shows that the damages derived by the jury could not have occurred unless the
2 jury (1) failed to take into account approximately \$250,000 in direct sales to KLB for
3 which no Seltec tickets were generated and (2) the jury failed to properly deduct "fill" from
4 the pit surveys to determine "net" materials removed. The verdict was based flawed
5 analysis and inaccurate numbers. Because the jury's verdict is based on miscalculations, it
6 is excessively high and not supported by the evidence. The Court should order a new trial
7 or award a remittitur and reduce it by at least \$250,000.00 to confirm to the actual evidence
8 presented.
9
10
11

12 **II. STATEMENT OF PERTINENT FACTS**

13
14 The Court is well aware of the facts of this case and the testimony that was provided
15 at trial. This Motion incorporates by reference the pleadings and other documents that have
16 previously been filed. To summarize the current issues before the Court, the following facts
17 are noted:
18

19
20 The trial occurred from October 9-17, 2014. Plaintiffs' expert Bruce Moorer
21 testified on behalf of Plaintiffs and provided Plaintiffs' damage calculations. Mr. Moorer
22 was Plaintiffs' sole damage expert. In Mr. Moorer's testimony and in response to jury
23 questions Mr. Moorer did not give any credit for the direct sales by LSL LLC to KLB and
24 in response to a jury question indicated that he accounted for those sales in the ticket
25 analysis. This could not have been possible because the undisputed testimony was that the
26 borrow sales to KLB were direct sales on a quantity basis for which no tickets were ever
27 generated. This was confirmed by the invoices and payment evidence submitted by the
28
29
30

1 defendants. In addition, while the exact quantity determination is not known, the jury could
2 not have come to its damages determination without considering only the “cut” numbers
3 and not the net of “cut” and “fill” as set forth in the Aerometric survey report.
4

5 The jury returned a verdict of \$535,674.62 as the total amount of Plaintiffs’ damages
6 on October 17, 2014. This verdict is excessive and unsupported by the evidence, and the
7 Court should grant a new trial or reduce the jury verdict by \$250,000.00.
8

9
10 **III. LEGAL ARGUMENT**

11
12 **A. THE COURT HAS THE RIGHT TO REMIT THE DAMAGES WHERE THE**
13 **JURY’S VERDICT IS NOT SUPPORTED BY THE EVIDENCE**

14 The Court “has the power to lower a jury’s damages finding under the doctrine of
15 remittitur.” Sofie v. Fibreboard Corp., 112 Wn.2d 636, 654, 771 P.2d 711, 720 amended,
16 780 P.2d 260 (1989). This is provided by statute and common law through its inherent
17 powers. RCW 4.76.030; Bunch v. King Cnty. Dep’t of Youth Servs., 155 Wn.2d 165, 116
18 P.3d 381 (2005); Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d
19 1230 (1985) (“If a jury’s verdict is tainted by passion or prejudice, or is otherwise
20 excessive, both the trial court and the appellate court have the power to reduce the award
21 or order a new trial.”).
22
23
24

25 The Court should grant a remittitur if the damages are so excessive as to manifestly
26 have been the result of passion or prejudice, or if the verdict is unsupported by substantial
27 evidence. RCW 4.76.030; Hendrickson v. Konopaski, 14 Wn. App. 390, 394-95, 541 P.2d
28 1001 (1975).
29
30

1 “[R]emittitur is wholly within the power of the trial judge. Within the guidelines of
2 the doctrine, the judge makes the legal conclusion that the jury’s damage finding is too
3 high.” Sofie, 112 Wn.2d at 654. “The judge’s use of remittitur is, in effect, the result of a
4 legal conclusion that the jury’s finding of damages is unsupported by the evidence.” Id.
5

6 “[T]he process of remittitur is essentially to lop off excess verdict amounts and not
7 to substitute the court’s judgment for that of the jury.” 58 Am. Jur. 2d New Trial § 405
8 (2014).
9

