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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 347729-III

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

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**DEBORAH BURKSFIELD, A SINGLE INDIVIDUAL;  
AIRBORNE STABLES, LLC, A WASHINGTON  
LIMITED LIABILITY COMPANY,**

**Plaintiffs/Appellants,**

**v.**

**LSL PROPERTIES, LLC, A WASHINGTON LIMITED  
LIABILITY COMPANY, AND OTHERS DETERMINED  
CULPABLE FROM DISCOVERY BEFORE TRIAL;  
LARRY SALI AND STEVEN SALI, AN INDIVIDUAL,**

**Defendants/Respondents.**

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**JOINT RESPONSE BRIEF OF RESPONDENTS**

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iv-viii
<b>I.    <u>INTRODUCTION</u> .....</b>	<b>1</b>
<b>II.   <u>COUNTER STATEMENT OF CASE</u> .....</b>	<b>2</b>
<b>A.   SUMMARY OF BACKGROUND FACTS .....</b>	<b>2</b>
<b>III.  <u>ARGUMENT</u> .....</b>	<b>6</b>
<b>A.   STANDARDS OF REVIEW.....</b>	<b>6</b>
<b>B.   SUMMARY JUDGMENT STANDARD.....</b>	<b>7</b>
<b>C.   THE COURT SHOULD STRIKE           PLAINTIFFS' OPENING BRIEF           BECAUSE IT DOES NOT COMPLY           WITH RAP 10.3 .....</b>	<b>9</b>
<b>D.   THE TRIAL COURT PROPERLY HEARD           AND RULED ON DEFENDANTS'           MOTION FOR SUMMARY JUDGMENT..</b>	<b>11</b>
<b>E.   THE DISMISSAL OF THE CLAIMS           AGAINST LSL PROPERTIES, LLC WAS           PROPER, AND AT ANY RATE WOULD           BE JUSTIFIED ON THE BASIS OF           COLLATERAL ESTOPPLE AND <i>RES</i>           <i>JUDICTA</i> .....</b>	<b>14</b>

<b>F.</b>	<b>THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTED DEFENDANTS' COUNTER MOTION.....</b>	<b>16</b>
1.	<b>Airborne Stables Was Properly Dismissed Because It Was Never a Proper Party .....</b>	<b>16</b>
2.	<b>Plaintiffs' Request for An Audit Related to Re-determining Capital Accounts Was a Patently Frivolous Attempt to Reinstate the Redemption Claim, Which Was Properly Dismissed in the Prior Lawsuit .....</b>	<b>19</b>
	i. Judge Hahn Properly Dismissed All of the Claims Pertaining to the 2007 Transfer of Leonard Sali's LLC Interest .....	20
3.	<b>The Final Decree and Appeal in the Underlying Action is <i>Res Judicata</i> as to Plaintiffs' Claims for Indemnity .....</b>	<b>24</b>
4.	<b>Plaintiffs' Cannot Demonstrate That Indemnification of Defendants' Fees for Dismissed Causes of Action Was Improper .....</b>	<b>29</b>
5.	<b>RCW 25.15.140 and .170 Do Not Support A Claim for the Imposition of Remedies That Are Not Provided in the Operating Agreement .....</b>	<b>36</b>

G.	THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE CLAIMS MADE BY PLAINTIFF WERE FRIVOLOUS UNDER RCW 4.84.185 .....	38
H.	THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE AMOUNT OF FEES AND COSTS AWARDED TO DEFENDANTS UNDER RCW 4.84.185 .....	43
I.	THE COURT SHOULD AWARD FEES ON THIS APPEAL UNDER RCW 4.84.185 .....	47
IV.	<u>CONCLUSION AND REQUEST FOR COSTS AND ATTORNEY'S FEES</u> .....	47

**APPENDIX**

## TABLE OF AUTHORITIES

	Page
<b><u>State Cases</u></b>	
<u>Bates v. Grace Methodist Church,</u> 12 Wn. App. 111, 529 P.2d 466 (1974) .....	8
<u>Burksfield v. Sali,</u> 194 Wn. App. 1052 (2016) .....	1, 2, 20
<u>Camer v. Seattle Post-Intelligencer,</u> 45 Wn. App. 29, 723 P.2d 1195 (1986) .....	10
<u>Cowiche Canyon Conservancy v. Bosley,</u> 118 Wn.2d 801, 828 P.2d 549 (1992) .....	9, 10
<u>Davies v. Holy Family Hosp.,</u> 144 Wn. App. 483, 183 P.3d 283 (2008) .....	6
<u>Fluke Capital &amp; Mgmt. Servs. Co. v. Richmond,</u> 106 Wn.2d 614, 724 P.2d 356 (1986) .....	7
<u>Hanson v. City of Snohomish,</u> 121 Wn.2d 552, 852 P.2d 295 (1993) .....	23
<u>Highland Sch. Dist. No. 203 v. Racy,</u> 149 Wn. App. 302, 202 P.3d 1024 (2009) .....	6, 46
<u>Hurlbert v. Gordon,</u> 64 Wn. App. 386, 824 P.2d 1238 (1992) .....	10
<u>Impecoven v. Department of Revenue,</u> 120 WN.2d 357, 841 P.2d 752 (1992) .....	11

<u>In re Estate of Toland,</u> 180 Wn.2d 836, 329 P.3d 878 (2014) .....	12, 14
<u>Kearney v. Kearney,</u> 95 Wn. App. 405, 974 P.2d 872 (1999) .....	39, 40, 42
<u>Lane v. City of Seattle,</u> 164 Wn.2d 875, 194 P.3d 977 (2008) .....	33
<u>Layne v. Hyde,</u> 54 Wn. App. 125, 773 P.2d 83 (1989) .....	40
<u>LePlant v. State,</u> 85 Wn.2d 154, 531 P.2d 229 (1975) .....	8
<u>Marino Prop. Co. v. Port Comm'rs of Port of Seattle,</u> 97 Wn.2d 307, 644 P.2d 1181 (1982) .....	22
<u>Mejia v. Irwin,</u> 45 Wn. App. 700, 726 P.2d 1032 (1986) .....	8
<u>Milligan v. Thompson,</u> 110 Wn. App. 628, 42 P.3d 418 (2002) .....	10
<u>Minehart v. Morning Star Boys Ranch, Inc.,</u> 156 Wn. App. 457, 232 P.3d 591 (2010) .....	16
<u>Nursing Home Bldg. Corp.,</u> 13 Wn. App. 489, 535 P.2d 137 (1975) .....	33
<u>Olympia Fish Products, Inc. v. Lloyd,</u> 93 Wn.2d 596, 611 P.2d 737 (1980) .....	7
<u>Pederson v. Potter,</u> 103 Wn. App. 62, 11 P.3d 833 (2000) .....	24

<u>Rubenser v. Felice,</u> 58 Wn.2d 862, 365 P.2d 320 (1961) .....	11
<u>Sanders v. E-Z Park, Inc.,</u> 57 Wn.2d 474, 358 P.2d 138 (1960) .....	34, 35
<u>Sanders v. State,</u> 169 Wn.2d 827, 240 P.3d 120 (2010) .....	7, 43
<u>Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven,</u> 33 Wn. App. 397, 655 P.2d 1177 (1982) .....	33
<u>Scott v. Trans-Sys., Inc.,</u> 148 Wn.2d 701, 64 P.3d 1 (2003) .....	34
<u>Sligar v. Odell,</u> 156 Wn. App. 720, 233 P.3d 914 (2010) .....	8
<u>Starzewski v. Unigard Ins. Grp.,</u> 61 Wn. App. 267, 810 P.2d 58 (1991) .....	9
<u>State v. Cox,</u> 109 Wn. App. 937, 38 P.3d 371 (2002) .....	10
<u>Teagle v. Fisher &amp; Porter, Co.,</u> 89 Wn.2d 149, 570 P.2d 438 (1977) .....	7-8
<u>Turner v. Kohler,</u> 54 Wn. App. 688, 775 P.2d 474 (1989) .....	13, 14
<u>Walsh v. Wolff,</u> 32 Wn.2d 285, 201 P.2d 215 (1949) .....	22

