No. 95013-0

NO. 48184-7-II

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

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OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM;
CLALLAM COUNTY SHERIFF BILL BENEDICT;
CLALLAM COUNTY SHERIFF'S DEPARTMENT; AND
CLALLAM COUNTY

Appellants,

v.

REAL PROPERTY KNOWN AS
(1) JUNCTION CITY LOTS 1 - 12 INCLUSIVE, BLOCK 35;
(2) LOT 2 OF THE NELSON SHORT PLAT LOCATED IN
JEFFERSON COUNTY; AND
ALL APPURTANCES AND IMPROVEMENTS THEREON, OR
PROCEEDS THERE FROM

Respondents *in rem*,

STEVEN L. FAGER;
DBVWC, INC.; AND
LUCILLE M BROWN LIVING TRUST

Interested Parties.

FILED
COURT OF APPEALS
DIVISION II
2016 FEB 16 PM 3: 35
STATE OF WASHINGTON
BY DEPUTY

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ON APPEAL FROM
THE SUPERIOR COURT OF WASHINGTON
FOR JEFFERSON COUNTY
No. 09-2-00413-6

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BRIEF OF APPELLANTS

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## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** ..... ii

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR ..... 2

III. STATEMENT OF THE ISSUES ..... 3

IV. STATEMENT OF THE CASE ..... 4

A. RCW 69.50.505 DOES NOT AUTHORIZE OR PERMIT AN AWARD OF COSTS AND ATTORNEY'S FEES FOR LEGAL WORK PERFORMED IN A SEPARATE CRIMINAL PROCEEDING ..... 12

(1) The plain language of RCW 69.50.505(6) does not authorize attorney's fees for work performed in a criminal proceeding ..... 13

(2) Even if RCW 69.50.505(6) was ambiguous – it is not – the rules of statutory construction do not permit the strained interpretation the trial court adopted ..... 23

*i. A statutory waiver of sovereign immunity must be interpreted strictly* ..... 24

*ii. Notwithstanding a strict interpretation, the Legislature did not intent Title 69 RCW to abrogate the American Rule nor is "any proceeding to forfeit property" superfluous* ... 31

*iii. The trial court's interpretation leads to absurd results* ..... 35

B. TIMOTHY FAGER FAILED TO SATISFY THE STATUTORY PREREQUISITES OF RCW 69.50.505 AND IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES IN THIS FORFEITURE ACTION . 39

C. THE TRIAL COURT ERRED BY ENTERING VARIOUS UNNECESSARY AND SPECULATIVE FACTUAL FINDINGS ..... 44

VI. CONCLUSION ..... 50

VII. APPENDIX ..... 51

## TABLE OF AUTHORITIES

United States Supreme Court Cases

*Ardestani v. I.N.S.*,
502 U.S. 129, 130, 112 S. Ct. 515, 517, 116 L. Ed. 2d 496 (1991)..... 24
*U.S. v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, Al,*
579 F.3d 1315, 1319 (11th Cir. 2009), cert. denied
560 U.S. 927, 130 S.Ct. 3350, 176 L.Ed.2d 1224 (2010)... 16, 17, 19, 21

Washington Cases

*Bowman v. Webster*,
42 Wn.2d 129, 134, 253 P.2d 934, 937 (1953) (*en banc*)..... 45
*Christensen v. Skagit County*,
66 Wn.2d 95, 97, 401 P.2d 335 (1965)..... 43
*City of Bellevue v. Cashier's Check for $51,000 & $1,130.00 in U.S. Currency*,
70 Wn. App. 697, 701, 855 P.2d 330 (1993)..... 16
*City of Sequim v. Malkasian*,
157 Wn.2d 251, 271, 138 P.3d 943 (2006) (*en banc*)..... 1, 32
*Clark v. Baines*,
150 Wn.2d 905, 911, 84 P.3d 245 (2004)..... 34
*Espinoza v. City of Everett*,
87 Wn. App. 857, 867, 943 P.2d 387 (1997)..... 40, 41
*Guillen v. Contreras*,
169 Wn.2d 769, 777, 238 P.3d 1168, 1171 (2010)..... passim
*In re MacGibbon*,
139 Wn. App. 496, 499, 161 P.3d 441, 442 (2007)..... 14, 20, 22
*Junkin v. Anderson*,
12 Wn.2d 58, 72, 120 P.2d 548, 123 P.2d 759 (1941)..... 40
*Key Bank of Puget Sound v. City of Everett*,
67 Wn. App. 914, 916, 841 P.2d 800 (1992)..... 41, 42, 44
*Kilian v. Atkinson*,
147 Wn.2d 16, 21, 50 P.3d 638, 640 (2002) (*en banc*)..... passim