10 It is proper for a court to reduce an award of economic damages where the jury’s
11 award is outside the range of evidence. In Hill v. GTE Directories Sales Corp., 71 Wn.
12 App. 132, 856 P.2d 746 (1993), Division Three upheld the trial court’s ruling reducing the
13 jury’s award of economic damages to the plaintiff by over 52%, where, as here, the
14 plaintiff’s damage award was not supported by the evidence. Id. at 139-140. In Hill, the
15 plaintiff sued for sex discrimination, testifying that she consulted a doctor, who prescribed
16 Xanax to calm her, and a psychologist. The jury awarded her \$40,000 in lost income. Id.
17 at 134. The trial judge reduced the economic damages to \$19,000. The Court of Appeals
18 affirmed, noting the jury’s economic award was not supported by the evidence. Id. at 140.
19

20 Thus, the Court can and should remit the damage award if, as here, it is outside the
21 range of substantial evidence or the jury was obviously motivated by passion or prejudice.
22

23
24

25
26

27
28

1 **B. THE DAMAGE AWARD IS OUTSIDE THE RANGE OF SUBSTANTIAL**
2 **EVIDENCE BECAUSE IT FAILED TO ACCOUNT FOR THE KLB**
3 **DIRECT SALES**

4 The jury's verdict is not supported by the evidence. The record contains the
5 testimony of Robert Jones, the CFO for CRM and CAG. Mr. Jones' testimony showed
6 direct sales from LSL to KLB Construction from the AK Anderson pit. These direct sales
7 translate to \$247,124.40. It is undisputed that this amount was removed from the pit as a
8 direct sales by KLB and that LSL LLC was paid for this amount. It is important for the
9 Court to recollect from Mr. Jones' testimony that scale tickets are not generated for direct
10 sales of borrow material because KLB removed material from the pit by the truckload
11 without weighing at the scales. Thus, there are no scale tickets for these sales and it is not
12 possible that Mr. Moorer "accounted" for these sales in his ticket analysis. In addition, the
13 Plaintiffs produced no ticket analysis to show that the KLB direct payment records were
14 accounted for. It is simply not possible for Mr. Moorer to have considered tickets for KLB
15 sales of borrow material when no such tickets ever existed.

16 As a result, there is no evidence to support the jury's verdict. The verdict completely
17 failed to take into account established, undisputed evidence about the \$247,124.40 in KLB
18 direct sales. That evidence should have reduced the judgment by \$247,124.40. Mr.
19 Moorer's incorrect calculations directed the jury's verdict or otherwise caused the jury to
20 award excessive economic damages to Plaintiffs. There is no evidence in the record from
21 which the jury could determine the amount of damages as it did without relying in part on
22 the failure to account for the removal of the volume of materials by KLB which were in
23
24
25
26
27
28
29
30

1 fact paid for. The jury's \$535,674.62 verdict was clearly outside the range of the evidence,
2 and the judgment must be reduced to account for the KLB evidence as well as the failure
3 to determine the proper "net" materials removed by including on the calculation of the
4 "cut" and not the "fill" in the Aerometric survey data.
5

6
7 **C. THE JURY COULD NOT HAVE COME TO ITS CONCLUSION WITHOUT**
8 **IMPROPERLY CONSIDERING THE RESULTS OF THE AEROMETRIC**
9 **SURVEY DATA**

10 In addition to the failure to properly consider the KLB direct sales payments and
11 corresponding volume the jury could not have come to its conclusions without improperly
12 considering the Aerometric survey data. In considering such data the Court heard
13 testimony from Mr. Witter that they should only consider the "net" cut minus fill in the last
14 survey performed by Whiteshield and that only the "cut" figures from the Aerometric
15 survey data should be considered in determining the quantities removed during the time
16 period of 2003 to 2008 and 2008 to 2011. Not only this be contrary to the plain terms of
17 the Aerometric survey itself but the testimony by Mr. Witter that all "fill" materials would
18 be accounted for by considering only the net of cut and fill from the last survey performed
19 by Whiteshield for the 2011 to 2013 time period. This would be so contrary to the laws of
20 physics that the Court should take judicial notice of this incorrect calculation and remedy
21 this by a new trial or remitter because the jury could not have possibly reached the damage
22 figures they came to without failing to give due credit to "fill" materials which were not
23 removed between 2003 and 2011.
24
25
26
27
28
29
30