<u>Wright v. Dave Johnson Ins., Inc.</u> , 167 Wn. App. 758, 275 P.3d 339, 175 Wn.2d 1008, 285 P.3d 885 (2012) .....	39-40
--	-------

<u>Zink v. City of Mesa</u> , 137 Wn. App. 271, 152 P.3d 1044 (2007) .....	46
---	----

**Statutes**

RCW 25.15.385 .....	24, 26
RCW 25.15.140 .....	36
RCW 4.16.040 .....	24
RCW 4.84.185 .....	1, 2, 4, 7, 38, 39, 40, 43, 47, 48
RCW 4.84.330 .....	25
RCW 25.15.170 .....	36

**Rules**

CR 56 .....	12
CR 56(c) .....	7
CR 56(f) .....	13
RAP 9.2(b) .....	9
RAP 10.3 .....	9, 10, 11
RAP 10.3(a)(5).....	9, 10

RAP 10.3(a)(6) .....	10
RAP 18.1 .....	47, 48

## I. INTRODUCTION

Plaintiffs appeal the entry of Defendants' counter motion for summary judgment and a judgment against Ms. Burksfield personally for fees and costs under the frivolous claims statute, RCW 4.84.185. The trial court granted the counter motion, dismissed the claims, and awarded fees because the claims presented below were either devoid of merit or had previously been raised and reduced to final orders in an underlying action, Burksfield v. Sali et al., Yakima Superior Court Cause No. 11-2-01268-8 (Burksfield I).

Not only were most of the dismissed claims previously ruled upon in the underlying action, but this Court previously affirmed substantially all of the claims in an appeal from that action. *See* Burksfield v. Sali, 194 Wn. App. 1052 (2016).<sup>1</sup> As Defendants' brief demonstrates below, Plaintiffs' claims were already precluded as a matter of law when she filed the complaint, and the institution of the claims a second time was

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<sup>1</sup> A copy of this unpublished decision is attached as Appendix A.

frivolous under RCW 4.84.185, as properly determined by the trial court. Plaintiffs' appeal brief raises no issues or legal arguments to cast any doubt on the trial court's decisions.

The Court should affirm the trial court's decisions. The trial court's decisions were appropriate and based in law and fact.

## **II. COUNTER STATEMENT OF CASE**

### **A. SUMMARY OF BACKGROUND FACTS**

The facts of this case are well known, and many of them have already been decided by this Court in Burksfield v. Sali, 194 Wn. App. 1052 (2016). We will attempt to state only the most pertinent facts as concisely as possible.

Plaintiffs filed a motion for summary judgment on July 26, 2016. CP at 63-78. On August 15, 2016, the Salis filed a timely response as well as a counter motion for summary judgment. CP 409-433, 681-971. The counter motion asked the trial court to dismiss Plaintiffs' claims against the Salis, because the claims were either devoid of merit, barred by the statute of limitations, or constitute the frivolous assertion of claims that have already

been decided in prior litigation, and, in some instances, decided by this Court. CP 409-433. LSL members Larry Sali and Steven Sali filed declarations in support of the counter motion. CP 681-971, CP 386-408.

Plaintiffs filed a detailed reply on August 16, 2016, as well as a lengthy reply declaration from Ms. Burksfield. CP at 434-442, 443-449.

The competing motions were heard on August 24, 2016, by Judge Susan Hahn. *See* 8/24/16 RP. After lengthy oral argument, the trial court took the matter under advisement. *See* 8/24/16 RP at 63.

On August 29, 2016, Judge Hahn issued a written ruling, granting Defendants' counter motion in its entirety, and denying Plaintiffs' motion. CP at 564. The trial court found that (1) Ms. Burksfield's request for indemnification for costs and fees was disallowed by Judge McCarthy's prior order in Burksfield I; (2) indemnification of Sali's expenses by the LLC was proper; (3) the claim for an accounting of the capital account did not

create any issues of fact requiring further resolution; (4) there is no judicial remedy for expulsion and it is not available under the LSL agreement absent a two-thirds vote, which did not occur; (5) and Airborne Stables was not a proper party because it has no standing to assert any claim. CP at 562-564.

On September 16, 2016, Defendant LSL filed a motion seeking attorney's fees and costs against Ms. Burksfield under the frivolous claim statute, RCW 4.84.185. CP at 592. The motion argued that Plaintiffs' claims were devoid of merit and advanced without reasonable cause. CP at 612-617. The Salis joined in the motion. CP at 618. Counsel for Defendants submitted declarations with detailed invoices as well as explanations for the time and rates charged. CP at 593-611, 619-626.

Defendants noted for presentation a proposed final order and a judgment against Ms. Burksfield on the issue of fees. CP at 627. Plaintiffs filed an objection, arguing, as they do here, that

the claims were meritorious and the amounts billed excessive.  
CP at 629-641.

The trial court heard oral argument on October 7, 2016.  
*See* 10/7/16 RP. The same day, the trial court entered a formal  
order granting Defendants' counter motion, as well as the  
judgment as proposed. CP at 666-669.

In awarding fees, the trial court made a specific finding in  
the judgment that Plaintiffs' claims were frivolous and advanced  
without reasonable cause. CP at 669. The trial court, in  
exercising its discretion, and based on the information provided  
by declaration, awarded Defendants a combined total of  
\$64,159.38 in fees and costs. CP at 668-669. The trial court  
found that both the time billed and the rates used were  
reasonable, if not understated:

So, with all due respect to Counsel, and I certainly  
understand 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.

10/7/16 RP at 84.

Plaintiffs moved for reconsideration. CP 569-573. The trial court denied the motion by written order on September 15, 2016. CP at 588. Plaintiffs filed an appeal of the order granting summary judgment on October 11, 2016. CP at 660-661.

### **III. ARGUMENT**

#### **A. STANDARDS OF REVIEW**

As Plaintiffs correctly note, appellate courts “review a trial court’s denial of a motion for reconsideration for abuse of discretion.” Davies v. Holy Family Hosp., 144 Wn. App. 483, 497, 183 P.3d 283 (2008). “A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons.” Id. “An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” Id.

Review of a trial court’s award of fees and sanctions is also reviewed under an abuse of discretion standard. Highland Sch. Dist. No. 203 v. Racy, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). “[T]his court has held that an award of attorney fees that

is authorized by statute is left to the trial court's discretion and will not be disturbed 'in the absence of a *clear* showing of abuse of discretion.' . . . This standard of review is appropriate for decisions under RCW 4.84.185." Fluke Capital & Mgmt. Servs. Co. v. Richmond, 106 Wn.2d 614, 625, 724 P.2d 356 (1986) (citations omitted).

Likewise, the amount of fees awarded is reviewable only for abuse of discretion. Sanders v. State, 169 Wn.2d 827, 866, 240 P.3d 120 (2010).

## **B. SUMMARY JUDGMENT STANDARD**

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. Olympia Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980). A motion for summary judgment is appropriate whenever the pleadings, depositions, and other records on file, together with any affidavits submitted with the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Teagle v.

Fisher & Porter, Co., 89 Wn.2d 149, 570 P.2d 438 (1977). Once the moving party presents evidence showing he is entitled to judgment, the non-moving party must come forward with factual, probative evidence, not mere assertions, demonstrating there are unresolved material factual questions. Bates v. Grace Methodist Church, 12 Wn. App. 111, 115, 529 P.2d 466 (1974); LePlant v. State, 85 Wn.2d 154, 158, 531 P.2d 229 (1975).

