IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

SUPREME COURT NO. 89927-4

COURT OF APPEALS NO. 31339-5-III

BEDREDDIN IMAN, and SAMEER HATEM, Petitioners,

and

MUSLIM AMERICA, Petitioner,

v.

TOWN OF SPRINGDALE, Respondent

PETITION FOR REVIEW

BEDREDDIN IMAN
SAMEER HATEM
Appellants, *pro se*

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I. IDENTITY OF THE PETITIONERS

Bedreddin Iman and Sameer Hatem, *pro se* appellants below, hereby petition for review of the Court of Appeals' decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Appellants seek review of the Published Opinion issued by the Court of Appeals for Division III in the case of Dawud Ahmad, et al., v. Town of Springdale (December 12, 2013)(App. A hereto). The Court of Appeals denied Appellants' Motion for Reconsideration on February 6, 2014 (App. B hereto).

III. ISSUES PRESENTED FOR REVIEW

1. The lower courts' disregard for the applicability of RLUIPA to the issuance of mandamus and prohibition ignores controlling federal Constitutional law and State law.

2. The lower courts' failure to confer standing upon Appellants under RLUIPA raises a significant question of Constitutional law, involves an issue of substantial public interest and conflicts with decisions of this Court.

3. The lower courts' determination of an adequate remedy at law conflicts with decisions of this Court, ignoring the applicability of RLUIPA to

Appellants' religious land use.

4. The lower courts' holding Appellants' action frivolous disregards the Town's violation of Constitutional law and its consequence for citizens seeking relief in State courts from disturbance of religious exercise under color of law involves an issue of substantial public interest.

IV. STATEMENT OF THE CASE

A. Factual Basis for Action

In 2009, Appellant Bedreddin Iman ("Iman") found himself without funds to procure housing. (CP 14-15 §§ 2-8). Dawud Ahmad ("Ahmad"), Iman's shaikh (muslim teacher) and once chief legal officer of Muslim America, found that RCW 19.27.042 gives municipalities authority to pass an ordinance exempting buildings "whose character of use or occupancy has been changed to provide housing for indigent persons" from requirements of the State Building Code ("SBC"). (CP 17, ln. 3-10)(App. C). Consistent with principles of Islamic charity, Muslim America's Board of Directors approved Iman's residency in a small-scale prototype primitive cottage ("the cottage") built for storage and future development of similar retreat facilities in the community's wilderness acreage. [1] (CP 11 §§ 5-6). Representing Muslim America, Ahmad

1 The cottage resides on land of which Muslim America is the nominal fee simple owner, though it confers rights of equitable use thereof to the entire muslim community.

notified Springdale's mayor of Iman's use of the cottage and legislative provision for it. In late 2009, when Douglas Buche became mayor, Ahmad notified him of the same. In early 2010, Ahmad repeated this notice. (CP 12 § 7). The Town took no action.

On February 9, 2010, Deputy Marshal Paul Murray instructed Ahmad to request exemption for the cottage from the Town, which Ahmad did. (CP 356-358). In subsequent meetings of the Town Council, the Town took official action to prohibit residential use of the cottage, ordering Mr. Iman's eviction (CP 12 § 10, 11); threatening to "remove" the building and impose fines preparatory to a Notice of Infraction (CP 31); issuing a Notice of Infraction to Muslim America for failure to obtain a Town Business License (CP 50); and denying Muslim America's request for adoption of an Ordinance in compliance with the SBC. (CP 360-363).

On March 23, 2010, Appellants applied to the Stevens County Superior Court with the good faith belief that they had standing in equity under 42 U.S.C. § 2000cc, the Religious Land Use and Institutionalized Persons Act ("RLUIPA")(App. D), as well as Article I, Section 11 of the State Constitution, to seek a writ of mandamus requiring the Town to

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As such, every muslim is part owner of Muslim America.(CP 35 § 4, 6).

adopt the least restrictive means of meeting its compelling state interest, and a writ of prohibition arresting the Town's disturbance under color of law of their religious exercise.[2] (CP 164-174). Muslim America did not join the petition in view of the religious prohibition from demanding judgment in a non-muslim court.

The Town issued a Notice of Violation (CP 149) and later an Notice of Infraction to Sameer Hatem ("Hatem"), Secretary-General of Muslim America, for violation of Building Code Ordinance 343C. (CP 150). After assignment of a judge to the action, the Town withdrew the Notice of Infraction, citing its failure to "state an appeals process." (CP 151). The Town has not re-issued an amended Notice of Infraction stating an appeals process.

B. Proceedings Below

Following assignment of a visiting judge and the Town's answer (CP 70-73), Ahmad sought a ruling on jurisdiction, to which the Superior Court didn't respond. (CP 139-141). After Appellants filed a notice of hearing on the merits of their writ application (CP 83-86), the Town then moved to join Muslim America as a necessary party, claiming the cottage *per se* was the subject of the action. (CP 103, ln. 20-21). Ahmad sought a

2 Hereinafter, "Appellants" refers to Ahmad, Iman and Hatem.

ruling on jurisdiction once more during a May 19, 2010 Scheduling Conference, but the Court denied it after seeking the Town's response and accepting its argument that he was "seeking legal advice." (CP 498, 678). Though the Superior Court stipulated a transcript of the Conference would be made in the event of argument, no such record was made. (CP 650, ln. 20-23; CP 656, ln. 23-CP 657, ln. 2). Over Appellants' objection to the motion on legal and religious grounds (CP 117-124), the Superior Court granted it in spite of Muslim America having claimed no interest in the action. The Superior Court thereafter disqualified Appellants from representing the views of Muslim America in any way. Attorney Robert Simeone appeared briefly to file Muslim America's refusal to participate. (CP 280-281).

