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Division III  
State of Washington

Court of Appeals No. 347729

BEFORE THE WASHINGTON STATE COURT OF APPEALS  
DIVISION THREE

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DEBORAH BURKSFIELD, an individual,

Appellant

vs.

LSL PROPERTIES, LLC, a Washington Limited Liability Company,  
and LARRY SALI and STEVEN SALI, individuals.

Respondents

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On Appeal from the Yakima County Superior Court  
Case No. 15-2-01847-6

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OPENING BRIEF

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## I. INTRODUCTION

This is an appeal by Deborah Burksfield and Airborne Stables, LLC (“Appellant”) from the following orders of the Honorable Judge Susan Hahn, of the Yakima Superior Court:

1. Order denying plaintiff’s Motion for Summary Judgment, and granting a “cross-motion” for dismissal dated August 29, 2016;
2. Order denying Motion for Reconsideration dated September 15, 2016, and filed September 16, 2016;
3. Order of Dismissal and Order Awarding Attorney’s Fees under RCW 04.08.184 filed on October 7, 2016

As will be demonstrated below the Court erred in granting the above orders on the following bases: First—Appellant respectfully submits that the court erred in its ruling on the issue of whether appellant Deborah Burksfield’s contract claims were barred by the prior judgment and ruling in the matter of *Burksfield, LSL Properties, LLC v. Sali, et al.*, Yakima County Superior Court Civil Case No. 11-2-01268-8 (hereinafter “*Burksfield I*”). Appellant submits that the court was in error in agreeing with defendants and Respondents’ position that the final judgment dispensed with future contractual claims of Burksfield.

Second—Appellant respectfully submits that the Court erred in granting a “cross-motion” summary judgment that did not comply with CR 56, and further by allowing defendant and Respondent LSL Properties, LLC (“LSL Properties”) to obtain affirmative relief without filing any

pleadings under CR 56, or even a noticed motion.

Finally—Appellant submits that Judge Hahn erred in denying their motion for reconsideration, and thereafter finding that the lawsuit was frivolous under RCW 04.84.185 and awarding fees against Appellant and in favor of Respondents.

## **II. STATEMENT OF THE CASE**

### **A. FACTUAL BACKGROUND OF THE CASE**

#### *1. History of Burksfield v. Sali Lawsuit*

Deborah Burksfield (“Burksfield”) is a member-manager of LSL Properties. The other member-managers of LSL Properties are her brothers Larry Sali, Steve Sali (“the Sali Members”) and Ashley McEntyre, her daughter. On April 12, 2011, Burksfield filed a personal and derivative action (on behalf of LSL Properties) in Yakima County entitled *LSL Properties, Deborah Burksfield v. Larry Sally, et al.*, Superior Court Civil Case No. 11-2-01268-8 (“*Burksfield I*”) to recover lost profits from mineral resources being unlawfully removed from LSL Properties’ owned real estate and sold for profit by the Sali members and their wholly owned entities (including Columbia Ready Mix (“CRM”)), while tenants of LSL Properties’s real estate (see see RCW 19.94.510 1(f)).

The underlying matter was a long and tortuous litigation over the course of 3 ½ years. Prior to trial some of plaintiff’s claims, and defendants’ counterclaims were dismissed.<sup>1</sup> All of the claims advanced by Burksfield on LSL Properties’ behalf, whether they prevailed or not, were

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<sup>1</sup> CP 79-80 (Declaration of Deborah Burksfield, ¶¶1-3)

directly aimed at obtaining a benefit for LSL Properties as a whole—and not just Burksfield’s personal interests. The claims included the usurpation of business opportunities, the under charging of royalties for gravel, improper accounting procedures, professional malpractice against LSL Properties’ accountant, and other breaches of fiduciary duty.<sup>2</sup>

Throughout *Burksfield I* the two Sali members’ acts and omissions were alleged to directly harm LSL Properties by unjustly increasing legal fees and costs as well as by limiting recovery of the debt owed to LSL Properties. The Sali members’ acts, omissions, and motions interfered with LSL Properties collecting the true and accurate debt that was owed and they prevented LSL Properties’ recovery of interest on the monies the Sali members benefited from profits, during the eight years, the LSL royalty payments were withheld from LSL Properties including:

1. The Sali members successfully prevented LSL Properties from collecting the 2005 under paid royalties, based on their motion containing a false or misleading statement made under oath in September 2014 that no written contract ever existed prior to April 1, 2006; barring collection of a 2005 debt when in fact a 2000 written lease was valid until 2010,
2. The Sali members successfully denied LSL Properties recovery of prejudgment interest on 835,000 tons of commodities, they were contractually responsible to weigh but took more than they reported and paid to LSL

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2     *Id.*

Properties between April 2006 and March 2013, when in fact they always knew both the exact tons weighed and removed as well as the date commodities were taken for profit and billed to their customers,

3. The Sali members' after trial unsuccessfully pleaded for a retrial or a \$250,000 remittitur based on their motion containing two false or misleading statements made under oath that no materials removed by KLB Construction were ever weighed and KLB had paid directly to LSL Properties \$247,124.40; when in fact the Sali member's own trial exhibits clearly documented only \$103,634.83 of the KLB payments due LSL had been deposited by the Sali members or their entities employees into LSL's bank account.

On October 17, 2014, a jury in the underlying lawsuit *Burksfield I*, by unanimous verdict found the wholly owned Sali tenant CRM and the two Sali LSL members had breached both the 2006 lease agreements and their fiduciary duty owed to LSL Properties.<sup>3</sup> By a verdict of 11-1, the jury awarded LSL damages of \$27,226 caused by CRM's and the Sali members' bad faith 2006 lease contract underpayment of \$.10 per ton, and another \$508,448 for mineral resources taken between April 2006 and March 2013 by tenant CRM and the Sali members without any payment.<sup>4</sup>

Pursuant to Article 3, Section 3.2 of the LSL Properties Operating agreement, provides, in part:

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3 CP 80, at ¶4

4 *Id.*

Limitation of Liability – Indemnification. No Member (nor any employee or agent of a corporate Member) shall be liable, responsible, or otherwise accountable, in damages or otherwise, to the Company or the Members or Economic Interest Owners for any act or omission performed in good faith, *provided* (Emphasis in Original) that such act or omission does not constitute, fraud, misconduct, bad faith, or gross negligence. The Company shall indemnify and hold harmless the Member(s) . . . against any liability, loss, damage, cost, or expense incurred by them on behalf of the Company or in furtherance of the Company’s interests, without relieving any such person of liability for fraud, misconduct, bad faith, or gross negligence.

Any indemnification required to be made by the Company shall be made promptly following the fixing of the liability, loss, damage, cost, or expense incurred or suffered by a final judgment of any court, settlement, contract, or otherwise. . . . (Emphasis added).<sup>5</sup>

Plaintiff Burksfield spent 2,000+ man hours over four years in pursuing claims primarily on a derivative basis for LSL Properties.<sup>6</sup> Burksfield expended hundreds of thousands in litigation costs in good faith to preserve and protect LSL Properties's valuable mineral resources from waste or theft by both the wholly owned Sali-tenant CRM, as well as and by the Sali members. Again, although Judge Michael McCarthy of the Yakima Superior Court dismissed some of those claims (such as the accounting malpractice and the royalty price, the 2005 AKA underpayments, and the Rest Haven claims), Burksfield was successful in a number of areas: She established to the jury that the Sali members and their wholly owned corporation breached their fiduciary duties and in bad faith breached the AKA 2006 lease contract by not paying \$.60 per ton as

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5 CP 100-139

6 CP 81 (Declaration of Deborah Burksfield, ¶(6); Plaintiff Airborne Stables, LLC (“Airborne”) loaned Burksfield funds through the sale of assets and horses to pursue the underlying litigation, and was named a party for that reason.

agreed and underpaying royalties owed for 835,000 tons of gravel and materials taken without any compensation paid to LSL, and further by having an order entered by the Court that a new *independent* accountant be appointed, by the members of LSL Properties.