In addition, summary judgment should be granted when, although there are issues of fact, reasonable persons could reach but one conclusion from these facts after considering all of the evidence and the reasonable inferences there from most favorably to the non-moving party. Mejia v. Irwin, 45 Wn. App. 700, 705, 726 P.2d 1032 (1986).

A defendant may move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case. Sligar v. Odell, 156 Wn. App. 720, 725, 233 P.3d 914 (2010).

**C. THE COURT SHOULD STRIKE PLAINTIFFS' OPENING BRIEF BECAUSE IT DOES NOT COMPLY WITH RAP 10.3**

“A party seeking appellate review has the burden of providing the appellate court with all evidence in the record relevant to the issue before the court.” Starzewski v. Unigard Ins. Grp., 61 Wn. App. 267, 276, 810 P.2d 58 (1991); RAP 9.2(b). Specifically, RAP 10.3(a)(5) states that “[r]eference to the record must be included for each factual statement.” Moreover, RAP 10.3(a)(5) requires parties to provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The purpose of the rule and related rules “is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal

authority.” Hurlbert v. Gordon, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992).

It is appropriate for an appellate court to not consider contentions that are unsupported by citation. *See* Milligan v. Thompson, 110 Wn. App. 628, 634, 42 P.3d 418 (2002); Camer v. Seattle Post-Intelligencer, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986) (we need not consider on appeal contentions unsupported by citation of authority). *See also* State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (refusing to consider argument that did not comply with RAP 10.3); Cowiche Canyon Conservancy, 118 Wn.2d at 809 (“[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them.”).

In their opening brief, Plaintiffs repeatedly fail to provide record cites as required by RAP 10.3(a)(5), (6) in both the statement of facts and in the argument section. Citations to the record are rare. For example, Plaintiffs’ statement of facts is 16 pages long and yet contains only 20 citations to the record!

Almost the entire statement of facts is uncited. Two of the footnotes contain factual statements and no citations at all. *See Pls.' Brief at 7 n.8, 10 n.11.* This violates RAP 10.3, and accordingly the Court should not consider those statements or arguments.

**D. THE TRIAL COURT PROPERLY HEARD AND RULED ON DEFENDANTS' COUNTER MOTION FOR SUMMARY JUDGMENT**

Plaintiffs argue Defendants' counter motion for summary judgment was not properly noted and should not have been heard. *Pls.' Brief at 19-20.* This is the same argument Plaintiffs made to the trial court, CP 441-442, and which the trial court properly rejected. This Court should likewise reject it.

It is well established in this State that summary judgment may be granted in favor of the nonmoving party if it becomes clear that he or she is entitled thereto. *See, e.g., Rubenser v. Felice*, 58 Wn.2d 862, 365 P.2d 320 (1961); *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992)

(“Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party.”).

More recently, the case of In re Estate of Toland, 180 Wn.2d 836, 853, 329 P.3d 878 (2014) confirmed that a trial court is authorized to grant summary judgment to a non-moving party regardless of whether there is a counter motion.

We are not aware of any case, and Plaintiffs cite none, subjecting a counter motion for summary judgment to CR 56 notice periods, or even requiring a motion at all. Indeed any such requirement would for all intents and purposes eliminate the possibility of a countermotion, since the countermotion would need to be filed the same day as the motion in order to be heard.

Plaintiffs’ argument fails for several additional reasons. First, Plaintiffs’ argument seems to be that they did not have adequate time to respond. Yet, the record clearly shows Plaintiffs filed a detailed reply in support of their motion and in response to the counter motion, as well as a lengthy, 100 page (with attachments) supporting declaration from Ms. Burksfield. CP

434-442, 443-561. Plaintiffs' counsel also conceded at oral argument that the issues before the trial court were legal, as opposed to factual. 08/14/16 RP at 5. Thus, there was no reason why Plaintiffs' counsel could not present argument in opposition to the counter motion, and in fact he did so. *See* 08/14/16 RP. The counter motion was properly identified and noticed and heard.

Second, and perhaps more fundamentally, if Plaintiffs did not have adequate time to respond to the counter motion, the appropriate remedy would have been to move for a CR 56(f) continuance. CR 56(f) allows for a continuance when a party knows the existence of evidence and shows why he cannot obtain the evidence in time for the summary judgment proceeding. Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).<sup>2</sup>

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<sup>2</sup> CR 56(f) states as follows:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

If the party who requests the continuance can make such a showing, the trial court's duty is to allow the party a reasonable opportunity to complete the record before deciding on the summary judgment motion. Id.

Plaintiffs, however, never moved for a continuance or requested additional time to respond at any time before or during the hearing. Thus, they cannot now complain the counter motion was not proper.

**E. THE DISMISSAL OF THE CLAIMS AGAINST LSL PROPERTIES, LLC WAS PROPER, AND AT ANY RATE WOULD BE JUSTIFIED ON THE BASIS OF COLLATERAL ESTOPPEL AND *RES JUDICATA***

Plaintiffs' argument on the issue of the dismissal of the claims against LSL is somewhat difficult to understand. As noted, the trial court is authorized to grant summary judgment to a non-moving party regardless whether there is a counter motion. See In re Estate of Toland, 180 Wn.2d at 853. Thus, the trial court was certainly entitled to grant summary judgment to LSL

notwithstanding any lack of joinder or formal brief or motion, and its decision to do so was appropriate.

Moreover, even if LSL did not file a formal joinder (which was not necessary), LSL filed, in support of the counter motion, a declaration of Steven Sali, who is a member of LSL. CP at 386-408. It did so on behalf of LSL. This should have made it quite clear that LSL was also seeking summary judgment dismissal of all of Plaintiffs' claims.

Finally, as a matter of judicial economy and policy, Plaintiffs' position makes little sense. Resolution of the claims in the Salis' favor also resolved them in LSL's favor, since the claims are the same and arise from the same facts. Even if the trial court had only granted summary judgment to the Salis, the trial court's order and judgment would be *res judicata*/collateral estoppel that would entitle LSL to its own order. LSL would simply need to file its own separate motion with the trial court incorporating the Salis' arguments, and Plaintiffs would not be

able to contest it because the trial court would have already dismissed the claims.

Plaintiffs' argument seems to be asking the Court to require piecemeal litigation, which is not the policy of this State or this Court. *See, e.g., Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (piecemeal appeals must be avoided).

**F. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTED DEFENDANTS' COUNTER MOTION**

**1. Airborne Stables Was Properly Dismissed Because It Was Never a Proper Party**

It was never disputed below that Airborne Stables (1) has no ownership or role in LSL, (2) never entered into any contract with any of the defendants, and (3) lacks any privity with either LSL or the Salis. For those reasons, the Salis moved to dismiss it as a party for lack of standing. CP at 430-431. The trial court properly dismissed Airborne Stables. CP at 563.

On appeal, Plaintiffs erroneously argue Airborne Stables' addition as a party did not offend the Operating Agreement because Ms. Burksfield had only assigned a portion of her purported indemnity claim to it, as opposed to a portion of her membership interest in LSL. *Pls.' Brief at 35*. From the standpoint of the controlling LLC Operating Agreement, this is a distinction without a difference.

As pointed out to the trial court below, Plaintiffs' position is not legally tenable, because the LSL Operating Agreement clearly precludes such a transfer or assignment, regardless of whether it is an assignment of proceeds rather than membership interest. This is made clear by the terms of the LSL agreement discussed below:

4.2. Liability for Company Obligations. Members shall not be personally liable to the Company or to any other person for any debts, obligations, or liabilities of the Company, except as otherwise expressly provided herein or by applicable law.

Article 10. All interests in the Company, whether held by Members or by Economic Interest Owners, are subject to certain restrictions on transferability

and certain rights to purchase. These provision are set forth on “Schedule 4” attached to this Agreement, which is incorporated herein by this reference.