Muslim America took no other action in the suit.

During the hearing on the merits, the Superior Court briefly commented upon Appellants' cause of action, this being the Town's unlawful action with respect to their religious land use. (Verbatim Report of Proceedings ("VRP") 7/9/10, p. 33, ln. 4-16). Three months later, it dismissed the writ applications, stating the Town had not exceeded its jurisdiction, Appellants had an adequate remedy at law, and that adoption of an Ordinance pursuant to RCW 19.27.042 being discretionary, was

therefore not subject to mandamus. (CP 401-404). Appellants directly appealed to this Court. Afterward, the Superior Court awarded the Town costs and attorneys' fees for frivolous action in the amount of $23,916.66, stating that Appellants had no standing to bring their action, Muslim America's refusal to participate was fatal to their case and Appellants admitted they had an adequate remedy at law. (CP 562-565). The Court dismissed as a "curiosity" its earlier recognition of their cause of action. (VRP 1/7/11, p. 21, lines 20-25). Appellants amended their appeal to include this judgment. Having done nothing to advance the action yet burdened with a sizable costs and fees penalty, Muslim America joined appeal of the frivolous action holding.

Argument over the admissibility to the appellate record of a Narrative Report of Proceedings of the May 19, 2010 Scheduling Conference ensued in the Superior Court, where all but a brief portion of it was stricken. (CP 498, 678). Later, the same matter was adjudicated before the commissioner of this Court, where it met a similar fate. Ahmad's health worsened in late 2011 and before he was able to begin work on an opening brief, he passed away in May 2012. Robert Simeone withdrew from the action in June 2012. Having no prior experience as a *pro se* attorney and no professional legal assistance, Iman wrote and

submitted Appellants' opening brief in July 2012, convincing attorney Jeffry Finer to appear, write and submit an opening brief on behalf of Muslim America just shy of the deadline for so doing. Lacking knowledge of appellate procedure, Iman did not follow the strictures of RAP 10.3(g) in assigning error to findings of fact in either order of the Superior Court, though the content of Appellants' Opening Brief clearly contests most of the order awarding costs.

In December 2012, this Court transferred the case (originally Supreme Court Case # 85417-3) to Division III of the Washington State Appellate Courts. On December 12, 2013, The Court of Appeals filed its Published Opinion, affirming both judgments of the Superior Court, but denying the Town's motion for frivolous appeal fees. Judge Korsmo dissented from the majority on the issue of trial-level fees against Muslim America noting that Muslim America had taken no action to prosecute the petitions and had not advanced a frivolous suit. (Appendix A, Dissent).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review and consider a Court of Appeals' opinion if it involves a significant question of law under the Constitutions of the State of Washington or of the United States, if it involves an issue of substantial public interest, or if the decision conflicts with other decisions

of this Court or the Court of Appeals. RAP 13.4(b)(1)-(4).

A. The lower courts' disregard for the applicability of RLUIPA to the issuance of mandamus and prohibition ignores controlling federal Constitutional law and State law.

While it affirmed the Superior Court's holdings, the Court of Appeals could not call Appellants' "religious and federal based appeal arguments ... entirely frivolous." (App. A at.12). No explanation of this holding was provided, though it is a rational one. Under the Supremacy Clause of the U.S. Constitution, RLUIPA trumps State law.[3] In affirming the lower court's judgment per the writs, the Court of Appeals denied mandamus holding that the Town's adoption of aspects from RCW 19.27.042 was discretionary. (App. A at 7, 8)(citing *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 805, 982 P.2d 611 (1999)). They also denied prohibition upon the assertion that the Town had the legal authority to act as it did. (App. A at 8). The lower court did not address whether RLUIPA's requirements for a least-restrictive approach in fact imposed non-discretionary duty as argued by Appellants.

The Town has a statutory duty to enforce the SBC under RCW 19.27.050, which reads, "The state building code required by this chapter

3 Article 6, Clause 2 of the U.S. Constitution reads: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

shall be enforced by the counties and cities."[4] In seeking to enforce the provisions of the International Building Code 2006 ("IBC 2006"), the Town demanded Appellants make major structural changes as a condition of occupancy, threatening demolition of the cottage for noncompliance (CP 31). These changes would have required vacation of the cottage resident for an indefinite period of time. Additionally, they are demonstrably cost-prohibitive to Appellants.[5] Such demands constitute more than a mere inconvenience, confronting Appellants with the following choices: make the unaffordable modifications and deprive a homeless man of his shelter for an indeterminate period of time, stop applying a religious land use or suffer burdensome penalties for so doing. These demands clearly impose a substantial burden upon Appellants' religious land use.