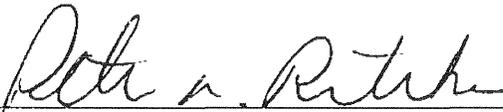
1 This incorrect application of basic math can be clearly demonstrated in the
2 mathematical proof which is attached hereto as ATTACHMENT A. The proof uses a one
3 unit "cut" and "fill" during each time frame. By demonstrating this on a one-unit basis the
4 Court should clearly see that the result would be the same regardless of whatever units are
5 substituted for each unit. The result from start to finish should be the same whether you
6 start with the 2003 baseline demonstrated by 12 units and end with the 2013 final result
7 which shows that only 3 units are removed or you properly account for the "net" cut and
8 fill in each time period and only count the "net" units removed. In ATTACHMENT A you
9 can clearly see that the correct determination of "net" cut from fill results in 3 units,
10 whereas incorrectly counting only "cut" in the time period of 2003-2011 results in the
11 inclusion of 2 extra measures of "cut" which were not in fact removed. By failing to net
12 fill from cut the jury improperly and incorrectly charged the defendants for units of material
13 that have never been removed from the quarry.
14
15
16
17
18
19

20 IV. CONCLUSION

21
22 The Court should grant Defendants' Motion for a new trial or remit the damages
23 awarded to Plaintiffs by at least \$250,000. This is required by the actual evidence presented
24 at trial, which shows that the damage determined could not have been reached without
25 failing to give proper credit for the direct sales materials removed and paid for by KLB and
26 by incorrectly failing to account for the net cut by deducting the fill materials as contained
27 in the Aerometric Surveys for the time period of 2003 to 2011. The resulting verdict was
28
29
30

1 contrary to the evidence and can only have been the result of the failure to consider the
2 direct sale evidence and flawed analysis and inaccurate calculations in considering the
3 survey data.
4

5 DATED this 15th day of December, 2014.
6

7
8 
9 JOHN A. MAXWELL, JR., WSBA # 17431
10 PETER M. RITCHIE, WSBA # 41293
11 Meyer, Fluegge & Tenney, P.S.
12 Attorneys for Defendants
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

1
2 **CERTIFICATE OF TRANSMITTAL**

3 I certify under penalty of perjury under the laws of the state of Washington that the
4 undersigned sent to the attorneys of record a copy of this document addressed to the
5 following:

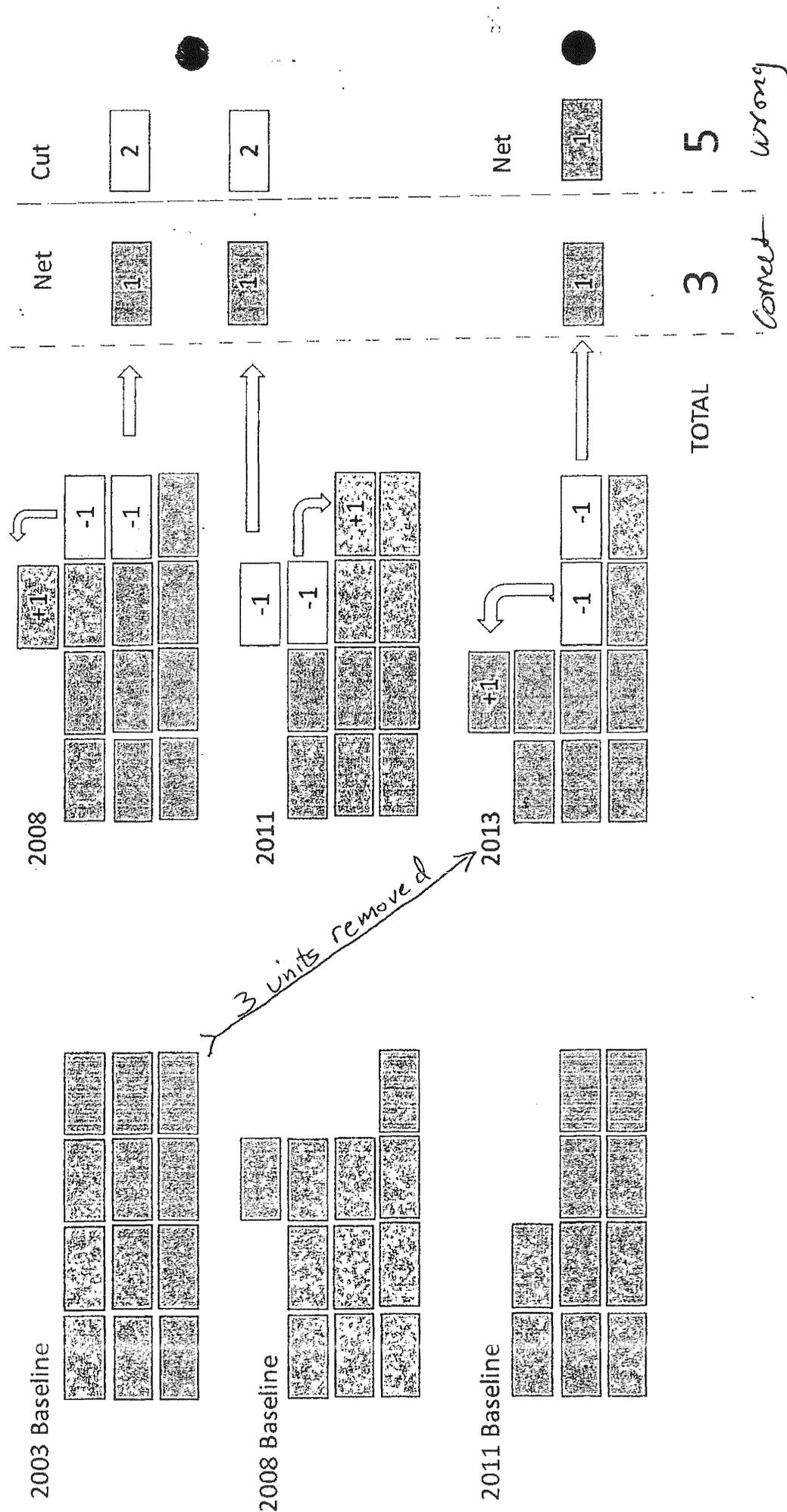
6
7
8
9
10
11
12
13
14
15

For Plaintiff: David B. Trujillo Law Offices of David B. Trujillo 4702 A Tieton Drive Yakima, WA 98908	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail <input checked="" type="checkbox"/> via hand delivery
For Defendants Sali, CRM, and CAG: Sean Russel Stokes Lawrence Velikanje Moore & Shore 120 N. Naches Avenue Yakima, WA 98901	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail <input checked="" type="checkbox"/> via hand delivery

16 Executed this 15th day of December, 2014, at Yakima, Washington.

17
18
19 Lori Stafford
20 LORI STAFFORD

ATTACHMENT A



1

FILED
COUNTY CLERK

'15 FEB -6 AIO:54

SUPERIOR COURT
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Burtstfield et al

NO. 11-2-01268-8

vs.

Sali et al

ORDER DENYING DEFENDANTS'
MOTION FOR NEW TRIAL/REMITITTUR

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

Defendants' motion for a new trial or
for remittitur is denied.

DONE IN OPEN COURT this 6th day of February, 2015.

[Signature]
JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

David Trills
Attorney for Plaintiffs
25580

Approved as to form:
(Copy received)

[Signature] 14431
Attorney for Defendants
[Signature] #34915
Attorney for Defendants