Schedule 4. Paragraph 4.1. Except as otherwise specifically provided herein, no Member or Economic Interest Owner shall have the right to sell, assign, pledge, hypothecate, transfer, exchange, or otherwise transfer for consideration (collectively, “sell”), gift, bequeath, or otherwise transfer for no consideration (whether or not by operation of law, except in the case of a transfer to [but not from] a bankruptcy trustee) all or any part of any interest in the Company.

13.11. Creditors. None of the provisions of this Agreement shall be for the benefit or enforceable by any Creditor of the Company.

CP at 754, 759, 774, 764.

Under the portions of the agreement cited above, which control in this instance, Ms. Burksfield cannot assign or transfer her indemnity claim or rights to indemnity to a third party. Plaintiffs construe the agreement as only restricting assignment of Ms. Burksfield’s actual membership shares or percentages. *Pls.’ Brief at 35.* It is not so limited. It refers more broadly to an “interest in the Company.” CP at 774. Regardless how

Ms. Burksfield characterizes the assignment, the agreement's preclusion clearly covers the "right to proceeds" or indemnification. Moreover, it is clear from the Complaint that Airborne is asserting the rights of a member of LSL. *See* CP at 6 ¶ 1.16. This completely belies Plaintiffs' position.

In short, the trial court properly dismissed Airborne Stables' claims because it was not a proper party. This Court should affirm that decision.

**2. Plaintiffs' Request for An Audit Related to Re-determining Capital Accounts Was A Patently Frivolous Attempt to Reinstate the Redemption Claim, Which Was Properly Dismissed in the Prior Lawsuit**

Plaintiffs' accounting claim is simply a rehash of a prior dismissed claim, and was properly dismissed as such below. In her first amended complaint, Plaintiffs claimed that the transfer of the LSL interests from Leonard Sali to Steve Sali and Larry Sali which occurred in 2007, was improper for various reasons. CP at 44-49. In the motion for summary judgment below, Plaintiffs attempted to expand on that transaction and the

accounting claim regarding member capital accounts by asserting that it resulted in an improper adjustment to the LLC members' capital accounts and that the 2007 LLC K-1 represented contributions that did not occur. CP at 68, 76, 77, 84, 448.

But these were the same allegations that Ms. Burksfield made in Burksfield I, in which she unsuccessfully attempted to claim that the purchase of Leonard Sali's interest in the LLC was not a sale but rather a redemption by the LLC. CP at 683, 724-726, 728,729, 733-735. As a result of the extensive litigation in Burksfield I on that issue, the trial court dismissed Ms. Burksfield's redemption claims and her claims against the accountant defendant John Rothenbueller and Alegria and Company. CP at 738, 740, 741. Notably, Ms. Burksfield did not file any appeal of the dismissal of those claims in the appeal of Burksfield I. See Burksfield v. Sali, 194 Wn. App. 1052 (2016).

- (i) Judge Hahn Properly Dismissed All of the Claims Pertaining to the 2007 Transfer of Leonard Salis's LLC Interests

The LLC interest transfer occurred in January, 2007 and was between existing *members* of the LSL, rather than with third parties. CP at 83, 84. The LLC agreement schedule 4-right of first refusal provisions in Schedule, 4 paragraph 4.2(a),(d), only apply to sales to a “third-party purchaser” who are not existing members. This is further clarified in paragraph 4.3(a). CP at 786-788.

More importantly, Ms. Burksfield herself and the prior litigation established as a matter of *res judicata* and collateral estoppel that Larry Sali owns 41 percent and Steve Sali owns 41 percent (collectively 82 percent). CP at 748. This was further confirmed by this Court in the appeal of Burksfield I. CP at 703 (last sentence).

In fact, in response to one of the jury questions in the prior trial, a supplemental instruction to the jury in response to the jury question established as a matter of law that Ms. Burksfield owned 18 percent of LSL and that the Salis owned the remaining

82 percent. The response to the jury question clarified that 82 percent of any judgment awarded on the derivative action would go to the benefit of the Salis because they in fact were recognized and established owners of 82 percent of the LSL membership interests. CP at 943.

In light of the above, it was, and remains clear, that *res judicata* and collateral estoppel bar Plaintiffs' claims relating to the transfer of interest. As pointed out below, and presumably agreed to by the trial court, the doctrine of *res judicata* ensures finality of judgments:

The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings . . . .

Marino Prop. Co. v. Port Comm'rs of Port of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (citing Walsh v. Wolff, 32 Wn.2d 285, 287, 201 P.2d 215 (1949)).

Likewise, the doctrine of collateral estoppel provides that the resolution of an issue in prior matter between the same parties determines that issue in subsequent litigation. Collateral estoppel, or issue preclusion as it can be called, prevents re-litigation of an issue after the party estopped has already had a full and fair opportunity to present its case. Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

The requirements for application of the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. Id. at 562.

Unlike *res judicata*, collateral estoppel requires the parties have a full and fair opportunity to present their case. Collateral estoppel also requires the same adjudication, while *res judicata*

only requires a “prior judgment.” Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000).

The trial court properly dismissed Plaintiffs’ claim that there was not a valid transfer of ownership from Leonard Sali in 2007, or that such transaction was a redemption by the LLC, because it is barred under either *res judicata* (because there is a judgment, which creates a bar or merger to assertion of the claim), and collateral estoppel (because it is the same issue being asserted by and between the same parties). As it was below, the reiteration of this claim on appeal is meritless and frivolous.<sup>3</sup>

**3. The Final Decree and Appeal in the Underlying Action Is *Res Judicata* as to Plaintiffs’ Claims for Indemnity**

At the conclusion of the trial in Burksfield I, Ms. Burksfield requested attorney’s fees and expenses under the derivative claims statute, RCW 25.15.385, and also under the

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<sup>3</sup> In addition, any such claims were properly dismissed as time barred. The transfer occurred in 2007. CP at 83, 84. Any claim regarding that transfer needed to have been filed or asserted within the six year statute of limitations for contract actions. *See* RCW 4.16.040. They were not. They are beyond the applicable statute of limitations and were properly dismissed. Plaintiffs’ repeated complaints about the transfer of Leonard Sali’s interest to the Salis were, and continue in this appeal, to be completely frivolous, devoid of any merit.

LSL Operating Agreement Paragraph 3.2 and was awarded reasonable costs, expert fees, and attorney's fees under both provisions in final judgment. CP at 745, 748 ¶ 3, 749 ¶ 4.

In addition, Ms. Burksfield requested additional fees in her appeal of that action, and this Court denied her any additional fees. CP at 711-712. The decision confirmed that Ms. Burksfield in fact already obtained an award of fees and costs pursuant to the LLC agreement and the derivative claims statute:

The trial court awarded LSL and Burksfield \$129,945.00 in attorney fees pursuant to paragraph 3.2 of the parties' LLC contract, RCW 4.84.330, and laws and standards for recovery of attorney's fees when derivative actions benefit the company and create a common fund.

CP at 706.

Finally, in confirming that it was not awarding her any more or less fees than had been previously determined by the trial court, this Court already ruled:

Deborah Burksfield requests this court award attorney fees and costs on appeal pursuant to RCW 4.84.330 and the fee shifting provisions of paragraph 3.2 of the LSL LLC agreement. Because

Burksfield does not prevail on two of her claims, we decline to declare her the prevailing party, and we reject her requests for fees and costs.

CP at 711-712.

This Court confirmed the final judgment of the trial court. As a matter of *res judicata*, the entry of the order and judgment on fees and costs bars further claims for fees and costs against the Salis and LSL under Paragraph 3.2 of the LLC Operating Agreement.