Still, Appellants wish to work with the Town to ensure it fulfills its statutory obligation under RCW 19.27.050. An RCW 19.27.042 ordinance is the middle ground by which the Town can meet Appellants halfway, each satisfying their own interests. Adoption of this ordinance would allow the Town's building inspector to legally determine if the cottage's change in character of use meets the requirements of RCW 19.27.042(1)

4 RCW 19.27.050. (in pertinent part)
5 Appellants initiated their action *in forma pauperis*.

(b), which states that "[a]ny code deficiencies to be exempted pose no threat to human life, health, or safety." (See Appendix C). The Town has never presented a less restrictive means of enforcing the SBC against Appellants' religious land use, yet it shows no willingness to reach this RLUIPA-compliant solution. Notably, in spite of its statutory duty to enforce the SBC, the Town has suspended its enforcement thereof, thereby violating it. It also refuses to do so by the least restrictive means as per Appellants' religious land use. Consequently, it acts in opposition to RLUIPA and RCW 19.27.050. Appellants also presented evidence to the lower courts that the Town never legally adopted the SBC, but rather, applies the IBC 2006, a model building code not containing the State Building Code Council's amendments thereto. (Appellants' Opening Brief at 21). Neither court reached these arguments.

No enforcement action on behalf of the Town is necessary to recognize the illegality of its actions under controlling State and federal law. Mandamus must lie to compel its compliance with respect to religious land use and prohibition must issue to prevent it from further violating these laws. Review by this Court is necessary to affect such judgment.[6]

6 On June 10, 2010, a new RLUIPA-compliant statutory provision facilitating religious organizations' hosting of temporary encampments for the homeless was passed by the

B. The Superior Court's denial of Appellants' standing under RLUIPA raises a significant question of Constitutional law, involves an issue of substantial public interest and conflicts with decisions of this Court.

Both courts made Muslim America's refusal to participate in this case dispositive to denial of the requested writs. (CP 564 § 3; App. A at 6). However, their application of CR 19 and land use decisions with respect to the underlying action raises an important question of Constitutional law, one that is also an issue of first impression:

In a religious land use action, may a Court deny a party standing clearly conferred upon him by RLUIPA simply because he is not the fee simple owner of the property upon which he applies a religious land use? The Court of Appeals didn't reach Appellants' standing argument on appeal, citing decisions that apparently precluded it from so doing. (App. A at 5)(citing *State v. Cardenas*, 146 Wn.2d 400, 404-05, 47 P.3d 127, 57 P.3d 1156 (2002)). Yet this Court has clearly stated that standing is a jurisdictional issue that may be raised for the first time on appeal. *International Association of Firefighters, Local 1789 v. Spokane Airport*, 146 Wn.2d 207, 212 (fn. 3). RAP 2.5(a).

The Superior Court held that Appellants never had standing to

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State Legislature. This law explicitly allows the use of buildings as part of an encampment. (See Appendix E).

apply for the writs, though the clear letter of RLUIPA protects individual ***persons*** applying a religious land use. (See Appendix D). This Court has affirmed such protection well before the enactment of RLUIPA, stating that "[t]he use, building or conversion of real property for the purpose of religious exercise shall be considered to be the religious exercise of the ***person*** or entity that uses or intends to use the property for that purpose." *City of Sumner v. First Baptist Church of Sumner, Washington*, 97 Wn.2d 1, 630 P.2d 1358 (1982)(See also App. D, RLUIPA, 42 U.S.C.§ 2000cc-5(7)(B)). (Emphasis added). Appellants are not merely guests on Muslim America's property. Their use thereof is sanctioned by Muslim America as affirmed by Mr. Hatem in his affidavit. (CP 35 § 4, 6). Because Appellants are applying a religious land use on Muslim America's land, they have standing under RLUIPA.

In the Superior Court, Muslim America claimed no interest in Appellants' action.[7] It never contested their religious land use on its property. Muslim America's status as a non-profit corporation holding title to the property used freely by Appellants was openly admitted by Appellants in their affidavits and evidenced by the Town itself. (CP 111-

7 Muslim America's request to the Town for the adoption of an RCW 19.27.042 ordinance is unlike its participation in a court of this State. (CP 28) Such a request does not seek to compel the Town to act, whereas applying for mandamus does. It is from the latter that Muslim America is religiously prohibited and Appellants can not seek its participation in a State court.

116). Determination of this status as a condition of adopting an RCW 19.27.042 ordinance did not require its joinder and participation in this action. Furthermore, the Superior Court subjected Appellants to a Hobson's Choice: either summon your religious community into this action in violation of your religious convictions or refuse to do this and risk deprivation of your religious liberty and place of shelter.[8] The Court of Appeals never reached Appellants' religious prohibition argument in this matter.

Under 42 U.S.C. § 2000cc-5(5), a "property interest" in land against which government seeks to enforce a land use regulation is sufficient to obtain standing and Appellants have met the requirements for such interest. (See App. D). RLUIPA imposes no test restricting its application solely to fee simple owners of such property. Subjecting Appellants' to such a test flies in the face of the Fourteenth Amendment's Equal Protection Clause, enforcing a law in a manner that clearly abridges their privileges.[9] Review by this Court is necessary to establish an individual's standing under federal Constitutional law and remove

8 Appellants chose the latter, which explains their every attempt to describe Muslim America's refusal without calling upon it to participate. The Superior Court left Appellants with no other means by which to explain their religious convictions in this matter.

9 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Constitution, Amendment XIV, Section 1. (in pertinent part)

therefrom the burden of property ownership as a requirement for the enjoyment of his rights in this respect.

C. The lower courts' determination of an adequate remedy at law conflicts with decisions of this Court and raises a significant question of Constitutional law.