2. *December 5, 2014 Hearing Related to the Judgment in Burksfield v. Sali*

On December 5, 2014, a hearing was held in *Burksfield I* before Judge Michael McCarthy of the Yakima Superior Court to determine the amount of judgment, fees and costs to be awarded. A portion of the fees and costs sought by the Plaintiffs involved the money, and other expenditures that plaintiff Burksfield expended or suffered in good faith on behalf of her co-plaintiff LSL Properties on all claims, both those that prevailed and created a jury award of \$535,674 “common LSL fund” single damage recovery of royalties owed, that in equity requires each member of LSL Properties that benefited, from the “common fund” created by Burksfield’s legal fees, to bear a pro rata portion of the cost of obtaining that fund and those that were dismissed.

Likewise, the Sali members of LSL sought an award of fees and costs all multiple defendants incurred under LSL 3.2 indemnification, for their successful defense of some of the claims as well as defending their wholly owned entities (who are not members of LSL and were never eligible for any LSL indemnification).<sup>7</sup> The \$90,145.80 in legal fees and costs sought jointly by all the defendants were detailed in their response in

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<sup>7</sup> See CP 183, line 14 to CP 184, line 16

opposition to awarding any fees and costs sought by Plaintiffs (LSL) and in their motion requesting LSL §3.2 indemnification of all the Defendants specifically, set forth as Redemption Issue Dismissed by Court \$48,056.40 and the Business Judgment Rule/Price/LS Wapato claims in the amount of \$42,936.12.<sup>8</sup> The defendants also sought \$113,283.77 in fees and costs from the Plaintiffs for parent Columbia Asphalt and Gravel, Inc. which all but \$39,000 was denied. Thus only \$129,174.27, in total, was incurred by all of the defendants specific to the Plaintiff's successful claims for breach of lease contract and breach of fiduciary duty.

During the December 5<sup>th</sup> 2014 hearing, Judge McCarthy awarded some fees and costs to LSL Properties from the Sali members based upon the Washington derivative statute. However, during argument, Judge McCarthy indicated that he believed any claims for reimbursement of legal fees and costs *under* the indemnification provisions of the LLC Operating Agreement (Section 3.2) had to be sought separately after presenting a request to LSL for indemnification:

THE COURT: Are you asking for your fees under the derivative action statute *or are you asking for fees under the LLC Agreement?*

MR. TRUJILLO: We -- we asked for fees *under the LSL Agreement for bringing the derivative action*, and we --

THE COURT: Doesn't she have to -- *doesn't your client have to present a bill to the LSL for that -- for those costs? Isn't that a separate issue as to whether they're liable?*

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<sup>8</sup> In *Burksfield I*, the defendants did not segregate their expenses and fees as to what they were unsuccessful for regarding the Rest Haven claim. They later sought reimbursement at the March 2015 meeting, and received that based upon majority control.

MR. TRUJILLO: No, it's -- I -- we take the position it should be done in court. And if there's any --

THE COURT: Well, I think it should be done in court, but it might have to be done in a different action if --

MR. TRUJILLO: Yeah, I mean, we served it on them. We're doing it here. We're effectively doing it right --

THE COURT: Yeah, but you're asking for fees from your -- your co-Plaintiff.

MR. TRUJILLO: Yes, but I think it's the court's position to make that ruling. The majority shareholders are never gonna allow that.

THE COURT: Well, I don't know that.<sup>9</sup> (Emphasis added)

3. *March 18, 2015 LSL Properties Meeting Regarding §3.2 Indemnification of Burksfield and the Salis members*

On or about January 5, 2016 (after the Judgment had been signed),

Burksfield submitted a detailed request for reimbursement directly *from*

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<sup>9</sup> CP 81 (¶¶7 and 8); CP 143-223, pages 161 and 162; see also Footnote 7, supra, where Judge McCarthy advised counsel for the Salis (John Maxwell):

THE COURT: I guess my -- my question to you on that though is very similar to the question I posed to Mr. Trujillo. *Isn't that maybe an issue for a different day or a different lawsuit or claim or whatever as to whether I can I can order the -- the LLC to reimburse your clients for their--*

MR. MAXWELL: Yeah. I -- I think that --

THE COURT: I mean, *don't you have to under the --remembering the clause is that -- and I don't have it in front of me, but basically is, you know, I think it'd be read to say why you'd need to make a make a claim or submit the bill to the LLC and see if they pay it before there's a --*

MR. MAXWELL: Well I mean, I think that's one way. I -- I agree that would be one way to address that issue. The other way would be and I have to raise it at this point --

THE COURT: Right. (Emphasis added).

LSL Properties under Section 3.2, which was updated on February 26<sup>th</sup> to include additionally \$20,000 paid legal fees for the appeal of Judge McCarthy's denial of approximately \$300,000 in interest on the rock taken and not paid for when CRM and the Sali members were responsible by contract to weigh each load removed and weights and measures statute 19.91.510 1(f) obligated to accurately weigh, and pay for what they took from LSL by the ton when as the buyer they were responsible to provide the weights and the \$39,000 in copying costs awarded to their "Parent" company CAG, knowing CRM in fact incurred and paid the \$39,000 for copying according to page 43 of Mr. Maxwell's lists of costs that he argued for during the December 5<sup>th</sup> Hearing.<sup>10</sup>

An LSL Properties meeting was held on March 18, 2015, after the two (2) written and documented requests for reimbursement were presented to LSL Properties by Burksfield—as denoted in Judge McCarthy's oral statements above. The Sali members presented their own *verbal* request without any supporting documents for reimbursement totaling **\$144,136.00** for defending all the Defendants, including their wholly owned entities (parent - Columbia Asphalt & Gravel, Inc., Columbia Ready-Mix, Inc., the lessee and LS Wapato, LLC) for the dismissed claims in *Burksfield I* as follows:

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<sup>10</sup> See Exhibit CP 227-63; since that demand, plaintiffs' costs and expenses have increased based upon costs incurred in appeal, and exclusive of costs incurred in pursuing this action. The total amount was approximately \$107,000 at that time

1. **Redemption Issue - \$48,056**
2. **Price/Business Judgment Issue - \$42,936**
3. **Indemnification for Rest Haven - \$53,144**<sup>11</sup>

In a vote of 2 to 1 (both Sali members voting “aye”), LSL Properties approved the oral reimbursements requested by the Sali members—over the objections of Burksfield (Article 3, §3.2 did not permit reimbursement to members who were found liable for fraud, misconduct, bad faith or gross negligence). In a vote of 2 to 1 (both Sali members voting “nay”), LSL Properties *rejected* Burksfield’s request for reimbursement. The Sali members then (again in a 2 to 1 vote) approved payment of interest by LSL Properties to them at the rate of 5%.<sup>12</sup>

#### **B. PROCEDURAL BACKGROUND OF THIS UNDERLYING LAWSUIT**

Burksfield had consulted with her trial attorney, David Trujillo, who had represented Burksfield and LSL Properties in the trial of the underlying litigation. Mr. Trujillo was present during the hearing where Judge McCarthy discussed the parties’ rights to pursue LSL Properties for contractual reimbursement separate from *Burksfield I*. Mr. Trujillo had prepared a final order in anticipation of Judge McCarthy ruling favorably

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<sup>11</sup> This fact was raised as part of Burksfield’s Motion for Summary Judgment regarding the conduct of the Sali members, and the fact their reimbursement of their own costs was a breach of their fiduciary duty. The Sali members of LSL are ineligible for indemnification of any acts and omissions constituting fraud, bad faith, misconduct, or gross negligence in the underlying civil case, *Burksfield I* and their acts or omissions constituting the same after 2014 trial.

<sup>12</sup> CP 82 (Declaration of Deborah Burksfield, ¶¶10-11; Exhibit 7 thereto, CP 264-9

for his client on the *contractual* indemnity portions. When Judge McCarthy declined to rule on LSL indemnification of either side, under paragraph 3.2 (see above), Mr. Trujillo did not remove the language and only adjusted the amounts.<sup>13</sup>

When Burksfield's new demand was rejected by the majority members of LSL Properties, who had been found liable for breach of contract and fiduciary duty, she filed a new action *pro se*, seeking relief including indemnification of the amounts she expended on LSL Properties' behalf, which were not awarded by Judge McCarthy under §3.2, as well as an order setting aside the payment by the Salis to themselves under the same section.