*Manker v. American Sav. Bank & Trust Co.*,
131 Wn. 430, 438, 230 P. 406, 409 (1924) (*en banc*) ..... 23
*Mayes v. Emery*,
3 Wn. App. 315, 321, 475 P.2d 124, 129 (1970) ..... 45
*Northwest Cascade, Inc. v. Unique Construction*,
187 Wn. App. 685, 702, 351, P.3d 172 (2015) ..... 43
*Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*,
181 Wn.2d 272, 284, 333 P.3d 380, 386 (2014) (*en banc*) ..... 24
*Snohomish Reg'l Drug Task Force v.*
*Real Property Known as 20803 Poplar Way,*
150 Wn. App. 387, 329 (2009) ..... 26, 27, 28, 40
*Spokane Research & Defense Fund v. City of Spokane*,
155 Wn.2d 89, 105, 117 P.3d 1117 (2005) ..... 40
*State v. Enloe*,
47 Wn. App. 165, 734 P.2d 520 (1987) ..... 14
*State v. Thiessen*,
88 Wn. App. 827, 829, 946 P.2d 1207, 1208 (1997) ..... 24, 25
*Stone v. Chelan Cty. Sheriff's Dep't*,
110 Wn.2d 806, 810, 756 P.2d 736, 739 (1988) (*en banc*) ..... 35

Federal Statutes

Civil Asset Forfeiture Reform Act of 2000 ("CAFRA")
28 USC § 2465(b)(1) (2006) ..... 17, 18

Washington Statutes

26.09 RCW ..... 16
26.18 RCW ..... 15, 16
74.20 RCW ..... 15, 16
74.20A RCW ..... 15, 16
Chapter 26.[18] RCW ..... 15
RCW 1.16.080 ..... 43
RCW 4.56.110 ..... 25
RCW 10.105.010(4) ..... 2
RCW 26.09 ..... 14
RCW 26.09.140 ..... 15
RCW 26.09.140 (2007) ..... 14
□CW 26.18.160 ..... 15

RCW 69.50.101(cc) ..... 43
RCW 69.50.401(1) ..... 11, 20, 22
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## I. INTRODUCTION

Departing from long standing Washington law, the trial court erroneously ordered Appellants Olympic Peninsula Narcotics Enforcement Team; Clallam County Sheriff Bill Benedict; Clallam County Sheriff's Department; and Clallam County (hereinafter "Clallam County") to pay Steven and Timothy Fager's[1] attorney's fees and costs in a civil forfeiture action for the legal defense costs in the Fagers' separate criminal proceedings. There is no statute, contract, or equitable doctrine that allowed the trial court to award costs and attorney's fees in a civil forfeiture action for legal work performed in a separate criminal prosecution. Thus, the trial court order is contrary to long-established Washington law. *See e.g., City of Sequim v. Malkasian*, 157 Wn.2d 251, 271, 138 P.3d 943 (2006) (*en banc*). As a matter of law, RCW 69.50.505(6) only authorizes an award costs and attorney' fees for work in the civil forfeiture proceeding itself.

Additionally, to invoke the benefits of RCW 69.50.505 a prospective claimant must first provide notice "in writing of the person's claim of ownership or right to possession" of the items seized. RCW 69.50.505(4). Timothy never provided written notice of ownership in the property subject to forfeiture. Therefore, he was not entitled to a "reasonable opportunity to be heard" regarding his alleged interest in any seized property, much less an award of attorney's fees and costs under the

[1] For clarity, Timothy and Steven will be referred to by their first names and collectively as the "Fagers." No disrespect is intended by this practice.

forfeiture statute. RCW 69.50.505(5) (only those who provide written notice of their claim to the seizing agency are entitled to a hearing on their claimed right in seized personal and/or real property); RCW 10.105.010(4) (same); RCW 69.50.505(6) (attorney's fees and costs can only be awarded to one who has submitted a written claim and participated in a forfeiture proceeding). The trial court erred when it awarded Timothy his attorney's fees and costs.