The Superior Court held that Appellants' adequate remedy at law would be made available "upon commencement of enforcement proceedings by the Town" while the Court of Appeals asserted that Appellants' remedy at law "exists." (CP 403 § 4-5; App. A at 9). In light of the *prima facie* circumstances under which Appellants initiated their action, neither court exercised proper discretion in determining the adequacy of Appellants' remedy at law. On page 24 of their Opening Brief, Appellants cited to *City of Kirkland v. Ellis*, 82 Wn. App. 819, 920 P.2d 206 (1996), in which this Court has established a criterion for determining the adequacy of a remedy at law:

> The question of whether an appeal is an adequate remedy depends on whether: (1) the error was so clear that reversal would be "unquestioned" if the case were already before the Superior Court on a post-judgment appeal; and (2) the litigation will terminate once the error is corrected by means of interlocutory review.

Kirkland, supra at 827. In *State v. Harris*, 2 Wn. App. 272, 469 P.2d 937 (1970), we find further elaboration of this criterion:

> We are tempted to announce the rule that the remedy by appeal is inadequate whenever it appears inequitable to require the litigants to proceed through a lengthy, expensive trial which, if the present state of the case were allowed to continue, would mean an unquestioned reversal and termination of the entire litigation when appealed after the trial.

Harris, supra at 280. (See also Appellants' Reply Brief, p. 7). This Court has also differentiated between an available remedy at law and an adequate remedy at law, stating "[I]t is the ***adequacy*** of the remedy by appeal, ***not its mere existence***, which defeats the right to a writ of prohibition." *State ex rel. Western Canadian Greyhound Lines, Ltd. v. Superior Court of King County*, 26 Wn.2d 740, 749 (1946). (Emphasis added). It has determined that the question as to what constitutes a plain, speedy and adequate remedy is dependent upon the facts of each particular case. *Id.* at 748.

Given their standing under RLUIPA, were Appellants summoned to court as a result of the Town's Notice of Violation, the action would be unquestionably dismissed upon applying the criterion defined in *Kirkland* and *Harris*. The facts particular to this action require the Town's adoption of an RCW 19.27.042 ordinance as the most equitable solution for all parties. As such, the lower courts' failure to reach this determination constitutes an abuse of discretion and provides cause for this Court to

grant review of the Court of Appeals' denial of the writs.

D. The lower courts' holding Appellants' action frivolous disregards the Town's violation of Constitutional law and its consequence for citizens seeking relief in State courts from disturbance of religious exercise under color of law involves an issue of substantial public interest.

The Superior Court considered Appellants' underlying action to be entirely frivolous, punishing them with the payment of lodestar attorney fees. The Court of Appeals affirmed this ruling. Pursuant to RCW 4.84.185, such fees are awarded only when an action is frivolous ***in its entirety***. *Tiger Oil Corp. v. Department of Licensing*, 88 Wn.App. 925,938,946 P.2d 1235 (1997). (Emphasis added). Both lower courts' holding of frivolity serves to diminish the gravitas of Constitutional law and involves an issue of substantial public interest in that it punishes a party with crippling pecuniary sanctions simply for seeking in good faith a court's equitable relief from disturbance of his religion under color of law.

The Court of Appeals' affirmation of the Superior Court's frivolity ruling is predicated upon three arguments, each of which fails under close scrutiny:

First, the Court of Appeals cites Appellants' failure to assign error to findings of fact. (App A. at 10). Mr. Iman assumed responsibility for preparing all legal instruments to continue this action without any prior

experience as a *pro se* attorney. His lack of compliance with RAP 10.3(g), as such, did not constitute a conscious concession that the Superior Court's findings of fact are verities on appeal. Rather, this occurred as a result of his unfamiliarity with this particular appellate procedure. Moreover, Division II has held that

> [i]n appropriate circumstances, we will waive technical violations of RAP 10.3(g), especially, where, as here, the appellant's brief makes the nature of the challenge clear and includes the challenged findings in the text.

Harris v. Urell, 133 Wn. App. 130, 137, 135 P.3d 530, 533 (2006). Appellants' Opening Brief makes the nature of their challenge clear, including in its text argument that specifically challenges Finding of Fact #9 in the order dismissing the writs. (CP 402 § 9)(Appellants' Opening Brief, p.25-31). In the same brief, *et passim*, Appellants' argument challenged every Finding of Fact in the order for costs and fees with the exception of Findings #6 and #8. Under RAP 1.2, Appellants should not suffer a gross miscarriage of justice because of their good faith failure to comply with RAP 10.3(g). As such, this failure does not warrant an imposition of heavy pecuniary damages.

Second, the Court of Appeals cites a lack of an enforcement action against Appellants. (App. A at 10). As argued in Issue A supra, an

enforcement action is not necessary to recognize the Town's current violation of State and federal law. Thus, the Court of Appeals' assertion that Appellants' action was frivolous because no building code enforcement was subject to review is error.

Third, the Court of Appeals states that Appellants "seemingly conceded a remedy at law exists for them." (App. A at 8). The Court of Appeals' claim fails under close scrutiny. During the July 9, 2010 hearing, Mr. Ahmad stated:

> [H]e (Mr. Riley) is correct that we could knock down the infraction by a Constitutional challenge in the infraction court, just as we knocked down an ordinance on business licenses in the infraction court. ***However, the writ of prohibition can issue to prevent an official from doing a wrongful act, to save these victims of unlawful prosecution from ever having to go to court in the first place***. And this is one of the purposes of the writ of prohibition. It has been issued for that purpose.

VRP 7/9/10, p. 38, ln. 23-p. 39, ln. 7. (Emphasis added). As argued in Issue C supra, there is a distinction between an ***available*** remedy at law and an adequate one. Examined in its proper context, this is the central idea of Mr. Ahmad's argument. The Court of Appeals' use of Mr. Ahmad's argument to support the Superior Court's frivolity ruling is thus disingenuous.