She later contacted her former attorney, Brian H. Krikorian. Mr. Krikorian conducted a reasonable investigation of the facts, including reading the entirety of the hearing transcript, reviewing all the court orders, reading the presentations to LSL Properties, and the minutes of LSL Properties. Mr. Krikorian was also familiar with the underlying litigation and familiar with the LSL Properties Operating Agreement.<sup>14</sup> Mr. Krikorian concluded, based upon Judge McCarthy's statements,

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<sup>13</sup> CP 565-568 (Trujillo Declaration attached to the Declaration of Brian H. Krikorian); Shortly after this, relying upon the oral statements of Judge McCarthy and her attorney's subsequent advice that she promptly appeal two orders issued on December 5, 2014 (the denial of prejudgment interest on materials the majority members and their wholly owned entity CRM had taken without any payment and the expense award to CAG, the parent company of CRM, also controlled by the same majority members of LSL), Burksfield made a written request for payment (i.e., "presented a bill to the LSL for that", per Judge McCarthy), as noted above

<sup>14</sup> Mr. Krikorian also regularly lectures on LLC law. See CP 642-55.

existing contract and LLC law, and the facts of the case, that Burksfield had a viable, tenable claim to pursue and agreed to represent her in this matter.

Shortly thereafter LSL Properties' counsel, Jeffrey Simpson, filed a motion to dismiss the action as to Airborne Stables, LLC. Mr. Simpson later struck this motion. There was no hearing or argument (or opposition).<sup>15</sup> Mr. Simpson then served discovery which contained **one Hundred and sixteen Interrogatories** and **four Requests For Production**. In contrast, Burksfield served a set if discovery on LSL Properties with **fifteen Interrogatories** and **three Requests for Production**.<sup>16</sup>

Because Burksfield was seeking separate equitable relief against her co-members (independent of the indemnity against LSL Properties), Mr. Krikorian amended the complaint to include the Sali members. Mr. Maxwell appeared. The Sali members served no discovery or any other pleadings. Mr. Maxwell eventually filed an answer but made no motions.<sup>17</sup>

*Nothing* occurred in the matter between April of 2016 and July 2016, when Burksfield filed a Motion for Partial Summary Judgment. Mr. Maxwell, on behalf of the Salis individually, opposed the motion, and

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15 *Id.* at ¶6

16 *Id.* at ¶¶7-8

17 *Id.* at ¶9

submitted one declaration in opposition. The Sali members included in their opposition to the Motion for Summary Judgment of Burksfield a request for a “cross motion” to dismiss. The Salis did not file a separate motion, noted under the requirements of CR 56 for a Motion for Summary Judgment.

Mr. Simpson, on behalf of LSL Properties, filed the declaration of Steven Sali. He did not file a joinder or prepare a separate opposition.<sup>18</sup>

The parties appeared on August 24, 2016 before Judge Susan Hahn. The Court took oral argument for approximately 90 minutes. The Court permitted Mr. Simpson to argue *on behalf of LSL Properties* separately (over objections by Mr. Krikorian) for over 20 minutes—even though he had filed no pleadings or joinder. The Court took the matter under submission, and ruled approximately 1 week later via letter, finding that plaintiffs’ claims were barred by Judge McCarthy’s prior order.<sup>19</sup> As noted above, in the December 5, 2015 hearing, Judge McCarthy indicated that he believed *any* claims for payment from LSL Properties (whether made by the Salis or Burksfield) *under the separate indemnification provisions of the LLC Agreement* (Section 3.2) had to be sought in a “different action”. Judge McCarthy later, in the same hearing, refused to award fees to the Sali members on the same grounds. In response to plaintiff’s motion for summary judgment, the Sali members argued that

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18 *Id.* at ¶10; See RT 9, line 19 to page 10, line 21.

19 See CP 642-55 at ¶11; CP 662-664

because the final order *referenced* paragraph 3.2 of the LSL Properties LLC Agreement, that it served to bar any future efforts for Ms. Burksfield to seek recompense directly from LSL Properties. In both denying Burksfield's Motion for Summary Judgment and dismissing her case on a "cross-motion" contained in the opposition, Judge Hahn agreed with this reasoning, finding that *notwithstanding* Judge McCarthy's oral pronouncements at the December 5 hearing, his final order (which was appealed to the Court of Appeals and affirmed) controlled. Judge Hahn also found that the other, newly raised issues regarding the management of LSL Properties by the Salis were also foreclosed by Judge McCarthy's ruling, and further, that the Court had no authority to interfere with the management of the LLC.

Burksfield then filed a motion for reconsideration. Burksfield raised the following issues with the Court's order dismissing her case. First—as indicated in the declarations of David Trujillo and Deborah Burksfield, the proposed final judgment was prepared by Mr. Trujillo prior to the December 5, 2014 hearing before Judge McCarthy. As the record, and the hearing transcript in that case reflected, both plaintiffs LSL Properties and Burksfield, as well as the Sali members, sought *separate* contractual reimbursement under the LSL Properties Agreement, Article 3.2. This was therefore reflected in the order. When the hearing took place, Judge McCarthy unambiguously indicated that certain of these fees

were being sought prematurely and he could not grant relief. After making all of his final rulings, Mr. Trujillo testifies he modified the order accordingly. But the reference to Article 3.2 was not removed.<sup>20</sup>

The second problem with the Court's reasoning was that Judge McCarthy certainly did not foreclose Burksfield's rights to seek *future* recompense and enforcement of her contractual rights, from her co-plaintiff LSL Properties, simply because he awarded some fees *to LSL Properties* in *Burksfield I*. As pointed out in plaintiffs' motion for summary judgment and during oral argument, it was certainly in LSL Properties's interest to both seek appeal of the denial of pre-judgment interest, as well as defend the Sali members' cross appeal. Whether or not prevailing party fees were awarded by this appellate Court in the appeal of *Burksfield I*, nothing in the earlier order from Judge McCarthy prevented her from exercising her *contractual* rights under the Operating Agreement of LSL Properties.

Finally, it was an inconsistent result by Judge Hahn to accept the Sali members' argument that Judge McCarthy's ruling foreclosed Burksfield from later asserting contractual rights under the final order, but somehow he didn't also deny the Sali members' the same remedy, even though his oral statements are otherwise. By permitting the Sali members

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20 CP 565-8

to pay themselves, and not their minority member, and argue that the final award did not affect them is an inconsistent, and inequitable, result.<sup>21</sup>

Plaintiff requested Judge Hahn reconsider her ruling on the issues of the breach of contract and whether the Sali members' are entitled to their own reimbursement. Alternatively, plaintiff requested that the court vacate its ruling on these two issues, and then refer the issue to Judge McCarthy for a final decision as to whether it was *his intent* to foreclose the future claims when he signed the order. In this way, the parties (and the Court) could be clear that Judge McCarthy's intentions were truly carried out. Judge Hahn denied the Motion for Reconsideration.<sup>22</sup>

Defendants then made a motion for attorney's fees under RCW 04.84.185, and sought more than \$60,000 in fees against plaintiff. Judge Hahn, relying solely on her letter ruling of August 29, 2016, found that plaintiff's case was frivolous and brought without any basis in fact and law. Without making any clear, specific findings, and rejecting Appellants' arguments related to segregation and reasonableness, she awarded 100% of the fees sought by both counsel, finding the case was complicated and required thorough examination.

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21 CP 569-573

22 CP 588

### III. ARGUMENT

#### A. STANDARD OF REVIEW

##### 1. *Defendants did not Meet The Requisite Legal Burden On Summary Judgment*

The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court. *Castro v. Stanwood School Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004); *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987). See also *Ski Acres, Inc. v. Kittitas County*, 118 Wash.2d 852, 854, 827 P.2d 1000, 1002 (Wash.,1992). A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all evidence and inferences in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

CR 56(c) provides in part that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The burden of showing that there is no genuine issue of material fact falls upon the party moving for summary judgment. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 757 P.2d 507 (1988). ***If the***

***moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the non-moving party has submitted affidavits or other evidence in opposition to the motion. Id.***

2. *Motion for Reconsideration and Attorney's Fees Motion*

An appeal of a trial court's denial of a motion for reconsideration and its decision whether to consider new or additional evidence presented with the motion, is reviewed based on whether the trial court's decision is manifestly unreasonable, or based on untenable grounds. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 683, 15 P.3d 115 (2000); *Chen v. State*, 86 Wash.App. 183, 192, 937 P.2d 612 (1997). *Martini v. Post*, 178 Wash.App. 153, 161, 313 P.3d 473, 478 (Wash.App. Div. 2, 2013).