Clallam County respectfully asks this Court to reverse the award of fees and costs, and remand this matter back to the trial court with directions to award Steven $20,571.92, the costs and attorney's fees for work actually performed in the civil forfeiture proceeding, and deny all other requests for fees and costs.

## II. ASSIGNMENTS OF ERROR

Clallam County assigns error to two legal conclusions:

1. RCW 69.50.505(6) allows civil forfeiture claimants to recover attorney's fees and costs incurred defending a separate criminal prosecution;

2. Timothy Fager was properly awarded his attorney's fees even though he never filed a notice of claim in the underlying forfeiture proceeding.

Clallam County also assigns error to several individual findings of fact and conclusion of law the trial Court entered on September 18, 2015:

1. Finding of Fact No. 3, finding the corporation that had a possessory interest in the realty subject to forfeiture was the "Discovery Bay Village Wellness Collective."

2. Finding of Fact No. 3, finding the total value of the real estate seized was over $500,000.

3. Finding of Fact No. 8, finding that the State of Washington would have pursued a criminal prosecution if the Fagers had first brought a suppression motion in the civil forfeiture proceeding.

4. Finding of Fact No. 14, finding the State of Washington's conduct in the criminal prosecution supported an award against the seizing agency, and finding the seizing agency continued to fight unnecessarily after the criminal prosecution resolved.

5. Finding of Fact No. 15(d) & (e), finding Steven Fager and Timothy Fager reasonably incurred approximately $295,000 in attorney fees for defending against the civil forfeiture, and the amount was reasonable regarding work performed in the civil forfeiture action.

6. Finding of Fact No. 15(g), finding that Steven Fager and Timothy Fager were entitled to reimbursement.

7. Findings of Fact No. 6-11, and 14-15, finding there was more than one claimant to the underlying civil forfeiture.

8. Findings of Fact No. 9, 15(c), and Legal Conclusion No. 2 that the primary purpose for the Fager's incurring attorney's fees in the criminal proceeding was to prevent the civil forfeiture which entitled them to their criminal defense fees as a matter of law.

## III. STATEMENT OF THE ISSUES

A. Whether the trial court erred when it construed RCW 69.50.505(6) to awarded the Fagers attorney' fees and costs in defense of their separate criminal proceedings when the express terms of RCW 69.50.505(6) only allow an award of fees for work done in a "proceeding to forfeit property"?

B. Whether the trial court erred when it awarded Timothy Fager costs and attorney's fees under RCW 69.50.505 despite his failure to timely serve a notice of claim contesting the civil forfeiture on the State?

C. Whether the trial court erred when making various irrelevant findings of fact and findings of fact without sufficient evidence?

## IV. STATEMENT OF THE CASE

The Olympic Peninsula Narcotics Enforcement Team ("OPNET") is a multi-jurisdictional drug task force comprised of state and local law enforcement officers. (Clerk's Papers ("CP") 19, 403 (¶ 13)). In 2007, the officers of OPNET suspected Steven Fager was growing and distributing marijuana. (CP 87). In 2009, OPNET began surveilling a facility at 115 Freeman Lane in Port Townsend, Washington. (CP 87). The property comprised of two parcels: Parcel A owned by Steven L. Fager with indication that deed of trust was granted to Lucille M. Brown Living Trust, and Parcel B owned by DBVWC, Inc. (CP 9).

During the investigation, several officers reported the strong odor of marijuana emanating from Steven's property. (CP 88.) Based upon these reports, law enforcement obtained a warrant to examine utility records and perform a thermal-imaging search of the property. (CP 88).

The thermal search revealed suspicious activity consistent with an indoor marijuana growing operation. (CP 88). This fact, along with the abnormal utility consumption, prompted OPNET to apply for a warrant to enter and search the property at 115 Freeman Lane. (CP 88). Upon executing the warrant, the OPNET discovered a large, sophisticated marijuana grow operation. (CP 19, 88).

On October 9, 2009, the State of Washington charged both Steven and Timothy with one count of manufacturing marijuana; and one count possession with intent to deliver marijuana.[2] (CP 88).

Also on October 9, 2009, Clallam County initiated a civil forfeiture action against the real property that facilitated the alleged criminal acts. (CP 1-13). Clallam County provided notice of the proceedings to all known individuals/entities that had an interest in the real property at issue: Steven Fager, DBVWC, and the Lucille M. Brown Living Trust. (CP 22).