The Court of Appeals' rationale for affirming the frivolity ruling of

the lower court ignores Appellants' federal and religious based arguments in the Superior Court. Ironically, the Court of Appeals itself held that Appellants' religious and federal based appeal arguments, which are not substantively different from their arguments in the Superior Court, were ***not*** entirely frivolous on appeal. (App. A at 12). Its citation to *Ermine v. City of Spokane*, 143 Wn.2d 636, 650, 23 P.3d 492 (2001) provides no support for its affirmation of the Superior Court's frivolity ruling concurrent with its denial of the town's RCW 4.84.185 attorney fee request. The Court of Appeals' peculiar judgment holds Appellants to a double standard: while their argument is reasonable enough to avoid incurring penalty on appeal, the same argument warrants onerous monetary punishment in the lower court.

Appellants inability to pay the $24,966.66 penalty presents them with a scenario of possible dispossession and loss of a family home, place of worship and school. They incurred this burden merely as a result of seeking relief from the Town's disturbance of their federally protected religious land use and have lived in fear of destitution for over three years. Such an outcome is certainly a matter of substantial public interest. For any citizen, reliance upon the courts for the sole purpose of protecting his fundamental rights should never yield such a result:

> [I]t would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage.

Straus v. Victor Talking Mach. Co., 297 F. 791, 799 (2nd Cir. 1924).

Accordingly, this Court should grant review of the lower courts' frivolity ruling.

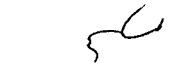
VI. CONCLUSION

For the reasons above, Appellants Bedreddin Iman and Sameer Hatem pray this Court grant review under RAP 13.4(b)(1)-(4) to reverse the Court of Appeals' decision affirming denial of Appellants' writ application and the award of fees for frivolous action.

Dated this 10th day of March, 2014 at Springdale, Washington.

Respectfully submitted,

BEDREDDIN IMAN
Appellant, *pro se*



SAMEER HATEM
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CERTIFICATE OF SERVICE

I certify that on this day, March 10, 2014, I served a copy of the foregoing **Petition for Review** to the parties of this proceeding or their counsel as shown:

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RAQEEBAH AMATALLAH

FILED
DEC. 12, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

DAWAUD AHMAD and BEDREDDIN IMAN and SAMEER HATEM, and MUSLIM AMERICA, a non-profit corporation, Appellants, v. TOWN OF SPRINGDALE, a municipal corporation, Respondent.	)	No. 31339-5-III PUBLISHED OPINION

BROWN, J. — Dawud Ahmad,[1] Bedreddin Iman, Sameer Hatem, each pro se, (individual plaintiffs) appeal the trial court's orders denying writs of prohibition and mandamus, joining Muslim America, a Washington non-profit corporation, as a necessary party, and granting frivolous action costs, including attorney fees, under RCW 4.84.185 to the Town of Springdale. Muslim America appeals the costs award. The individual plaintiffs contend the trial court erred in asserting jurisdiction, denying individual standing to bring the writs, and awarding the costs. Muslim America contends

[1] Mr. Ahmad died in May 2012.

Appendix A

the trial court erred in imposing the frivolous action costs. We find no trial court error. We decline the town's request for attorney fees against the individual appellants and Muslim America on appeal because we cannot say their appeal is entirely frivolous. Accordingly, we affirm.

FACTS

The following facts derive primarily from the trial court's findings of fact that are unchallenged and, therefore, verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). For background, in 2006, the town adopted the International Building Code (IBC) after Washington adopted the IBC as the state building code. RCW 19.27.031. Muslim America owned real property at N. 610 Main Street in Springdale where Mr. Ahmad resided in a home with outbuildings. One outbuilding, a shed without a foundation, sanitation facilities, or utilities, was apparently used at relevant times as living quarters for Mr. Iman. Mr. Hatem identifies himself as Secretary-General for Muslim America and authorized as counsel to practice Islamic law.

The town issued an unsafe structure notice at N. 610 Main Street to Mr. Ahmad, Dawud Ahmad & Associates, noting an occupied outbuilding violated the building code and lacked a certificate of occupancy. Mr. Ahmad, as registered agent for Muslim America, and apparently acting as Muslim America's Mufti or chief legal officer for Islamic law, asked the town by letter styled as from Dawud Ahmad & Associates to pass an ordinance exempting Muslim America's property from the building code pursuant to

RCW 19.27.042. The town council declined to do so and notified Mr. Ahmad of its decision. Mr. Ahmad, on pleading paper showing Dawud Ahmad & Associates, Mr. Iman, and Mr. Hatem, each pro se, then sought superior court writs of prohibition and mandamus, seeking to prohibit the town from enforcing the building code against the property and mandating the town to adopt an ordinance exempting the property from the building code.

After answering the writ applications, the town's counsel discovered Muslim America owned the property and the shed and moved to join Muslim America as a necessary party. Mr. Ahmad objected on behalf of Muslim America, arguing Muslim America refused to be joined because it was not a necessary party, and because joinder violated exercise of religion principles. The court disqualified Mr. Ahmad, a nonlawyer, from representing Muslim America and struck his pleadings. In June 2010, attorney Robert Simeone made a limited appearance for the sole purpose of filing Muslim America's refusal to be joined as a necessary party and the same day he withdrew. The trial court granted the joinder. Muslim America did not seek reconsideration or review of the joinder order, and it failed to file an affidavit or present evidence of its status as a nonprofit corporation or its beneficial interest in support of the writ applications.