Likewise, a Motion for Attorney's fees and Sanctions is also considered under an abuse of discretion standard. See *Cooper v. Viking Ventures*, 53 Wash. App. 739, 740, 770 P.2d 659, 659 (1989). Burksfield submits that the trial court abused its discretion in refusing to consider supplemental timely submitted evidence pursuant to CR 59, and further by improperly finding that Burksfield's action was frivolous, and awarding fees in favor of Respondents. The decision to award attorney's fees as a sanction for a frivolous action is left to the discretion of the trial court, and the court's decision will not be disturbed absent a showing of abuse of

discretion. *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 132, 783 P.2d 82, review denied, 113 Wash.2d 1001, 777 P.2d 1050 (1989).

**B. THE COURT ERRED, AS A MATTER OF LAW, BY CONSIDERING AND GRANTING DEFENDANT’S “CROSS-MOTION” WITHOUT COMPLYING WITH CR 56 AND NOT GRANTING BURKSFIELD’S MOTION FOR RECONSIDERATION**

*1. Neither LSL Properties nor the Salis filed a Noticed Motion for Summary Judgment*

In the lower court, **Burksfield** filed a noticed motion for partial summary judgment seeking affirmative relief. The Sali defendants filed a responsive brief, containing a “cross motion” for dismissal.<sup>23</sup> LSL Properties filed no pleadings or joinder in opposition to the motion for partial summary judgment or in support of a cross motion to dismiss, and only filed the Declaration of Steven Sali. Over the objection of Burksfield, the trial court awarded affirmative relief to **both** the Salis and LSL Properties, and dismissed plaintiffs’ claims and case.

Under CR 56(c), a party is entitled to at least 17 calendar days to collect opposing affidavits and other evidence, and draft an opposition to the Sali member’s “cross motion for partial summary judgment on liability.” The Salis’ brief was filed on August 15, 2016, nine (9) days before the hearing set for plaintiff’s motion. This unfairly and improperly deprived Burksfield of time to prepare an actual response and was simply

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23 CP 409-433

inappropriate. There is no applicable Washington case where a court has permitted a motion for summary judgment (even if characterized as a “cross motion”) to be heard less than 28 days after the motion was filed. See 14A Wash. Prac., Civil Procedure § 22:18 (2d ed.)

The cross-moving party should serve and file an express “notice of cross motion,” designating the cross motion to be heard at the same time and place as the pending motion. All other prerequisites pertaining to the filing of an independent motion under the civil and local rules should be followed. If the opposing party wants both to oppose the main motion and seek alternative relief of its own, the best approach is to serve a notice of cross-motion, with the accompanying brief and/or affidavits offering both support of the cross-motion and opposition to the main motion. (citing to *Pahuta v. Massey-Ferguson, Inc.*, 942 F. Supp. 161 (W.D. N.Y. 1996) (response to motion did not constitute cross motion where cross-movant failed to file and serve notice of motion, statement of material facts, or supporting memorandum of law). *McCorkle v. Walker*, 871 F. Supp. 555 (N.D. N.Y. 1995) (cross motion’s request for relief insufficiently specific).

During oral argument, Judge Hahn had a colloquy with counsel whether she could rule on a legal question without a cross-motion, and dismiss the case as requested by respondents, based upon an issue of law.<sup>24</sup> However, in their opposition, respondents went beyond just an issue of law, as did the trial court in rendering its oral ruling. To the contrary, the trial court made specific findings of undisputed fact in favor of the respondents in granting them affirmative relief on a motion—they did not bring.

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24 RT page 5, line 10 to page 9, line 12  
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2. *Judge Hahn Impermissibly Allowed LSL Properties To Both Argue In Opposition To The Motion For Partial Summary Judgment, As Well As Awarded LSL Properties An Affirmative Dismissal Without It Even Filing Any Papers In Opposition*

LSL Properties, LLC, which was separately represented by counsel, *did not* file an opposition or a joinder in the opposition of the Sali, nor did it *separately* move for a Motion for Summary Judgment.<sup>25</sup> Despite this, Judge Hahn permitted Mr. Simpson to argue for 15 to 20 minutes in support of an opposition he did not file, or a “cross motion” or “motion” he did not file, and to argue for affirmative relief, i.e. a dismissal.<sup>26</sup> Ultimately, the trial court granted affirmative relief in favor of LSL Properties, without it having even filed a pleading with arguments, either in opposition to Burksfield’s motion for partial summary judgment or in support of a “cross motion”.<sup>27</sup> See for example *Winterroth v. Meats, Inc.* (1973) 10 Wash.App. 7, 516 P.2d 522—holding when a party moving for summary judgment presents affidavits which make out a prima facie case, the opposing party may not rely on mere allegations contained in his pleadings but must make an evidentiary showing of a factual issue which is material to the contentions before the court. While LSL Properties did

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25 Attorney Jeffrey Simpson, representing the LLC separately, only filed a declaration of Steven Sali. See RT 9, line 13 to page 12, line 4.

26 See RT 47, line 10 to page 57, line 3.

27 Mr. Simpson claimed he did not file something due to the press of business. See RT 9, line 13 to page 12, line 4.

file the declaration of Steven Sali,<sup>28</sup> LSL Properties did not offer any factual argument or legal argument in either opposition to the motion for partial summary judgment of Burksfield, or formally join or make a cross-motion for a dismissal. Plaintiff had no ability to respond to LSL Properties' arguments separately, as the relief sought from LSL Properties was completely distinct and separate than any relief sought from the Salis (contractual indemnity for the former, and equitable relief related to the latter).

Over Burksfield's objections, the trial court permitted Mr. Simpson, on behalf of LSL Properties, to not only argue but then granted affirmative relief in favor of LSL Properties without so much as a pleading or motion seeking such a relief. Burksfield submits that this ruling was completely antithetical to the intent of both Civil Rule 56, and Washington law, and Judge Hahn impermissibly granted affirmative relief to both the Salis and LSL Properties without a proper noticed motion.

**C. THE COURT IMPROPERLY DENIED PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND THEN GRANTED AFFIRMATIVE DISMISSAL IN FAVOR OF RESPONDENTS**

- 1. The 2015 Order by Judge McCarthy in Burksfield v. Sali, et al. did not Foreclose a Separate Action by Burksfield against LSL Properties, LLC*

It is the general rule, that a court's oral decision is not a finding of

fact and that a final written order remains the order of the court. *Ferree v. Doric Co.*, 62 Wash.2d 561 (1963); *Quigley v. Barash*, 135 Wash. 338, 237 P. 732, *Colvin v. Clark*, 96 Wash. 282, 165 P. 101; *In re Patterson*, 98 Wash. 334, 167 P. 924; *Swanson v. Hood*, 99 Wash. 506, 170 P. 135. *Rutter v. Rutter*, 59 Wash.2d 781, 370, P.2d 862 (1962). However this was not the issue here, and the lower court below erred in finding that Judge Michael McCarthy's December 2015 written judgment foreclosed plaintiff from seeking a *separate contractual* indemnification from her co-plaintiff, LSL Properties.