In response to the notice, Steven's attorney, Jeffery Steinborn, filed a notice of appearance on November 13, 2009:

> YOU WILL PLEASE TAKE NOTICE that JEFFREY STEINBORN is appearing on behalf of ***STEVEN FAGER***.
>
> **CLAIM**
>
> CLAIMANT ***STEVEN FAGER***, through counsel, claims an ownership and/or possessory interest in the defendant property.

(CP 31 (emphasis added)). No other parties filed a written notice claiming an interest in the seized property. (*See* CP 31, 33, 37, 46).

On January 26, 2010, Mr. Steinborn, on behalf of Steven, agreed to an order staying the civil forfeiture proceeding. (CP 34-36). Mr.

[2] The criminal proceeding against Steven was assigned cause number 09-1-00173-7. The criminal proceeding against Timothy was assigned cause number 09-1-00172-9. The two causes were consolidated and tried together.

Steinborn took no other action in the civil forfeiture proceeding. (*See* CP 37).

Nearly seven months later on August 11, 2010, while the civil forfeiture proceeding was still stayed, Mr. Steinborn withdrew and Samuel Ramirez at Haas & Ramirez entered a notice of appearance on behalf of "STEVE FAGER." (CP 37-38).

Mr. Ramirez took no action in the civil forfeiture proceeding for approximately three years and seven months, and the clerk filed a notice of dismissal for want of prosecution on March 24, 2014. (CP 39). On April 23, 2014, Mr. Ramirez and the County filed a joint status report with the court stating "continuing the case will allow additional time for . . . settlement negotiations." (CP 42-44).

The following day, April 24, 2014, Mr. Ramirez withdrew as counsel for Steven, and James Dixon entered a notice of appearance for Steven. (CP 45-47). On the same day he appeared, Mr. Dixon filed the first substantive motion in the civil forfeiture proceeding, a motion for summary judgment. (CP 51). The summary judgment motion argued that the civil forfeiture case should be dismissed because the evidence creating a nexus to the property, thereby subjecting it to forfeiture, was suppressed in the Fagers' criminal proceedings. (CP 54-55).

Before the motion for summary judgment could be ruled on, Clallam County removed the *lis pendens* that encumbered the real estate, and moved to voluntarily dismiss the forfeiture under CR 41(a)(1)(B). (CP 107-109).

On June 11, 2015, under RCW 69.50.505(6), Mr. Dixon moved for costs and attorney's fees for legal work performed in the civil forfeiture action and also requested the combined criminal defense costs for Steven and Timothy in their criminal proceedings. (CP 286-457 (motion); CP 159-285 (Declarations of Steven and Timothy Fager, and their various attorneys).

The trial court dismissed the underlying forfeiture proceeding pursuant to Clallam County's motion for voluntary dismissal, and on August 5, 2015, granted Mr. Dixon's motion for attorney's fees. (CP 540). Citing RCW 69.50.505(6), the trial court awarded $295,185.64 in fees to the Fagers. (CP 540). The trial court stated that $293,185.64 covered the cost of legal services through the court's August 5, 2015 ruling, and preparing the proposed written findings. (CP 540). An additional $2,000 was ordered as fees incurred by the Fagers in responding to Plaintiffs' objections to the Proposed Findings of Fact and Conclusions of Law. (CP 540).

The court, however, did not break down the amounts awarded to Steven as compared to Timothy. (*See* CP 540). For example, Mr. Dixon represented Timothy in the defense of Timothy's criminal charges from October 8, 2009 until December 14, 2014, and Timothy incurred $88,744.81 in criminal defense fees during that time period. (CP 230-260). Then on March 19, 2015, Mr. Dixon began representing Steven in the civil forfeiture proceeding and Steven incurred $18,571.92 until the filing of the present appeal. (CP 261-264; 505-506; 540). But Steven

requested $85,314.67 in an award of attorney's fees for Mr. Dixon's work (CP 170), and Timothy requested the same $85,314.67 for Mr. Dixon's work (CP 164). It is difficult to tell from the record if, when the court awarded the $85,314.67 for Mr. Dixon's work, it was awarded to Steven as a portion of the $88,744.81 Timothy incurred in the defense of the criminal charges; whether the $85,314.67 was awarded directly to Timothy solely as criminal defense fees; or whether some portion was awarded to both Timothy and Steven Fager. (*See* CP 540 (not breaking down the fee award); *see also* CP 510 (County's request for a breakdown)).