At the writ applications hearing, Mr. Ahmad argued if the town issued a code violation or tried to enforce the code against him or Muslim America's property, they could (as a remedy) "knock down the ordinance by a constitutional challenge in the

infraction court." Report of Proceedings (July 9, 2010) at 38. Muslim America did not appear for the writ applications hearing. The trial court denied the writ applications, finding it had jurisdiction over the parties and subject matter and that the town did not act in excess of its jurisdiction because it had a duty under state law to enforce the state building code. The court reasoned, as Mr. Ahmad had argued, that if the town ever commenced enforcement proceedings against Muslim America's property and building, the plaintiffs would then have the right to raise constitutional issues and defend against such an action, thus providing a remedy at law that precluded extraordinary relief.

The individual plaintiffs appealed to the Washington Supreme Court. The town requested attorney fees and costs based on frivolous action. Muslim America did not respond. The trial court awarded the town attorney fees and costs, finding the individual plaintiffs and Muslim America had failed to support the writ claims with any rational argument. The individual plaintiffs then amended their appeal notice to include an assignment of error to attorney fees; Muslim America then separately appealed solely the attorney fees award. After consolidating the direct appeals and denying direct review, the Supreme Court transferred the matter to this court.

ANALYSIS

A. Jurisdiction and Standing

The issue is whether the trial court erred in exercising jurisdiction over the writ applications and in denying the individual plaintiffs standing to assert the applications for and act on behalf of Muslim America in resisting its joinder as a necessary party.

We review standing and jurisdiction issues de novo. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011) (standing); *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003) (jurisdiction).

The town is a "city" for purposes of the building code, and it is required to enforce the state building code. *See* RCW 19.27.015(2) (term "city" includes a "town"); RCW 19.27.020 (purpose of chapter to enforce minimum performance standards and requirements for construction and materials consistent with safety); RCW 19.27.031(state building code, which consists of the IBC, shall be in effect in all cities); RCW 19.27.050 (building code shall be enforced by cities). Under RCW 2.08.010, the superior court has original jurisdiction of matters including possession of real property and the power to issue writs. Accordingly, the superior court had jurisdiction to consider the appellants' challenge to the town's enforcement of the building code and their writ applications.

Next, regarding standing, a party waives a standing issue by not raising it at trial. *State v. Cardenas*, 146 Wn.2d 400, 404-05, 47 P.3d 127, 57 P.3d 1156 (2002). The individual plaintiffs failed to argue standing below. Moreover, corporations appearing in court must be represented by an attorney; the individual plaintiffs appearing pro se fail to meet this requirement. *Cottringer v. Dep't of Emp. Sec.*, 162 Wn. App. 782, 787, 257 P.3d 667, *review denied*, 173 Wn.2d 1005 (2011).

Mr. Iman and Muslim America next argue the court erred in joining Muslim America as a necessary party under CR 19. But, Muslim America's appeal of the

attorney fees award does not bring up for review the joinder order, and the individual plaintiffs fail to support their passing reference to a "coerced joinder" with any authority or legal argument. And, an appeal of an award of attorney fees does not bring up for review the merits of an underlying decision not timely appealed. *Bushong v. Wilsbach*, 151 Wn. App. 373, 376-77, 213 P.3d 42 (2009). Thus, we need not consider this claim. RAP 2.4(b); *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Nevertheless, a person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must "be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that dispos[ing] of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest or . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." CR 19(a). Generally, a landowner is an indispensable party in a case that would affect the use of the landowner's property. *Wash. State Dep't of Corr. v. City of Kennewick*, 86 Wn. App. 521, 530-31, 937 P.2d 1119 (1997). Muslim America owned the property and buildings at issue, and it was the sole entity that could seek the exemption from the town council under RCW 19.27.042, to use the shed as a residence. Therefore, Muslim America was properly joined as a necessary party.

B. Writ Applications

The individual appellants contend the trial court erred in denying their writ applications. They argue the court should have exercised equity to grant the writ applications, prohibit the town from enforcing its building code, and mandate the town to enact and apply an exemption to the building code to Muslim America's property.

A writ of mandamus requires a state official "to comply with law when the claim is clear and there is a duty to act." RCW 7.16.160; *Paxton v. City of Bellingham*, 129 Wn. App. 439, 444, 119 P.3d 373 (2005) (citing *In re Personal Restraint of Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001)). Mandamus is an extraordinary remedy not available when there is a "'plain, speedy and adequate remedy in the ordinary course of law.'" RCW 7.16.170 (quoting *Paxton*, 129 Wn. App at 444-45). A writ of mandamus will not issue where an act to be performed is a discretionary act. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 805, 982 P.2d 611 (1999).

A writ of prohibition is the counterpart to the writ of mandamus. A writ of prohibition is an extraordinary remedy that "may be invoked to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power." *Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996); RCW 7.16.290. As with a writ of mandamus, a writ of prohibition cannot be issued if there is a plain, speedy and adequate legal remedy. RCW 7.16.300; *Leskovar v. Nickels*, 140 Wn. App. 770, 774, 166 P.3d 1251 (2007). Equitable remedies are extraordinary forms of relief, available solely when an aggrieved party lacks an

adequate remedy at law. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006).