In the *Burksfield I* matter, during the hearing to fix damages and costs and fees, Judge Michael McCarthy specifically stated in his oral ruling that he was *not* awarding any fees or costs under an independent theory of indemnification *from* LSL Properties to either Burksfield, or the Sali defendants who had lost.<sup>29</sup> When the final order was submitted for signature, it did not say that Judge McCarthy was (inconsistent with his oral ruling) foreclosing and finding that the parties had been denied contractual indemnity from LSL Properties directly.<sup>30</sup> Again—in the *Burksfield I* action, LSL Properties was a co-plaintiff. The trial judgment in that matter was a derivative action seeking damages from the Salis and their individually owned company for breaches of fiduciary duty *to LSL Properties*. The judgment states:

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29 See CP 91 to 99

30 See CP 92 to 97

3. Plaintiffs are awarded reasonable attorney’s fees against all the **Judgment Debtors** [defined as the Salis, individually and their entities]...and all consistent with paragraph 3.2 of the parties’ LLC contract...and RCW 4.84.330, and all the laws and standards of recovery of attorney’s fees where derivative actions benefit the company and create a common fund.<sup>31</sup>

4. **Costs and Expenses:** Plaintiffs [LSL Properties and Burksfield] are awarded **\$144,266.37** against **Judgment Debtors** [defined as the Salis, individually and their entities] for the Plaintiffs’ recoverable statutory costs and expert legal expenses (Emphasis added) incurred by the Plaintiff (sic) pursuant to paragraphs 3.2 of the LSL, LLC Agreement and pursuant to the Plaintiffs’ Declarations and Cost Bill on file herein, which are approved to the extent of the amount awarded in this paragraph, and nevertheless incorporated herein by reference as if fully set forth....<sup>32</sup>

The written Judgment signed by Judge McCarthy is not inconsistent with his oral rulings; in his rulings, he said that he was not going to permit (at that time) the Salis or Burksfield from *separately* seeking costs *against* LSL Properties (the co-plaintiff) for indemnity under the LLC Operating Agreement. He stated that was for another day. The language in the Judgment deals strictly with the individual Salis and their entities *repaying* LSL Properties for the costs and fees incurred in the derivative action—not whether LSL Properties owed a separate, enforceable contractual indemnity obligation to either the Salis or Burksfield. These are the proverbial “apples” and “oranges”.

Accordingly, Judge Hahn erred in finding that the written Judgment foreclosed Burksfield (or the Salis, for that matter), from

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31 CP 95

32 CP 96

seeking separate indemnification under the contractual provision of the LLC agreement, as those claims were completely separate from claims that *LSL Properties* had, derivatively, from the Salis.

2. *LSL Properties Had a Separate Contractual Obligation to Reimburse Burksfield for Her Good Faith Expenditures in the Underlying action as provided for in the LLC Agreement*

All states, including Washington, will enforce valid Operating Agreements entered into among LLC members.

In addition to agreeing among themselves with respect to the provisions of this chapter, the members of a limited liability company or professional limited liability company may agree among themselves to any otherwise lawful provision governing the company which is not in conflict with this chapter. Such agreements include, but are not limited to, buy-sell agreements among the members and agreements relating to expulsion of members.

(RCW 25.15.050 Member Agreements; see also RCW 25.15.005(5))

Like any contract, the interpretation of an Operating Agreement itself is a question of law and the fundamental principal of contract interpretation is to ascertain the intention of the parties and give effect to it. See *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 115 P.3d 262 (2005). See for example *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 749 (9th Cir. 2005) – the interpretation of agreements and their legal effect is an issue of law for the court; *Harbison v. Strickland*, 900 So. 2d 385 - Ala: Supreme Court 2004—holding that an LLC is a creature of statute, and in interpreting an operating agreement for

a limited liability company, the Court must look to the statute and the agreement; *Goldstein & Price, L.C. v. Tonkin & Mondl*, 974 S.W.2d 543 (Mo. Ct.App. 1998)—holding that the interpretation of legal partnership LLC agreement was a question of law and contract interpretation.

RCW 25.15.385 provides: “If a derivative action is successful, *in whole or in part*, as a result of a judgment, compromise, or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees, from the recovery of the limited liability company.” (Emphasis added). Here, the operative language of the LSL Properties Operating Agreement is not permissive and specifically states:

The Company **shall** indemnify and hold harmless the Member(s) . . . against . . . **expense incurred by them on behalf of the Company or in furtherance of the Company's interests**, without relieving any such person of liability for fraud, misconduct, bad faith, or gross negligence. [¶] Any indemnification required to be made by the Company shall be made *promptly* following the fixing of the liability, loss, damage, cost, or expense incurred or suffered by a final judgment of any court, settlement, contract, or otherwise. . . . (Emphasis added).

In *Interlake Porsche & Audi, Inc. v. Buchholz*, 45 Wash. App. 502, 522, 728 P.2d 597, 610 (1986) the Court of Appeals, Division 1, stated that the general rule regarding corporate entities that “[a]n award against the corporation of the minority shareholder's counsel fees and costs in vindicating a corporate claim for relief rests upon the rationale that the

plaintiff's efforts conferred on the corporation a benefit for which the corporation itself would otherwise have had to pay (citing to *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 995 (7th Cir.1976)). The Court noted:

Two important policies underlie this established practice: First, since all shareholders benefit from the plaintiff's efforts without contributing equally to the litigation expenses, to allow them to obtain full benefit from the plaintiff's efforts without contributing equally to the expenses would unjustly enrich them at the plaintiff's expense. Second, reimbursement of expenses serves to encourage meritorious derivative actions by the small shareholder whose expenses would normally exceed any increase in the value of his holdings resulting from a successful litigation.(Footnotes omitted.) 13 W. Fletcher, Private Corporations § 6045, at 447 (Perm.Ed.1984).

As noted above, the specific language of §3.2 is not permissive—it is mandatory (“shall indemnify and hold harmless”). Here Burksfield brought a derivative action in *Burksfield I* seeking several remedies, in furtherance of LSL Properties’s interest, and to benefit LSL Properties and the LLC as a whole. The ultimate outcome was unanimous jury verdict in LSL Properties’s favor, which found that the Sali members and their wholly owned corporation, CRM, were in violation of written agreements and had breached fiduciary duties owed to LSL Properties. As Judge McCarthy noted in his ruling on December 5, 2015, the subject of reimbursement of plaintiffs *total expenses* were a separate matter, and required that a demand be made under the LLC Operating Agreement directly to LSL Properties, since LSL Properties was Burksfield’s co-plaintiff. On January 4, 2015 Burksfield made a demand on LSL

Properties on behalf of the plaintiffs, on February 26, 2015, Burksfield's request was amended to include the sum of \$20,000 Airborne Stables, LLC loaned to LSL Properties on or about February 10<sup>th</sup> for payment made to the Law Office of Mr. David Trujillo in furtherance of LSL Properties's interests regarding the appeals filed, including to defend the appeal by the Sali members, and to appeal two (2) issues financially detrimental to LSL Properties.

On March 18, 2015, the Sali members exerted their majority control over LSL Properties by denying plaintiffs their costs, and instead rewarded themselves by directing the LLC pay their own defense costs and the costs to defend their wholly owned corporate entity, CRM, which was found liable for breach of contract by a unanimous Yakima jury.<sup>33</sup>

The Minutes of the March 18, 2015 reflect absolutely no basis, good cause or good faith rational as to why the majority members (who were found guilty of violating their fiduciary obligations owed to LSL Properties) could frustrate the mandatory language of §3.2 and deny Burksfield (the prevailing member) indemnification of those costs she incurred to recover the debt owed to LSL Properties. LLC managers owe the LLC entity itself and its *members* fiduciary duties analogous to those owed in a partnership. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wn.App. 443, 456, 158 P.3d 1183 (2007). One of these

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33 See CP 264-9

duties is the duty of loyalty, which requires the fiduciary to avoid “secret profits, self-dealing, and conflicts of interest.” *Horne v. Aune*, 130 Wn.App. 183, 200, 121 P.3d 1227 (2005). See RCW 25.15.040  
Limitation of liability and indemnification.

There were no facts in dispute that plaintiffs incurred reasonable expenses in furthering the interest of LSL Properties, and that the defendants were adjudicated in breach. Plaintiffs complied with the terms of the LLC Operating Agreement, and made demand upon LSL Properties. There is no reasonable basis for LSL Properties to refuse to reimburse plaintiffs, other than the Sali member’s self-dealing themselves \$460,497.52 of the judgment without ever incurring any costs for recovery of LSL Properties royalties and pre-judgment interest \$561,582.34, a debt; the Sali Member’s and their wholly owned CRM were adjudged to owe LSL Properties. This is in conflict with common law, statute RCW 25.15.155, the duty of care and fiduciary duty the Sali Members owed to LSL Properties and the other members, and the Court should grant summary judgment and/or partial summary judgment in favor of plaintiffs on this issue.