Following the jury verdict in the underlying action, Ms. Burksfield presented and was awarded reasonable attorney's fees, expert costs, and expenses under the derivative claim statute, RCW 25.15.385. The discussion regarding the factors and amounts awarded included all of Ms. Burksfield's requested attorney's fees from her attorney David Trujillo, all of her claimed expert expenses, and all of her other expenses of litigation that she requested from the Court. This is set forth in the transcript for entry of the judgment and for attorneys' fees

and costs on December 5, 2014, CP at 144, 161-170, 201-204, and the final judgment itself. CP at 745.

As that record reflects, Ms. Burksfield was first awarded \$128,500.00 in attorney's fees, exactly the amount requested by Mr. Trujillo. CP at 201. This was increased in the final judgment to \$129,945.00 to include time claimed by Mr. Trujillo and 5.1 hours for attorney James Perkins. CP at 748. Claims for attorney's fees by Robert Gould and Brian Krikorian were set at \$0 because they had a contingent fee arrangement and had abandoned the case. CP at 748. However, \$38,500.00 in expenses incurred by Ms. Burksfield at Mr. Gould's office were awarded, as well as \$25,205.92 in out-of-pocket costs incurred by Ms. Burksfield. CP at 749. Ms. Burksfield was also awarded \$80,560.00 in reasonable expert witness fees for her accountant witness, Bruce Moorer. CP at 749.

Thus, it is apparent Ms. Burksfield's fees, costs, and expenses have already been included as part of the final judgment in Burksfield I, which was confirmed on appeal and fully paid

and satisfied. CP at 790. Ms. Burksfield was already awarded all of her requested attorney's fees and costs. She does not get to claim them again or get a second "bite at the apple."

It should be noted that Plaintiffs are not requesting indemnification of legal costs and expenses with respect to the defense of any claims made against Ms. Burksfield. Rather, they request that Ms. Burksfield be awarded attorney's fees and expenses incurred in the prior action for which she has already received a judgment for fees, and also fees for her unsuccessful appeal in which this Court determined that she was not a prevailing party and was not entitled to any fees.

Plaintiffs cite absolutely no authority whatsoever that would support such a claim. The provisions of the indemnification agreement under paragraph 3.2 of the LSL agreement are couched in terms of, and apply to, the defense against liability, responsibility, and damages for actions taken on behalf of the LLC. CP at 753. In denying Ms. Burksfield's request for fees and costs, the LLC and its members were entitled

to rely on the finality of the trial court and this Court's prior rulings. Moreover, the LLC and its members were correct in denying claims for a deposit for fees for the prosecution of an appeal which was ultimately denied and in which Ms. Burksfield was deemed not to be a prevailing party.

**4. Plaintiffs Cannot Demonstrate That Indemnification of Defendants' Fees for Dismissed Causes of Action Was Improper**

On appeal, Plaintiffs complain it was not proper for the Salis to obtain indemnification for the causes of action against them which were dismissed. This is incorrect for a number of reasons. Indemnity was properly requested for the causes of action on which the Salis were not found to have any liability. Indemnity for claims is determined on a claim by claim basis and the Salis' indemnity claims were limited only to those claims against them which were dismissed.

In addressing those claims, the trial court directed that the claim for indemnification would have to be presented by the Salis

to LSL under paragraph 3.2 of the LSL agreement, which would decide those claims:

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.

MR. MAXWELL: -- at least and raise it because they've raised it as a contract issue. And say, “Well, we're entitled to fees under a contract and we're responding to that . . . .”

CP at 184.

The Salis did precisely what the trial court directed. In an LSL meeting on March 18, 2015, the Salis followed the trial court's directive following the entry of the final order fixing and disposing of all liabilities at that point and presented their claims for reimbursement on the dismissed matters and were awarded fees and costs incurred for defending against various claims that had been dismissed. CP at 793,796, 797-932.

The indemnification was done pursuant to the indemnity provision of the LSL Operating Agreement under Paragraph 3.2 which would not have been available to the Salis until after the final order was entered. The provision uses the term “liability is fixed” and “final judgment”:

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 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), and each director, officer, partner, employee, or agent thereof, 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. No Member or Economic Interest Owner shall have, by reason of this Agreement, any personal liability with respect to the satisfaction of any required indemnification of the above-mentioned persons.

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...

CP 753 (emphasis added).

Pursuant to paragraph 3.2, the Salis were reimbursed for \$48,056.00 in fees and costs for dismissal of the redemption claims. They were also reimbursed \$42,936.00 in fees and cost for business judgment claims that were dismissed. Finally, they were reimbursed \$53,144.00 for claims related to the Resthaven Quarry which were dismissed after years of litigation. CP at 793. The claims were detailed as to attorney's fees and costs and allocated in defense of the Defendants which were dismissed. CP at 797-932.

The decision to reimburse the Salis' fees and costs was made after consideration of the details of those fees and costs which were allocated to the claims on which the Salis were the prevailing party. Such a decision was proper under the business judgment rule.

The business judgment rule “immunizes management from liability in a corporate transaction undertaken within both the power of the corporation and the authority of management where there is a reasonable basis to indicate that the transaction was made in good faith.” Schwarzmann v. Ass’n of Apartment Owners of Bridgehaven, 33 Wn. App. 397, 402, 655 P.2d 1177 (1982) (affirming trial court’s granting of summary judgment on the basis of the business judgment rule).

The business judgment rule presents a substantial threshold and a policy of deference to decisions made by the majority of the members of the LLC. Because of the rule, courts are reluctant to substitute judgment for that of corporate directors, *id.*, and they “infrequently reverse a business decision.” Lane v. City of Seattle, 164 Wn.2d 875, 194 P.3d 977 (2008). *See also* Nursing Home Bldg. Corp., 13 Wn. App. 489, 498, 535 P.2d 137 (1975) (“Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors.”).

Under the ‘business judgment rule,’ corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.

Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 709, 64 P.3d 1 (2003).

In Sanders v. E-Z Park, Inc., 57 Wn.2d 474, 358 P.2d 138 (1960), a dissident minority stockholder of Pigeon Hole Parking, Inc. brought a derivative action against the corporate officers and directors representing the majority stockholders “seeking rescission of its purchase of all the assets of the E-Z Park, Inc.” Id. at 474. The dissident shareholder alleged that Pigeon Hole’s president misrepresented the patentability of E-Z Park’s assets and breached his fiduciary duty by voting on an issue in which he had a personal financial interest. Id. The trial court dismissed the complaint.

The Supreme Court affirmed, noting that

[w]hile the board of directors of a corporation is bound to exercise reasonable business judgment, it is not the prerogative of the minority stockholders

to decide what is reasonable. Minority stockholders cannot exercise the discretion involved in guiding the operations of a corporation.

Id. at 477-78.

At no time in determining the indemnification did Ms. Burksfield raise a valid argument or dispute as to the right of Salis to indemnification which was limited to the dismissed causes of action or as to the proper calculation of those amounts as they were detailed in the fee affidavits which were specifically segregated to those dismissed claims upon which the Salis prevailed.

Rather, Plaintiffs continue to urge the untenable position that indemnification is not to be determined on a claim by claim basis, when that argument is directly contrary to the plain terms of the LLC agreement paragraph, which allows indemnification relative to “any act or omission performed in good faith...” CP at 753. The Salis were only allowed indemnity for claims which were

dismissed and for which they were determined not to have engaged in any misconduct.

**5. RCW 25.15.140 and .170 Do Not Support A Claim for the Imposition of Remedies That Are Not Provided in the Operating Agreement**

Plaintiffs reiterate on appeal the untenable claim that the trial court could expel the Salis from LSL. *Pls. ' Brief at 32*. The trial court correctly dismissed that claim. It is neither supported by RCW 25.15.140 nor the LLC Operating Agreement, and is entirely devoid of merit.