We review the superior court's determination as to the availability of an adequate remedy at law for abuse of discretion. *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). We do not disturb the court's decision "unless the superior court's discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

Under RCW 19.27 the town had the legal authority and duty to pass and enforce the IBC. Thus, it was not acting in excess of its jurisdiction in sending the unsafe structure notice. Whether to enact an exemption for buildings used by Muslim America was a discretionary matter for the town council to decide under RCW 19.27.042(1). This statute provides, "The legislative authorities of cities . . . *may* adopt an ordinance or resolution to exempt from state building code requirements buildings whose character . . . has been changed . . . to provide housing for indigent persons." *Id.* (Emphasis added.) A writ of mandamus cannot compel a discretionary act, and Mr. Iman failed to name a state officer relating to their application for writ of mandamus. The appellants seemingly conceded a remedy at law exists for them when Mr. Ahmad argued it could appeal any enforcement proceeding against them or Muslim America. The trial court correctly specified that this remedy was available to appellants. Because equitable remedies are extraordinary forms of relief, available solely when an aggrieved party lacks an

adequate remedy at law and because a remedy at law exists, we conclude the trial court did not err in denying the writ applications without applying equitable principles.

C. Costs and Attorney Fees

The issue is whether the trial court erred in granting the town's request for costs and attorney fees under RCW 4.84.185. Mr. Iman and Muslim America contend the action was not frivolous.

A court may award attorney fees only when authorized by a contract, a statute, or a recognized ground in equity. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). Here, the town sought an award of reasonable attorney fees and costs under RCW 4.84.185, which allows attorney fees to the prevailing party in defending against a frivolous action. The purpose of RCW 4.84.185 is to discourage abuse of the legal system by providing for award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for the purposes of harassment, delay, nuisance or spite. *Biggs v. Vail*, 119 Wn.2d 129, 134-36, 830 P.2d 350 (1992).

The standard of review for attorney fees in frivolous lawsuits is abuse of discretion, examining the trial court's decision whether a case, taken as a whole, is advanced without reasonable cause. RCW 4.84.185; *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). Under this standard, we will reverse a trial court's decision only where the trial court's granting of attorney fees is

untenable or manifestly unreasonable. *Ermine v. City of Spokane*, 143 Wn.2d 636, 641, 23 P.3d 492 (2001).

A judge is to consider all evidence presented at the time of the motion to determine whether the action was frivolous and advanced without reasonable cause. *Id.* A frivolous action is one that cannot be supported by any rational argument on the law or the facts. *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). An action must be frivolous in its entirety. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997).

Here, the writs were advanced without reasonable cause. Appellants failed to assign error to the findings of fact either in the writ action or in the order for attorney fees. Appellants assert their action was not frivolous because they raised possibly valid constitutional free exercise claims. But no building code enforcement against appellants is before us. And, considering Mr. Ahmad's writ hearing argument, he was aware a plain, speedy, and adequate remedy at law is available to resist an enforcement action.

Muslim America argues it was wrongly ordered to pay attorney fees considering it was an unwilling participant in the individual appellants' writ applications. Muslim America, however, did not appeal its joinder; it appealed solely the attorney fee costs award. As noted, an appeal of an award of attorney fees does not bring up for review the merits of an underlying decision not timely appealed. *Bushong*, 151 Wn. App. at 376-77. Moreover, Muslim America did not respond to the town's request for attorney

fees. An objection would have given the trial court an opportunity to address the issue and correct any possible errors. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (the reason issues may not be raised for the first time on appeal is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals.). By comparison, a defendant waives the right to assert an affirmative defense by failing to raise the defense below. *Rapid Settlements, Ltd.'s Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wn. App. 683, 695, 271 P.3d 925 (2012). Therefore, we decline review.

In sum, the writ actions were not supported by rational argument on the law or the facts. Because an adequate remedy at law was known to be available should an enforcement action unfold, no equitable remedy was available. Thus, the trial court had tenable grounds to grant the town its attorney fees and did not err.

Citing RAP 18.9 and RCW 4.84.185, the town requests an award of its attorney fees and costs for defending a frivolous appeal. An appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 619, 94 P.3d 961 (2004) (citing *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)).

The individual plaintiffs and Muslim America raise issues under article I section 11 of the Washington Constitution, the First Amendment to the United States Constitution, and the federal Religious Land Use and Institutionalized Persons Act, 21

U.S.C. § 2000cc; 2000cc–5. Since discretion assumes that two decision makers may reach a different outcome, the court of appeals and trial court remain free to decide differently as to whether the same claims are frivolous. *Ermine*, 143 Wn.2d at 650. Because we cannot say the appellants' religious and federal based appeal arguments are entirely frivolous, we exercise our discretion and deny the town's RCW 4.84.185 attorney fee request.

The town as prevailing party is entitled to costs predicated upon compliance with RAP 14.4.

Affirmed.

Brown, J.

I CONCUR:

Fearing, J.

No. 31339-5-III

KORSMO, C.J. (dissenting) — Muslim America did nothing to further this litigation or otherwise impose costs to the Town of Springdale. Thus, the trial court erred in imposing sanctions against Muslim America. Muslim America also was free to challenge the joinder decision in this appeal because the order joining it was not an appealable order. In all other respects, I agree with the majority.

Appealability of the Joinder Ruling. Respondent argues that Muslim America lacks the ability to challenge the joinder ruling under RAP 2.4(b). The plain language of that rule proves otherwise. The critical final sentence of that rule states:

> A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

(Emphasis added.)