3. *The Lower Court Erred by Finding That Burksfield Was Precluded from Contractual Indemnity by the December 2015 Order, but that the Sali Members Were Not, and That the Court Had No Authority to Act Against the Sali's Subsequent Breaches*

Both Washington law and the Operating Agreement do not permit a liable party to reap the benefit of their misconduct by having the LLC reimburse them for their defense. RCW 25.15.040 (1) (b) provides that an LLC may:

(b) Indemnify any member or manager from and against any judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which an individual is a party because he or she is, or was, a member or a manager, ***provided that no such indemnity shall indemnify a member or a manager from or on account of acts or omissions of the member or manager finally adjudged to be intentional misconduct or a knowing violation of law by the member or manager, conduct of the member or manager adjudged to be in violation of RCW 25.15.235*** [Limitations on Distribution], or any transaction with respect to which ***it was finally adjudged that such member or manager received a benefit in money, property, or services to which such member or manager was not legally entitled.*** (Emphasis added)

Likewise, §3.2 of the Operating Agreement notes that the indemnification provisions will not apply to the actions of any member whose actions constitutes “fraud, misconduct, bad faith, or gross negligence.” Once again, the Minutes of the March 18, 2015 reflect no basis or rational as to why the majority members voted themselves reimbursement after being found guilty of breaching their fiduciary duties to the LLC. Incredibly, and unlike the plaintiffs, the Sali members did not

even go through the exercise of providing back up or support for their costs and fees they personally had paid. Instead, they simply used their majority position to vote themselves reimbursement. This action flies both in the face of Washington case law, statutory law, and the LLC Agreement itself, and the Court should order the Sali members to reimburse LSL Properties for any amounts paid, and order their actions void as a matter of law.

RCW 25.15.140 provides:

Remedies for breach of limited liability company agreement by member. A limited liability company agreement may provide that (1) a member who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement “shall be subject” to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a member “shall be subject” to specified penalties or specified consequences. [1994 c 211 § 306.]

RCW 25.15. 170 provides:

Remedies for breach of limited liability company agreement by manager. A limited liability company agreement may provide that (1) a manager who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement “shall be subject” to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a manager “shall be subject” to specified penalties or specified consequences. [1994 c 211 § 405.]

In this case, the LSL Properties Operating Agreement provides remedies for a member’s continued abuse of the LLC and disregard of the LLC’s rules. Article 4, Section 4.8 provides that a member may be

expelled from the company “upon a determination by the Managers that the Member has been guilty of wrongful conduct that adversely and material affects the business or affairs of the Company, has willfully and persistently committed a material breach of the...this Agreement, or has otherwise breached a duty owed to the Company or to the other Members.” The effect of such an expulsion shall result in the members being “Economic Interest Owners” only and having no further management authority.

Nothing in the final judgment of *Burksfield I* precluded the lower court from providing future relief to Burksfield in this case. To carry the Court’s position to its logical conclusion, no member would have a remedy under the Operating Agreement after the court’s 2014 judgment. That certainly was not Judge McCarthy’s intent, either in his oral rulings or his written judgment.

4. *Washington Law Permits Courts To Intervene if the Majority Members are Violating the Operating Agreement*

RCW 25.15.140 provides:

Remedies for breach of limited liability company agreement by member. A limited liability company agreement may provide that (1) a member who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement “shall be subject” to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a member “shall be subject” to specified penalties or specified consequences. [1994 c 211 § 306.]

RCW 25.15. 170 provides:

Remedies for breach of limited liability company agreement by manager. A limited liability company agreement may provide that (1) a manager who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement “shall be subject” to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a manager “shall be subject” to specified penalties or specified consequences. [1994 c 211 § 405.]

The LSL Properties Operating Agreement provides remedies for a member’s continued abuse of the LLC and disregard of the LLC’s rules. Article 4, Section 4.8 provides that a member may be expelled from the company “upon a determination by the Managers that the Member has been guilty of wrongful conduct that adversely and material affects the business or affairs of the Company, has willfully and persistently committed a material breach of the...this Agreement, or has otherwise breached a duty owed to the Company or to the other Members.” The effect of such an expulsion shall result in the members being “Economic Interest Owners” only and having no further management authority.

It was not in dispute that the LSL Properties Operating Agreement provides protections for both the members and the LLC by right of first refusal to purchase the Interests of members desiring to sell and other restrictions to limit the costs the LLC would incur as a result of any transfer of LSL’s LLC Interests to other than a spouse or direct descendent of an existing member. The Sali members failed to comply with Schedule

4, when the Sali members executed the February 2007 purchase-sale agreement of Len Sali's LLC interests to themselves in breach of the LLC Agreement. It is also indisputable that each member's capital account "shall be maintained separately" according to the incorporated Schedule 3 of the LLC agreement and RCW 25.15.200 which provides:

RCW 25.15.200 The profits and losses of a limited liability company "shall be allocated" among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement.

RCW 25.15.195 provides:

(1) Except as provided in a limited liability company agreement, a member is obligated to a limited liability company to perform any promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability, or any other reason. If a member does not make the required contribution of property or services, the member is obligated at the option of the limited liability company to contribute cash equal to that portion of the agreed value (as stated in the records of the limited liability company required to be kept pursuant to RCW 25.15.135) of the contribution that has not been made. This option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the limited liability company may have against such member under the limited liability company agreement or applicable law.

In her Motion for Summary Judgment, Burksfield requested that the Court order a comprehensive audit of all cash and equity transactions that as there is no way to determine who's capital was factually transferred to LSL, and if the Sali Members actually made the cash contribution or alternatively if they still today personally owe LSL, the cash capital contribution of \$374,276 that increased only the Sali Members' capital accounts. Burksfield also requested that the Court use both its equitable,

and legal power, to enforce the LSL Operating Agreement’s contractual provisions to ensure that the Sali members were not abusing their authority, and to refund payments improperly made. Instead of doing so, Judge Hahn found that she had no authority to enforce the provisions of the Operating Agreement, as there existed no “judicial remedy” to do so. This is contrary to both the legal, and equitable, powers of the court to enforce the Operating Agreement, and to further apply Washington case law as it relates to the majority members’ breaches of the same.

5. *Airborne Stables, LLC was a Proper Party*

Burksfield and Airborne Stables, LLC submit that Judge Hahn erred by dismissing Airborne Stables from the lawsuit. Judge Hahn accepted the Respondents argument that under the Operating Agreement Burksfield could not assign her membership interest. However, the evidence in the record was *not* that she assigned her membership interest—but that she borrowed money from Airborne and assigned a portion of her indemnity *proceeds* to Airborne.<sup>34</sup> That made Airborne a legitimate party to the lawsuit below, even if it was for nominal purposes, and ensured that an argument could not be made by Respondents’ that Burskfield did not own the entire indemnity claim since she had borrowed money from a separate LLC. As such, Airborne should be reinstated as a party if the matter is reversed.

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34 CP 80, ¶6; CP 140-1

**D. THE COURT ERRED BY GRANTING RESPONDENTS’  
MOTION FOR ATTORNEY’S FEES UNDER RCW 4.84.185**

*1. Under RCW 4.84.185, Plaintiffs’ Had a Rational Basis  
to Proceed with the Lawsuit*

Under RCW 4.84.185, the court (after making specific findings), can award reasonable costs and attorney’s fees if it finds that the “action... was frivolous and advanced without reasonable cause.” A frivolous action is one that *cannot* be supported by **any** rational argument on the law or facts. (Emphasis added). See *Goldmark v. McKenna*, 172 Wash.2d 568, 259 P.3d 1095 (2011), citing *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 132, 783 P.2d 82, review denied, 113 Wash.2d 1001, 777 P.2d 1050 (1989). However, allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, frivolous. *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wash.App. 690, 696–97, 723 P.2d 483 (1986) citing *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980)—upholding the denial of fees on a finding by the trial court that issues were “debatable.”

Under a similar CR 11 standard, to avoid being swayed by the benefit of hindsight, the trial court should impose sanctions only when it is ***patently clear*** that a claim has absolutely no chance of success. *In re Cooke*, 93 Wn.App. 526, 969 P.2d 127 (1999); *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996). Sanctions are not appropriate because an action’s factual basis ultimately proves deficient or

a party's view of the law proves incorrect. *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wn.App. 106, 780 P.2d 853 (1989); "The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable." *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992).