Nonetheless, from the record information can be gleaned to create a timeline, work performed, total fees requested, fees that are uncontested for work performed in the forfeiture proceeding, and total criminal defense fees for the Fager brothers individually. (**Appendix** at p. 1-2). A less detailed, compact version of that Appendix follows:

**Steven Fager – Breakdown of Fees**

| Attorney | Work Performed In Forfeiture | Requested Fees | Undisputed fees[3] |
|---|---|---|---|
| Steinborn (9/12/09-1/26/10) | Not. of Appear. (CP 30) Agreed stay (CP 34) | $10,000 (CP 170) | $2,000[4] |
| Ramirez (8/9/10-4/7/15) | Not. of With. and Sub. (CP 37)[5] | $0 (CP 170) | $0 |

[3] Reasonable Attorney's fees in civil forfeiture action Appellants are not disputing

[4] No billing statements provided for Mr. Steinborn (CP 160)

[5] Mr. Ramirez did not provide any billing in support of his fees incurred in the civil forfeiture matter. Mr. Ramirez's former partner, Mr. Hass, provided billings for work Mr.

| | | | |
|---|---|---|---|
| Hass (No appearance) | None | $180,477.33 (CP 170; 204) | $0 |
| Dixon (4/7/15-9/18/15) | Not. of With. and Sub. (CP 46) Mot. For Summ. Judg. (CP 51) | $93,889.67[6] (CP 170, 208, 505-506, 540) | $18,571.92[7] |
| Woodford and Dupree (Experts) | Unknown[8] | $11,094.64[9] (CP 302) | $0 |
| **Totals** | | **$295,461.64[10]** | **$20,571.92** |

**Timothy Fager - Breakdown of Fees**

| Attorney | Work Performed In Forfeiture | Requested Fees | Undisputed fees[11] |
|---|---|---|---|
| Dixon | None | $85,314.67 (CP 164; 208) | $0 |
| **Totals** | | **$85,314.67** | **$0** |

While the record is unclear regarding whether the Court's award of the $85,314.67 related to Mr. Dixon's fees, those fees appear to be related to the fees incurred from the criminal prosecution of Timothy. The trial

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Hass and Mr. Ramirez did defense of Steven's criminal charges; however, that billing does not show an entry for any work in the civil forfeiture matter. Since discovery on this attorney's fees issue was not scheduled, it is unclear if Mr. Ramirez opened a separate billing matter for his representation of claimant Steven in the civil forfeiture matter.

[6] This amount is the $85,314.67 in criminal defense fees also requested by Timothy Fager; the $6,575 (CP 505-506) the court awarded for work on the attorney's fees motion and the $2,000 awarded by the court for responding to objections to factual findings.

[7] $9,996.50 was originally billed to Steven Fager for work in civil forfeiture case (CP 261-264); $6,575 work on motion for attorney's fees (CP 505-506), and $2,000 for responding to objections to findings of fact and conclusions of law (CP 540)

[8] Work done by Experts was likely during stay of civil forfeiture proceedings since the only expert testimony was in the criminal case

[9] Total of Dr. Woodford and Alan Dupree's expert witness fees, lodging, and Dr. Woodford's airfare.

[10] It is unclear from the record why the amount awarded, $295,185.64, is $276 less than the amount requested. The total includes $85,314.67 also requested by Timothy Fager.

[11] Reasonable Attorney's fees in civil forfeiture action Appellants are not disputing

court explained that the attorney's fees/costs relating to the criminal prosecution against Timothy were included because "he's a part owner of DBVWC, Inc. . . . [and] everything I read suggests that the fees that are being charged pertained – ultimately pertained to this case." (RP 65 (8/5/15)). Thus, it appears that the trial court awarded the $85,314.67 to Timothy as his criminal defense fees and the remainder, $209,879.97, to Steven. (*See* RP 65 (8/5/15)).

What is clear from the record, however, is the civil forfeiture proceedings were stayed for essentially five years while the criminal prosecutions of Timothy and Steven were ongoing, (CP 35, 42), and there was only a handful of filings in the civil forfeiture matter (CP 308-309). The criminal prosecutions on the other hand included a nine-day suppression hearing, which ultimately resulted in dismissal of the charges against the Fagers, and a subsequent appeal of the order on the suppression motion. (CP 90). Neither Timothy nor Steven sought an award of costs or attorney' fees in their criminal proceedings or the appeal of the dismissal of this their criminal proceedings under RCW 69.50.505(6). (CP 103, see also CP 86-101 (not mentioning an attorney's fees request)).