Plaintiffs cite RCW 25.15.140 and .170. *Pls. ' Brief at 31*. But these statutes only state that remedies against members and managers may be included in an LLC agreement. They do not authorize the trial court to impose any remedies, nor do they allow the trial court to re-write an LLC agreement to contain procedures or remedies that were never agreed upon by the members.

The LLC Operating Agreement, contains no “expulsion” remedy as Plaintiff envisions it. While the LLC agreement does contain the possibility for expulsion of a member, it is also subject to the terms and conditions of the agreement as to how and when and under what circumstances a member can be expelled. Most importantly, it requires a two-thirds majority vote by the members. Article 4, section 4.8 provides only that:

A member may be expelled upon a determination by the Managers that the member has been guilty of wrongful conduct that adversely and materially affects the business or affairs of the Company...

If this Company operates without Managers, then an action to expel a member shall require the approval of two-thirds (2/3) majority of the Members entitled to vote on such action, using the weighted vote procedures established by this Agreement.

CP at 755.

The LLC is a member managed entity. CP at 753 (par. 3.1), 780. Whether the vote would be by managers or members in accordance with either paragraphs 5.2 or 4.8, Ms. Burksfield could never obtain a two-thirds majority vote, or even a simple

majority, given that the Salis control 82 percent of the membership interests and votes. In their briefing, Plaintiffs cite absolutely no facts or authority in support of the expulsion claim.

The frivolous nature of Plaintiffs' expulsion claim is further emphasized by the fact that Ms. Burksfield submitted this very issue to a vote of the members and managers at the same March 15, 2015, meeting at which the Salis voted on indemnification of fees. CP at 795. She was out-voted 82 percent to 18 percent, and the motion to expel was rejected. CP at 795 (paragraph i). This occurred three months prior to the filing of her frivolous lawsuit. CP at 1, 3. In other words, she knew better but filed the claim anyway.

**G. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE CLAIMS MADE BY PLAINTIFF WERE FRIVOLOUS UNDER RCW 4.84.185**

Plaintiffs argue the fees and costs the trial court awarded under RCW 4.84.185 were not proper. They argue the length of oral argument and the seven days it took Judge Hahn to issue a ruling show the issues are not "simple." *Pls.' Brief at 42.*

However long Judge Hahn allowed for oral argument, the only relevant consideration is whether Plaintiffs' claims could be supported by any reasonable legal argument or fact. Since they could not, the award of fees was appropriate.

RCW 4.84.185 states that “[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' argument chiefly rests on the claim that they had a reasonable, good faith belief that Judge McCarthy did not intend for prevent Ms. Burksfield from seeking additional indemnification. *Pls. ' Brief at 37*. What Judge McCarthy may or may not have intended is irrelevant. The actual language of the final order entered on December 12, 2014, which she authored, is what is relevant. The order clearly states that Ms. Burksfield's award of fees was composed of fees under both the LSL Operating Agreement, paragraph 3.2, and the derivative claims statute, thereby foreclosing any argument that she was

subsequently entitled to seek indemnification. CP at 748. That is not debatable; it is not subject to reasonable dispute. It was, and still is, frivolous for Plaintiffs to contend that the order did not foreclose an additional right to seek indemnification when it found that the fees awarded to her were based on the indemnification provision. The trial court's order completely resolved this issue. Moreover, this Court confirmed that in its decision in Burksfield I.

Likewise, Ms. Burksfield's purported reliance on her then-attorney's advice that she could later seek indemnification from LSL is irrelevant. *Pls.' Brief at 38*. Her own attorney prepared and presented the order, and included the indemnification clause justification. CP at 750.

Finally, Plaintiffs argue the accounting and expulsion claims and the addition of Airborne Stables as a party were not frivolous. *Pls.' Brief at 39-40*. As to Airborne Stables and the claim for an accounting, this Court can refer to the arguments above. There was never any rational basis to include Airborne

Stables as a party, since it has no interest in the litigation, and the claim for an accounting was raised and resolved in the other litigation.

As to the other argument, the trial court properly ruled expulsion was not a proper claim. As noted, there is no judicial or equitable remedy called “expulsion” under the law, under the trial court’s discretion, or under controlling LSL agreement. A claim with no rational basis is the very definition of a frivolous claim. *See Kearney*, 95 Wn. App. at 416

The trial court did not award fees because Plaintiffs’ theory of the case proved incorrect or “weak.” *Pls. ’ Brief at 40*. This is not an instance where there are issues that are “still not fully resolved,” as Plaintiffs allege. *Pls. ’ Brief at 40*. The trial court awarded fees because Plaintiffs presented no debatable issues at all. Rather, the claims were frivolous. Plaintiffs presented issues that were clearly without merit or had already been adjudicated in prior litigation and in most cases affirmed on appeal. The trial court made the determination that the claims

were not meritorious. This is evident from the trial court's colloquy on the record, noting, "I don't think it was a simple feat to try to tie that all together to illustrate for this Court that all these things had already been determined or basically had no merit." 10/7/16 RP at 82.

The trial court properly awarded Defendants their fees and costs incurred in defending against the claims.

**H. THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE AMOUNT OF FEES AND COSTS AWARDED TO DEFENDANTS UNDER RCW 4.84.185**

The sole issue is whether the trial court abused its discretion in awarding the fees. Sanders, 169 Wn.2d at 827. There is no basis to reverse the trial court's discretionary decision. Plaintiffs' entire argument is that the attorneys took too much time to respond to what Plaintiffs characterize as an uncomplicated case. *Pls. ' Brief at 46.*

But it is a *non sequitur* to argue that the fees should not have been great if the claims were in fact truly frivolous. *Pls. '*

*Brief at 46.* It took a great deal of time, effort, and energy, and the work of multiple attorneys to gather the materials and present them in a manner that was understandable to the trial court.<sup>4</sup> That counsel did so effectively is evident in the briefing filed below and in the trial court's ruling and its oral colloquy:

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 all these things had already been determined or basically had no merit.

10/7/16 RP at 82.

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<sup>4</sup> Indeed, it was because of the amount of work invested that the trial court could conclude that, in retrospect, the matter was simple. 10/7/16 RP at 82. This is obvious from the trial court's colloquy. The result may be simple, but it was not simple to present, review, and digest the material, as is evident from Judge Hahn's statement that she had "spent hours and hours studying it [the materials]." 08/24/16 RP at 9. This Court can review the Clerk's Papers to ascertain the volume of work that was prepared. The declaration of Larry Sali, for example, is very detailed and comprised approximately 300 pages with attachments. CP 681-971. We also note that Ms. Burksfield's initial declaration filed in support of the motion was over 300 pages. CP 79-408. This was material Defendants had to review, digest, analyze, and counter in responding to Plaintiffs' motion. This was no small feat.

Defense counsel submitted detailed declarations containing detailed invoices and explanations for the fees, documenting the basis for fees. CP at 593-611, 619-626. It is apparent from the above statements that the trial court believed the amount of work Defendants' counsel needed to expend to achieve their resolve was substantial. The trial court then expressly and properly made findings, based upon documentation in the record provided by Defendants, that the fees were appropriate and that they were "entirely reasonable":

So, with all due respect to Counsel, and I certainly understand 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.

10/7/16 RP at 84.

Plaintiffs contend Judge Hahn failed to make adequate findings as to why the time entries were reasonable. *Pls. ' Brief at 48*. The law only requires the trial court to have an objective basis for an award of fees.

In awarding reasonable attorney fees, a trial court should have an objective basis for the award. In

addition, a trial court must sufficiently explain the basis for its fee award to permit appellate review and enter findings in support of the decision.

Highland Sch. Dist. No. 203 v. Racy, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009)

This Court has held that, in the context of awarding fees, a decision is only manifestly unreasonable “if it is outside the range of acceptable choices.” Zink v. City of Mesa, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007).