Here, the lower court was operating through the lens of hindsight. If the lower court had objectively viewed the evidence before it prior to the dismissal of plaintiffs' claims, it could not reasonably conclude that there was *no* reasonable basis for plaintiffs' lawsuit, or that the issues were not "debatable". First—while the trial court may have disagreed with Burksfield's position there certainly is, and was, a "rational" good faith belief that Judge McCarthy *did not* intend to foreclose Burksfield from proceeding with a separate, contractual indemnity demand against LSL Properties for the payment of her non-compensated expenses. This was not a frivolous argument, nor claim. It was advanced in good faith. Moreover, the Sali members had obtained from LSL Properties their fees under 3.2 of the LLC agreement, and they were also told the same thing by Judge McCarthy in his oral ruling. Because the Sali members did the same exact thing (which Judge Hahn inconsistently upheld in her ruling), raises a "debatable" issue. Again—while Burksfield may respectfully

disagree with the lower court's ultimate conclusion on these issues—that does not make Burksfield's claims "frivolous" considering LSL Properties 1998 Limited Liability Agreement shows the parties consciously and deliberately considered the relevant question(s) in connection with a member's acts or omission regarding indemnification under 3.2, and after having done so, the LLC contract intentionally excluded indemnification of "only" member's acts or omissions constituting fraud, bad faith, misconduct or gross negligence.

In addition to Judge McCarthy's colloquy during the hearing, there also is the fact that plaintiff relied, in good faith, upon the advice of LSL's attorney in the derivative action, David Trujillo, to request LSL's indemnification. Mr. Trujillo required that Ms. Burksfield advance funds from of her personal recovery to fund the appeal. It would make no logical sense for Ms. Burksfield to request reimbursement under Section 3.2, if Mr. Trujillo and Ms. Burksfield *knew* Judge McCarthy had in fact ruled that Ms. Burksfield could not recover this under the contractual 3.2 indemnification. Mr. Trujillo submitted a declaration in support of plaintiffs' motion for reconsideration, which noted that the original order was drafted *before* Judge McCarthy ruled on the issues. It was not frivolous for plaintiff to believe she still had (and has) a viable claim, and that the final judgment signed by Judge McCarthy was not intended to foreclose on her contractual right to LSL performance claims. This is an

issue where certainly reasonable minds could differ.

Finally, it is a matter of Washington law, that a contractual indemnification right does not *accrue* until the court orders payment of an obligation. The right to *contractual* indemnity does not accrue until the underlying liability is “fixed and absolute.” *Parkridge Associates, Ltd v. Ledcor Industries, Inc.*, 113 Wn.App. 592, 605 (2002). Indemnity agreements to indemnify against claims and losses resulting from the indemnitee's own negligence are enforceable contracts, and the courts have “long preferred to enforce indemnity agreements as executed by the parties.” *McDowell v. Austin Co.*, 105 Wash.2d 48, 53–54, 710 P.2d 192 (1985). Washington courts also recognized that parties rely on indemnity agreements for allocating and the courts tend to lean towards not frustrating those plans. See *McDowell*, 105 Wash.2d at 54, 710 P.2d 192. It was therefore not “frivolous” for Burksfield to seek to enforce her contractual indemnity rights against LSL *after* Judge McCarthy issued his final judgment.

Second—regarding the allegations related to an accounting and expulsion, nothing related to this argument was irrational, meritless or frivolous. The claims certainly had a basis in the LSL Operating Agreement, and under the court’s equitable power. The trial court and parties spent very little time addressing this, and most of the trial court’s focus was on the contractual indemnity issues.

Last—about Airborne Stables being named as a party, this was a minor, procedurally issue. Airborne Stables was included since it was an assignee by Burksfield of a “portion of the proceeds”. There was a rational basis to include Airborne as a party, especially since the Civil Rules require all possible parties to be named. In the end, the fact that Airborne was named did not give rise to “substantial” litigation over that issue. Mr. Simpson prepared an initial motion, which he later struck. The issue was never raised again until the responses to the Motion for Summary Judgment.

In *Truong v. Allstate Property & Casualty Insurance Company*, 151 Wash.App. 195, 211 P.3d 430 (2009), Division 1 of the Court of Appeals held that even where they affirmed the dismissal of the matter, it was not proper to find CR 11 sanctions simply because the plaintiff’s case was “weak.” In *Truong*, a motorist injured in an automobile accident with another driver, brought an action against his own insurer, alleging it acted in bad faith by refusing to waive reimbursement of the personal injury protection (PIP) provisions of their insurance contract, after insurer had paid medical bills of \$4,172 and insured had settled with other driver's insurer for only \$9,347.54, which the insured contended did not fully compensate him. The lower court dismissed the insured’s claim, and found in favor of Allstate under CR 11 for fees.

On appeal, the Court affirmed the dismissal of Truong’s claim.

However, the court reversed the awarding of fees against plaintiff's lawyers under CR 11 because it dealt with legal issues which were still not fully resolved, and that Truong's counsel was making a tenable argument for an extension of the legal precedent:

CR 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Bryant v. Joseph Tree*, 119 Wash.2d 210, 219, 829 P.2d 1099 (1992). ***Truong's case is weak factually but the fact that we are affirming the order of summary judgment does not mean that the case was entirely groundless or advanced for an improper purpose.*** We conclude the record lacks a tenable basis for the award of sanctions against Truong and his attorneys.

Burksfield would submit it is not unequivocal that her claims were groundless or advanced for an improper purpose. The fact that the trial court entertained 90 minutes of argument, permitted Mr. Simpson to argue when LSL had not even filed a joinder or opposition, and then took the matter under submission suggests that there were certainly "debatable" issues before the court. Every case has a "winner" and a "loser". This does mean that in every case, the "loser" is bringing a frivolous case or asserting a frivolous defense.

It is also clear from Judge Hahn's oral ruling at the hearing on the Motion for Fees she was ruling "from hindsight".<sup>35</sup> After conceding that her letter ruling never mentioned, or found, that the action was frivolous, Judge Hahn stated:

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<sup>35</sup> Judge Hahn, in granting the motion for fees, conceded that in her letter ruling, she never made a specific finding that Burksfield's action was "frivolous". See RT 83, ll. 1-3

There was a lot of time spent by Plaintiffs' counsel and then Defense having to defend this. When looking at it, it was so simple. The LLC -- it's simple what McCarthy said. And an argument that we should concern -- be concerned with his oral ruling when his final ruling is so clear. I don't understand that.

After spending 90 minutes of arguments, and Judge Hahn taking 1 week to deliver a written letter ruling, she now looked back on it to say it really was "so simple." However, at the time of the hearing on the motion for partial summary judgment, Judge Hahn clearly did not express the simplicity of the issue. As such, the Court erred in finding that Burksfield's action was frivolous under RCW 4.84.185.

*2. Even if Fees Were Awardable, the Amounts Awarded by the Trial Court were not reasonable and The Court Did Not Make Sufficient Findings of Fact*

As argued to the trial court, respondents failed to adequately meet their burden of segregating fees or justifying the amount of fees sought. In a word, for a case that involved one Motion for Summary Judgment, and two sets of discovery, a request for \$63,000 in fees was unwarranted.

In Washington, reasonable attorney's fees are calculated using the "lodestar" method. *Bowers v. Transamerica Title Insurance*, 100 Wash.2d 581, 593-4, 675 P.2d 193 (1983). In *Bowers*, the Washington Supreme Court held that for purposes of an award of attorney fees:

The trial court must determine the number of hours reasonably expended in the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. This

documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.). The court must limit the lodestar to hours reasonably expended, ***and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.*** (Emphasis added)

Id. at 597.

In determining what constitutes a reasonable attorney fee, the trial court should *make an independent decision* as to what represents a reasonable amount of attorney's fees. *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744 (1987). The lodestar is grounded in the market value of the lawyer's services. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 150 (1993); *Steele v. Lundgren*, 96 Wash.App. 773, 780 (1999). Moreover, the burden of proving the reasonableness of the fees requested **is upon the fee applicant**. *Scott Fetzer*, at 151: “[T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees’. [Citing *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 744, 733 P.2d 208 (1987)]. Along with the considerations outlined above, the trial court may also examine reasonableness of the hours claimed in light of the testimony of other attorneys called as experts.”