Counsel for respondent quite properly agreed at oral argument that the joinder order was not appealable as a matter of right. A joinder ruling is not an appealable order. RAP 2.2(a) lists 13 classes of rulings that are appealable as a matter of right; joinder of a party is not included within any of those categories. Thus, under the plain terms of the underlined language of RAP 2.4(b), the bar on fee rulings bringing up other appealable decisions is inapplicable to this situation. Muslim America could not appeal the joinder

order but was free to challenge that ruling once there was an order from which it could[1]—and did—appeal. The first and only chance it had to challenge the joinder ruling was in this timely appeal from the attorney fees. To the extent that the majority holds otherwise, I disagree.

Sanction Order. Muslim America was sanctioned for something it did not do. The decision affirming that ruling stands our frivolous litigation statute on its head. For that reason I respectfully part company with the majority and would reverse the fee award as to Muslim America.[2]

RCW 4.84.185 provides that in a civil proceeding where the judge finds that an action, claim, or defense "was frivolous and advanced without reasonable cause," the court may require payment to the prevailing party of its reasonable expenses, including attorney fees "incurred in opposing such action." The two quoted provisions state the operative aspects of this case: (1) the frivolous action must be advanced without cause, and (2) reimbursement is for the expenses incurred in opposing the action. Muslim America did nothing to advance the case and Springdale's expenses were not incurred by

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[1] Although the order denying the writs was appealable and would have brought up the joinder ruling, Muslim America could not have appealed from that ruling because it was not an aggrieved party as it did not oppose the ruling. RAP 3.1 ("Only an aggrieved party may seek review by the appellate court.").

[2] Because the statute is inapplicable to Muslim America in this case, I do not reach the difficult constitutional questions that would arise from involuntarily adding a religious organization to a lawsuit and then sanctioning it for being there.

opposing anything Muslim America did. There is no basis for sanctioning Muslim America.

Washington courts have consistently applied the statute in accordance with the basic principle that it reimburses a party for the costs of frivolous litigation imposed upon it by another party. *E.g.*, *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). If there was some evidence that Muslim America had done something to cause this litigation, or evidence of agency or similar *respondeat superior* type of liability, then it would be possible to uphold the trial court's order. However, there is no such evidence in this record and respondent has never claimed otherwise.

Instead, the record clearly reflects, and the parties certainly agree, that Muslim America took no part in this litigation other than a brief one day appearance to file an objection to the joinder. It did nothing to advance the litigation. Springdale incurred no costs because of Muslim America. For both reasons, the statutory requirements for imposing a fee award under RCW 4.84.185 were not met and the trial court had no authority to impose the sanction on Muslim America.

I respectfully dissent.

Korsmo, C.J.

FILED
Feb. 06, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

DAWAUD AHMAD and BEDREDDIN IMAN and SAMEER HATEM, and MUSLIM AMERICA, a non-profit corporation, Appellants, v. TOWN OF SPRINGDALE, a municipal corporation, Respondent.	)	No. 31339-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellants' motion for reconsideration of this court's decision of December 12, 2013, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellants' motion for reconsideration is hereby denied.

DATED: 2/06/14

PANEL: Jj. Brown, Korsmo, Fearing

FOR THE COURT:

KEVIN M. KORSMO
CHIEF JUDGE

Appendix B

RCW 19.27.042

Cities and counties — Emergency exemptions for housing for indigent persons.

(1) Effective January 1, 1992, the legislative authorities of cities and counties may adopt an ordinance or resolution to exempt from state building code requirements buildings whose character of use or occupancy has been changed in order to provide housing for indigent persons. The ordinance or resolution allowing the exemption shall include the following conditions:

(a) The exemption is limited to existing buildings located in this state;

(b) Any code deficiencies to be exempted pose no threat to human life, health, or safety;

(c) The building or buildings exempted under this section are owned or administered by a public agency or nonprofit corporation; and

(d) The exemption is authorized for no more than five years on any given building. An exemption for a building may be renewed if the requirements of this section are met for each renewal.

(2) By January 1, 1992, the state building code council shall adopt by rule, guidelines for cities and counties exempting buildings under subsection (1) of this section.

[1991 c 139 § 1.]

Appendix C

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 ("RLUIPA")

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

...

42 U.S.C. § 2000cc-5. Definitions

...

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

...

(7) Religious exercise
(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

RCW 35A.21.360

Temporary encampments for the homeless — Hosting by religious organizations authorized — Prohibitions on local actions.

(1) A religious organization may host temporary encampments for the homeless on property owned or controlled by the religious organization whether within buildings located on the property or elsewhere on the property outside of buildings.

(2) A code city may not enact an ordinance or regulation or take any other action that:

(a) Imposes conditions other than those necessary to protect public health and safety and that do not substantially burden the decisions or actions of a religious organization regarding the location of housing or shelter for homeless persons on property owned by the religious organization;

(b) Requires a religious organization to obtain insurance pertaining to the liability of a municipality with respect to homeless persons housed on property owned by a religious organization or otherwise requires the religious organization to indemnify the municipality against such liability; or

(c) Imposes permit fees in excess of the actual costs associated with the review and approval of the required permit applications.

(3) For the purposes of this section, "religious organization" means the federally protected practice of a recognized religious assembly, school, or institution that owns or controls real property.

(4) An appointed or elected public official, public employee, or public agency as defined in RCW 4.24.470 is immune from civil liability for (a) damages arising from the permitting decisions for a temporary encampment for the homeless as provided in this section and (b) any conduct or unlawful activity that may occur as a result of the temporary encampment for the homeless as provided in this section.

[2010 c 175 § 4.]