The trial court’s ruling was based on objective evidence provided and documented in the record, and certainly within the range of acceptable choices supported by the documentation. The ruling clearly explains the basis for its fee award. The trial court specifically found that the hours billed and the rates used were reasonable. This was all that was required. *See Zink*, 137 Wn. App. at 277 (the trial court found, as a whole, that the fee award was reasonable and counsel’s hourly rate was reasonable).

Whether Plaintiffs believe the hours were too high does not matter. This was within the trial court’s discretion and there

is no evidence that the trial court's decision was manifestly unreasonable or rests upon untenable grounds or reasons. The trial court, having had to review the work product, sift through it, and render a decision based on it, was in the best position to judge whether it was worth the amounts billed, and its decision should not be lightly challenged.

**I. THE COURT SHOULD AWARD FEES ON THIS APPEAL UNDER RCW 4.84.185**

This Court should also specifically award the Respondents their costs and attorney's fees on this appeal. RCW 4.84.185; RAP 18.1. For the same reasons noted above, Plaintiffs' appeal seeks to renew claims that do not raise any debatable issues, and is therefore frivolous.

**IV. CONCLUSION AND REQUEST FOR COSTS AND ATTORNEY'S FEES**

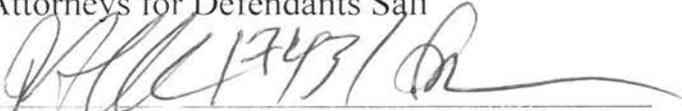
The Court should affirm the decisions and judgment of the trial court and hold that Defendants' counter motion for summary judgment was properly granted and the judgment properly entered. This appeal, like the complaint below, raises issues that

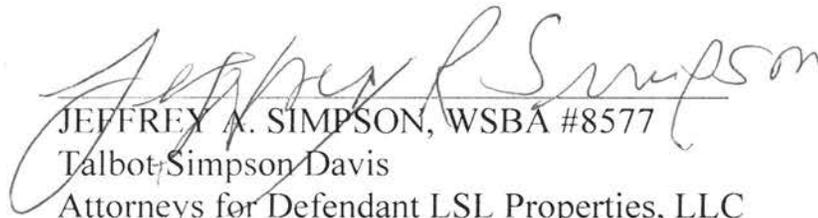
are either devoid of merit or were fully resolved in other litigation such that they are precluded. The claims below, and this appeal, raise no debatable issues and present arguments unsupported by any rational argument based in fact or law.

The trial court's decision below was correct, appropriate, based on sound legal doctrine and established facts, and in no way was based on an abuse of discretion or error. It should be affirmed in its entirety, and the Court should award the Defendants their costs and attorney's fees on this appeal. RCW 4.84.185; RAP 18.1.

Respectfully submitted this 26 day of June, 2017.

  
\_\_\_\_\_  
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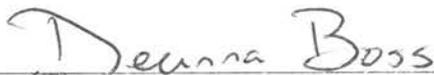
  
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Talbot Simpson Davis  
Attorneys for Defendant LSL Properties, LLC

**CERTIFICATE OF TRANSMITTAL**

I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

<p><b>For Plaintiff:</b></p> <p>Brian H. Krikorian Law Offices of Brian H. Krikorian Ridgewood Corporate Square 11900 NE 1st Street, Suite 300, Bldg. G Bellevue, WA 98005</p> <p>Email: <a href="mailto:bhkrik@bhklaw.com">bhkrik@bhklaw.com</a></p>	<p><input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via hand delivery</p>
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DATED this 26<sup>th</sup> day of June, 2017, at Yakima, Washington.

  
DEANNA M. BOSS

## **APPENDIX**

1. Unpublished Opinion in Burksfield v. Sali, Court of Appeals, Division III Cause No. 330371

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The Court of Appeals  
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State of Washington  
Division III



July 7, 2016

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CASE # 330371  
Deborah Burksfield, et al v. Larry Sali, et ux and Steven Sali, et ux, et al  
YAKIMA COUNTY SUPERIOR COURT No. 112012688

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:sh  
Enclosure

c: E-mail Honorable Michael G. McCarthy

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

DEBORAH BURKSFIELD, a single  
individual; LSL PROPERTIES, LLC, a  
Washington Limited Liability company,

Appellants,

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,

Respondents.

No. 33037-1-III

UNPUBLISHED OPINION

FEARING, C.J. — Deborah Burksfield and LSL Properties, LLC, a company partially owned by Burksfield, successfully sued Burksfield's brothers and a company owned by the brothers, Columbia Ready-Mix, Inc., for royalties owed under a gravel pit lease. Burksfield and LSL appeal the trial court's denial of prejudgment interest on the

jury award. Burksfield also appeals the trial court's award of costs against her in favor of a related company, Columbia Asphalt & Gravel. The defendants appeal the trial court's grant of reasonable attorney fees and costs to Burksfield for bringing a limited liability company derivative action. We affirm all trial court rulings.

### FACTS

Plaintiff Deborah Burksfield, defendant Larry Sali, defendant Steven Sali, and nonparty Leonard Sali are siblings. Larry and Steven are the sole shareholders of defendants Columbia Ready-Mix, Inc. (CRM) and Columbia Asphalt & Gravel, Inc. (CAG).

On June 17, 1998, Larry, Steven, and Leonard Sali formed plaintiff LSL Properties, LLC (LSL) with each owning one third. The limited liability company's operating agreement included a paragraph requiring the company to "indemnify and hold harmless the Member(s), and each director, officer, partner, employee, or agent thereof, 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." Clerk's Papers (CP) at 156. In December 1999 and January 2000, Deborah Burksfield acquired an eighteen percent interest in LSL with the three brothers thereafter splitting the other 82 percent ownership.

LSL owns two gravel quarries, the AK Anderson Quarry and the Resthaven Quarry. On April 1, 2006, LSL agreed to lease the AK Anderson Quarry to CRM. In turn, CRM agreed

[T]o pay [LSL] rent as full and complete payment for all materials removed by [CRM] from said land and for the use of said property while such material is being removed therefrom, sixty cents (\$0.60) per ton. Material shall be weighed on scales on the leased property and weight tickets shall be issued for each load removed. . . . If LSL properties LLC, conducts a physical survey of the volume of material removed from the site, the volume of material determined by the physical survey shall prevail.

CP at 2873. The agreement did not specify a conversion rate to convert the volume measurement obtained by a survey into a weight measurement used for determining cost.

The lease also provided:

RECORD KEEPING

8.1 [CRM] agrees to keep accurate records of all material removed from the demised premises and monthly shall furnish [LSL] with copies of said records. The records kept and provided to [LSL] shall include weight tickets for all material removed during the prior month.

CP at 2874-75.

On January 1, 2007, Larry and Steven Sali purchased Leonard Sali's interest in LSL. On January 18, 2011, CRM exercised the option to renew the lease with LSL. In turn, Larry and Steven Sali agreed, on behalf of LSL and over Deborah Burksfield's objection, to renew the lease with no increase in price.

PROCEDURE

On April 12, 2011, Deborah Burksfield, individually and on behalf of LSL, sued Larry and Steve Sali for breach of the LSL operating agreement and breach of the lease. We refer to the plaintiffs collectively as Deborah Burksfield. Burksfield also sued CRM, Larry Sali, and Steven Sali for breach of fiduciary duty. She sued CRM, CAG, Larry, and Steven for declaratory relief to render the renewed lease void. Burksfield also alleged various defendants understated the quantity of rock removed from LSL's quarry. We refer to defendants, other than CAG, collectively as CRM. Deborah Burksfield verified the complaint.