Appellants now challenge the award to Timothy in whole, and the award to Steven in part: (1) Steven is only entitled to an award of attorney's fees expended in the defense of the civil forfeiture action, approximately $20,571.92, and (2) that Timothy is not a proper claimant

in the civil forfeiture action nor is he allowed to recover his criminal defense costs in the civil forfeiture action.

## V. ARGUMENT

Fundamentally at issue is the proper interpretation to be given to RCW 69.50.505(6). Statutory interpretation is a question of law that the appellate courts review *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

First, the trial court erred when it awarded attorney's fees and costs in the civil forfeiture action for work performed in the separate criminal proceeding. RCW 69.50.505(6) expressly limits recovery of attorney's fees and costs to work performed in "any proceeding to forfeit property" under Title 69 RCW, and therefore does not allow the Fagers to recover the attorney's fees/cost for work in separate criminal proceedings involving drug crimes charged under RCW 69.50.401(1). Had the Legislature intended to allow individuals charged with drug crimes under Title 69 RCW to recover attorney's fees, it would have used the broader and more typical "any proceedings under this title" language rather than limiting recovery of attorney's fees to "any proceedings <u>to forfeit property</u> under [Title 69]." RCW 69.50.505(6) (emphasis added). The language of RCW 69.50.505(6), and the Legislature's intent is unambiguous. Moreover, even if the language of RCW 69.50.505(6) is ambiguous – it is not – there is no rule of statutory construction that allowed the trial court

to construe RCW 69.50.505(6) to award of attorney's fees for work performed in a separate criminal proceeding.

Second, the trial court also erred when it awarded fees in the civil forfeiture action to Timothy, who had never submitted a written claim and was not a party to the civil forfeiture action. By the express terms of the statute, attorney's fees/costs can never be awarded to an individual who never filed the statutorily mandated written claim of interest in the seized property and, further, was never a party to the forfeiture action.

Besides the primary issue of statutory interpretation, the court abused its discretion by making several factual findings unsupported by the record, and unnecessary to determining the award of attorney's fees under RCW 69.50.505(6).

Accordingly, this Court should reverse the order awarding fees and costs insofar as it awards any fees to Timothy or permits the Fagers from recovering fees and costs for work performed in separate criminal proceedings; and on remand, the trial court should be instructed to enter a factual findings limited to the determination that reasonable attorney's fees for work actually performed for Steven in the civil forfeiture proceeding under RCW 69.50.505(6) which amounts to $20,571.92.

### A. RCW 69.50.505(6) Does Not Authorize Or Permit An Award of Costs and Attorney' Fees For Legal Work Performed In A Separate Criminal Proceeding.

The only authority offered by the Fagers or relied upon by the trial court for the award of attorney's fees for work in the criminal action was RCW 69.50.505(6). RCW 69.50.505(6), in the relevant part, provides:

> (6) In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant.

RCW 69.50.505(6) (emphasis added). As demonstrated below, RCW 69.50.505(6) does not authorize or permit the award of attorney's fees for work performed in a criminal proceeding.

**(1) The plain language of RCW 69.50.505(6) does not authorize attorney's fees for work performed in a criminal proceeding.**

The trial court violated the fundamental rules of statutory construction when it construed RCW 69.50.505(6) to contravene its plain meaning, and therefore committed error when it allowed the Fagers to recover attorney's fees incurred separate criminal proceedings, rather than limiting recovery of attorney's fees to work performed in a proceeding to forfeit property. The Washington Supreme Court has repeatedly held: "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638, 640 (2002) (*en banc*). "[A]n an unambiguous statute is not subject to judicial construction." *Id.* The courts must decline "to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it." *Id.* "[C]ourts may not read into a

statute things which it conceives the legislature has left out [even if] unintentionally." And as a corollary, the courts must give meaning to all the language in a statute so that no portion is rendered meaningless or superfluous. *Id.* "[T]he drafting of a statute is a legislative, not a judicial, function." *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987); *see also, Kilian*, 147 Wn.2d at 20.