Under the lodestar method of determining reasonable fees, the court must first “exclude from the requested hours any wasteful or

duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Mahler v. Szucs*, 135 Wash.2d 398, 434, 957 P.2d 632 (1998); *Pham v. City of Seattle*, 159 Wash.2d 527, 538-9 (2007); see also *Target Nat. Bank v. Higgins*, 321 P.3d 1215, 1224 (Wash. Ct. App. 2014). Because segregation of time is essential to the reasonableness of a fee award, “[t]he burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees.” *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App 665, 690 (2005) (vacating fee award and remanding for segregation, if possible, or alternatively denial of fees); *Schmidt v. Cornerstone Inv., Inc.*, 115 Wash.2d 148, 171 (1990) (denying fees because “the attorney fee declaration . . . does not segregate.”). If the fee applicant provides a basis to do so, the trial court must segregate and exclude unproductive time “[r]egardless of the difficulty involved.” See *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 344-5 (2002).

Finally, RPC 1.5(a) lists 12 factors to consider when evaluating the reasonableness of attorney's fees for purposes of attorney ethics, and Washington courts have ruled that the factors should be considered when addressing fee shifting in litigation. *Target Nat. Bank* at 1225. As noted above, the court is required to “exclude from the requested hours any wasteful or duplicative hours”. In *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983) the United States

Supreme Court noted:

The district court also should exclude from this initial fee calculation hours that were not “reasonably expended.” S.Rep. No. 94–1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. ***Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.*** “In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.” *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original). (Emphasis added)

The Washington Supreme Court has adopted the *Hensley* Court’s “billing judgment” duty with respect to lawyers in Washington. See *Scott Fetzer*, supra, 122 Wn.2d 141, 156—noting that “the United States Supreme Court exhorted attorneys to exercise ‘billing judgment’ in fees requests so as to avoid a costly second major litigation.”

Here, both defendants sought a combined \$63,000 for work on the case below. LSL’s counsel (Mr. Simpson) served one set of discovery with a total of 115 repetitive interrogatories. He only responded to 15 interrogatories from plaintiff. Other than opposing plaintiff’s Motion for Summary Judgment, and filing an answer, counsel for the Salis, John Maxwell, did nothing else in the litigation. He served no discovery; no depositions were taken by any party; there were no experts.

A review of both Mr. Simpson and Mr. Maxwell’s bills show an

excessive amount of “discussions”, “reviews” and “impact” analysis, client meetings—and very little actual *litigation* work that was mandated by this case. Mr. Maxwell spent roughly 40 hours and \$8000-to \$9000 in fees addressing the Motion for Summary Judgment—which on its face appears excessive for the only work done in this case. Mr. Maxwell also assigned a second attorney to work on the file—clearly not necessary in a case of this stature. The Motion for Summary Judgment did not present complicated issues, and there is no doubt that Mr. Maxwell and his firm were well versed in the facts of the case, since they were counsel in *Burksfield I*.<sup>36</sup>

Mr. Simpson, did not file an opposition or a joinder—yet he billed close to 10 hours to “examine the motion... very carefully” (See entry of August 2, 2016) and review the draft *prepared* by Mr. Maxwell.<sup>37</sup>

Mr. Simpson billed nearly 120 hours in this case for sending out a set of interrogatories, responding to a set of interrogatories and requests for production, and reviewing the Motion for Summary Judgment and Mr. Maxwell’s work. Mr. Maxwell and Mr. Ritchie billed an *astounding* 154 hours to file an answer, and oppose a Motion for Summary Judgment. That is a combined, almost 275 hours to deal with what defendants call a “frivolous” case. That was simply senseless. It was defendants’ responsibility to provide segregated, reasonable hours for the lower court

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36 CP 619-26

37 CP 593-611; CP 608

to review. They did not.

The lower court then erred by accepting, wholesale, those numbers without engaging in any analysis. The total analysis by the court is found at Reporter Transcript, page 82, lines 10-22:

Let me say that, first of all, a lot of work went into this. It's quite obvious. The claims by the defendants were that this had all been litigated earlier. And there was a lot of litigation over it not only before Judge McCarthy but also in the Court of Appeals.

I don't think it was a simple feat to try to tie that all together to illustrate for this Court that these things had already been determined or basically had no merit. It took a lot of work to do that. ***When you look at it now in retrospect***, it was -- it was all in certain places work could be found, *but it wasn't easy for the defense to put that together in a way that the Court would be able to comprehend and make rulings on it.* (Emphasis added)

At page 84, ll. 18-21:

So, with all due respect to Counsel, and I certainly understand that you disagree with it, I will say that I think the hourly rate is incredibly reasonable. *And I also think the time that was spent was well spent and necessary.* (Emphasis added)

While findings of fact are superfluous on summary judgment and an appellant need not assign error to such findings, this is not the case with respect to findings and conclusions in support of sanctions. Sanctions under CR 11 are reviewed under the abuse of discretion standard.

*Harrington v. Pailthorp*, 67 Wash. App. 901, 911, 841 P.2d 1258, 1263 (1992), citing to *Concerned Coupeville Citizens v. Coupeville*, 62 Wash.App. 408, 413, 814 P.2d 243, review denied, 118 Wash.2d 1004, 822 P.2d 288 (1991); *In re Guardianship of Lasky*, 54 Wash.App. 841,

852–54, 776 P.2d 695 (1989).

As noted above, Judge Hahn (“in retrospect”) felt Burksfield’s case was “so simple”—and yet, she later concluded that it was necessary for three (3) attorneys to spend a collective 275 hours on a “simple” case. Other than these conclusory comments, admittedly made in hindsight, Judge Hahn made no specific findings as required under the law as to why the time entries were reasonable, why the hours billed were reasonable, and why the amount of the fees was reasonable.<sup>38</sup> Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record. *Mayer v. City of Seattle*, 102 Wash.App. 66, 78–79, 10 P.3d 408 (2000)—remanding because the lower court accepted Mayer's request in full as reasonable, without addressing any of the specific challenges; *Progressive Animal Welfare Society v. University of Washington*, 54 Wash.App. 180, 187, 773 P.2d 114 (1989)—holding that in attorney fee cases the Courts have stressed the need for entry of findings indicating what factors the trial court relied on to reduce or enhance a fee request, and how the trial court arrived at the particular fee awarded. See also *Taliesen Corp. v. Razore Land Co.*, 135 Wash. App. 106, 143, 144 P.3d 1185, 1205 (2006).

Other than the colloquy cited above during the oral argument, none of the Court’s final orders or judgments contained any findings as to the

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38 Burksfield did not object to the hourly rate charged by counsel.

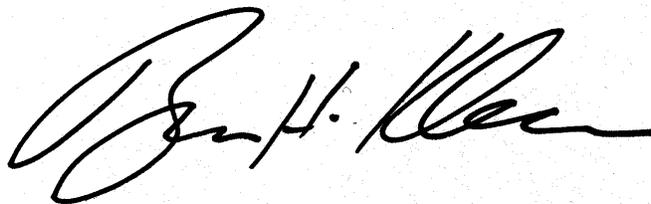
specific issues raised in the fee request including: (i) unnecessary work undertaken by the three billing lawyers (ii) duplicative work, such as Mr. Simpson's billing of time to review "very carefully" Mr. Maxwell's briefing; (iii) whether time was duplicative over all; or (iv) whether 3 lawyers were needed for a case Judge Hahn later concluded was "so simple."<sup>39</sup> For these and other reasons articulated above, Judge Hahn's order should be reversed.

#### IV. CONCLUSION

For all of the foregoing reasons, Appellants respectfully submit that this Court reverse the order of summary judgment, and reverse the award of attorney's fees under RCW 4.84.185, and remand this matter to the Yakima Superior Court.

Dated: April 13, 2017

LAW OFFICES OF BRIAN H. KRIKORIAN



By \_\_\_\_\_  
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39 See CP 663 to 666.

I, Brian H. Krikorian, declare:

On April 13, 2017, I caused to be served the Appellants' Opening

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: April 13, 2017

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**Transmittal Letter**

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Court of Appeals Case Number: 34772-9

Party Represented: Appellants

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