At trial, Deborah Burksfield used topographical land surveys to show the amount of material CRM removed from the AK Anderson quarry. Bruce Moorer, an expert in forensic accounting with experience in the trucking industry, testified on her behalf. Moorer testified that, based on the surveys, 741,847 cubic yards of material was extracted from the AK Anderson Quarry between 2003 and 2008, and 207,400 cubic yards from 2008 through 2011, and 91,169 cubic yards after 2011. He also testified that he converted from cubic yards to tons using a conversion rate of 2.45. From the total amount of extracted material, he reduced the amount of material extracted but not removed, the amount for which CRM paid, and the amount extracted outside the statute of limitations. According to Moorer, CRM failed to pay for 857,582 tons. At \$.60 per ton, the total underpayment was \$535,674.

CRM expert, John Rothenbueller, testified that LSL received payment for 35,992 tons of gravel more than CRM extracted from the Anderson quarry. Therefore, according to Rothenbueller, CRM overpaid \$21,595.

At the close of Deborah Burksfield's case, CAG moved to dismiss the claims against it because Burksfield did not present any evidence supporting a claim against CAG. The trial court granted the motion and also granted CAG's posttrial request for costs under RCW 4.84.185. The court awarded CAG \$39,000 in costs. The judgment denied any award for attorney fees, but the \$39,000 award necessarily included some attorney fees incurred by CAG in defending the suit.

The jury found that CRM and the brothers breached the lease agreement and their fiduciary duties and awarded \$535,674.62 to Deborah Burksfield and LSL. The trial court denied Burksfield's request for prejudgment interest. The court ruled that the amount owed was not liquidated because "the amount of rock that was taken and the value thereof was a moving target throughout this litigation and throughout the trial." Report of Proceedings (Dec. 5, 2014) at 54. The trial court awarded LSL and Burksfield \$129,945.00 in attorney fees pursuant to paragraph 3.2 of the parties' LLC contract, RCW 4.84.330, and laws and standards for recovery of attorney's fees when derivative actions benefit the company and create a common fund.

#### LAW AND ANALYSIS

On appeal, Deborah Burksfield argues that the trial court erred in failing to award

her prejudgment interest. She also contends that the trial court erred in awarding CAG reasonable attorney fees and costs against her. CRM appeals the ruling granting Deborah Burksfield fees.

#### Prejudgment Interest

Deborah Burksfield contends that the trial court erred by not awarding prejudgment interest because CRM owed a liquidated sum and CRM should not benefit from its spoliation of records. CRM argues that the trial court correctly denied prejudgment interest because the calculation of the amount owed required use of surveys, expert testimony, and discretion. The law supports CRM's position.

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). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A decision is manifestly unreasonable if the court adopts a view that no reasonable person would take. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is exercised on untenable grounds if the trial court relies on unsupported facts or applies the wrong legal standard. *Mayer*, 156 Wn.2d at 684.

Prejudgment interest is allowable (1) when an amount claimed is liquidated or (2) when the amount of an unliquidated claim is for an amount due on 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. *Dep't of Corr. v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 789, 161 P.3d 372 (2007); *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). Deborah Burksfield claims the amount awarded by the jury was liquidated because the lease specified that a land survey controlled upon a discrepancy in the amount of material removed from the quarry. Nevertheless, the jury necessarily relied on the opinions of experts in awarding the sum. CRM's expert testified to a different sum owed than the sum formulated by Burksfield's expert, Bruce Moorer. Moorer's use of 2.45 for the cubic yard to ton conversion factor was discretionary. The trial court correctly noted that the sum owed was a moving amount throughout trial.

Deborah Burksfield argues that the court should not reward CRM for destruction of records and its failure to maintain weight tickets as required by the lease agreement. Nevertheless, neither the jury nor the trial court found spoliation. Burksfield presents no authority that spoliation of records by one party entitles another party to prejudgment interest.

We conclude the amount owed to respondents was uncertain and unliquidated. Thus the trial court properly denied the request for prejudgment interest.

Attorney Fees and Costs

Deborah Burksfield contends the trial court erred in characterizing her suit against CAG as frivolous and thereby awarding CAG \$39,000 in costs. CAG replies that the trial court properly awarded fees under RCW 4.84.185 because Burksfield never factually or legally supported her claim against it. We agree with CAG.

RCW 4.84.185 declares:

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

We 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).

Deborah Burksfield contends that CAG and CRM were operated interchangeably by the Sali brothers. Burksfield, however, presented no trial testimony to support this contention. CAG was only a party to the suit because it was a closely held company of the Sali brothers, but not because it owed LSL any contractual or fiduciary duties. Therefore, the trial court did not abuse its discretion in awarding costs.

When CAG moved the court for an award of costs, Deborah Burksfield filed a declaration supporting her argument that CAG and CRM operated interchangeably and CAG may have sold some of the gravel from the Anderson quarry. The trial court

determines the frivolity of a lawsuit, however, on evidence presented at trial, not evidence the opposing party fails to submit until the time of the motion for costs and fees. Burksfield cites no law to the contrary.

Deborah Burksfield also argues the trial court failed to enter the findings required by RCW 4.84.185. In the judgment awarding fees, however, the court found “the claims advanced against Defendant CAG were frivolous and advanced without reasonable cause.” CP at 2246. This finding is sufficient under RCW 4.84.185.

#### Derivative Claim

CRM argues that the trial court erred in failing to dismiss the derivative claims brought by Deborah Burksfield on behalf of LSL. Thus, CRM asks this court to vacate the trial court’s award of attorney fees under RCW 25.15.385. Burksfield argues that she met the requirements for a shareholder derivative claim. We conclude that Burksfield properly brought a derivative claim on behalf of LSL.

Under former RCW 25.15.370:

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.

Contrary to CRM’s assertions, Deborah Burksfield presented evidence at trial that she was an LSL shareholder and that she attempted to resolve the underpayment issue by approaching Larry Sali, as owner of LSL, before filing suit. Also,

considering Burksfield's response to the suit, the trial court could have reasonably determined that any effort to ask the Sali brothers to pursue claims that LSL held against themselves and CRM would have been futile. Thus, the trial court correctly ruled that Burksfield's claims fall within the derivative claim statute.

CRM notes that Deborah Burksfield did not testify at trial. Nevertheless, Larry Sali testified that Deborah Burksfield was an owner of LSL and that she tried to resolve the dispute before filing suit. CRM cites no case that requires the needed testimony to come from the partial company owner herself.

CRM also contends that Deborah Burksfield failed to verify her complaint and verification is necessary to forward a derivative action claim. The assertion is factually false.

Regardless of whether Deborah Burksfield complied with the statute authorizing derivative suits, the trial court could have granted reasonable attorney fees and costs to Deborah Burksfield and LSL on other grounds. Paragraph 3.2 of the parties' LLC contract and RCW 4.84.330 also authorized recovery of fees and costs.

#### Fees on Appeal

Deborah Burksfield requests this court award attorney fees and costs on appeal pursuant to RCW 4.84.330 and the fee shifting provisions of paragraph 3.2 of the LSL LLC agreement. Because Burksfield does not prevail on two of her claims, we decline to

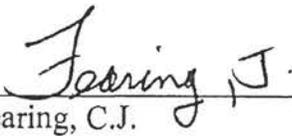
No. 33037-1-III  
*Burksfield v. Sali*

declare her the prevailing party, and we reject her requests for fees and costs.

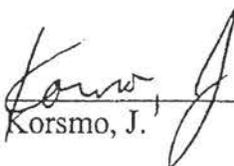
CONCLUSION

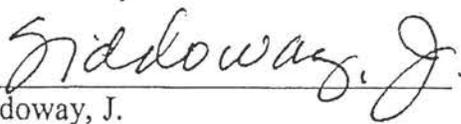
We affirm the trial court's denial of prejudgment interest to Deborah Burksfield and LSL. We affirm the trial court's grant of costs to CAG and fees and costs to Deborah Burksfield for the derivative suit. We deny Deborah Burksfield an award of fees on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
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Fearing, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Korsmo, J.

  
\_\_\_\_\_  
Siddoway, J.