The Washington Court of Appeals has previously ruled that attorney's fees provisions that contain unambiguous statutory language allowing recovery for "any proceeding under the chapter" is not so broad as to allow recovery of attorney's fees incurred in related proceedings brought under a different RCW. *In re MacGibbon*, 139 Wn. App. 496, 499, 161 P.3d 441, 442 (2007). In *MacGibbon*, the parties received a dissolution decree after approximately 20 years of marriage and having six children together. *MacGibbon*, 139 Wn. App. at 500. The decree of dissolution proceedings where governed by RCW 26.09, *see id.*, which allows the court to award reasonable attorney's fees in "any proceeding under this chapter." RCW 26.09.140 (2007). The ex-husband appealed the decree. *MacGibbon*, 139 Wn. App. at 500. Meanwhile while that appeal was pending, the ex-wife frequently had to seek assistance from Division of Child Support ("DCS"). *Id.* at 502. The ex-wife sought past due maintenance in two separate administrative proceedings, one for tax year 2001 and one for tax year 2002. *Id.* A different ALJ was assigned to each case. *Id.* Both ALJs found in the ex-wife's favor on the maintenance, but both ALJs denied the ex-wife's request for attorney's fees. *Id.* The ex-

husband appealed both rulings to the superior court, and a different superior court judge was assigned to each case. *Id.* Both superior court judges affirmed the maintenance determination; but reversed the decisions on attorney's fees, awarding attorney's fees to the ex-wife under RCW 26.09.140 (dissolution proceedings), and RCW 26.18.160 (child support enforcement), among other reasons. *Id.* at 503. The ex-husband than appealed both decisions to the Washington Court of Appeals, and the decisions were consolidated for appeal. *Id.*

Before the Court of Appeals, the ex-husband argued that the superior court erred in awarding attorney's fees because judicial reviews of administrative proceedings to secure maintenance and support for the dependent person are governed under chapter 74.20 RCW and 74.20A RCW. *See id.* at 504-505. He argued the court could not award fees under RCW 26.09.140 or RCW 26.18.160 for fees incurred in a proceeding under Title 74 RCW, even if the proceedings were related. *Id.* The Appellate Court first analyzed the statutory language in RCW 26.09.140, that provided a prevailing party may only recover attorney's fees in "any proceeding under this chapter." *Id.* at 504. It reasoned that "[t]the plain language" does not provide for fees incurred in a proceeding under Title 74 RCW. *Id.* It then turned to the similar attorney's fees provision in RCW 26.18.160 that provided fees in "any action . . . under this chapter." *Id.* at 505. The Court held the statute does not support the award "of fees of this type because they are not under Chapter 26.[18] RCW." *Id.* Notably, the Court ruled that "it may be true" that the ex-wife's forceful

argument that the policy reasons supporting an attorney's fees award in proceedings under chapters 26.09 and 26.18 RCW are equally applicable to proceedings under chapters 74.20 and 74.20A RCW. *Id.* at 505-506. Nonetheless, it found the "plain words of these statutes state that fees are not awardable in this case." *Id.* at 506. It reasoned this court "cannot create a statutory right to fees when the legislature has not done so" and the issue "must be addressed to legislature, not this court." *Id.*

Moreover, federal circuit court analyzing the practically identical federal civil forfeiture statute, under nearly identical circumstances, held that under the plain language of the statute "attorney's fees incurred in the defense of a criminal action, even if related to a civil forfeiture action . . . cannot be awarded [under the federal civil forfeiture statute.]" *U.S. v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, Al*, 579 F.3d 1315, 1319 (11th Cir. 2009), *cert. denied* 560 U.S. 927, 130 S.Ct. 3350, 176 L.Ed.2d 1224 (2010). "Washington Courts have frequently relied on federal cases in interpreting our state['s forfeiture] statute." *City of Bellevue v. Cashier's Check for $51,000 & $1,130.00 in U.S. Currency*, 70 Wn. App. 697, 701, 855 P.2d 330 (1993). Accordingly, *317 Nick Fitchard Rd.* is particularly instructive here. *See 317 Nick Fitchard Rd.*, 579 F.3d at 1319.

In *317 Nick Fitchard Rd.*, the federal government filed a civil *in rem* forfeiture against two bank accounts and a parcel of real property. *Id.* at 1317. The government stayed the civil proceeding to prevent the discovery process from adversely affecting the related criminal

investigation and prosecution. *Id.* The government subsequently filed a criminal indictment against the owners of the property subject to forfeiture. *Id.* However, after a seven-day bench trial, the defendants were acquitted on all counts. *Id.*

After the acquittal, the federal government moved to dismiss the civil forfeiture. *Id.* at 1317-18. The claimants argued that a dismissal entitled them to attorney's fees under the Civil Asset Forfeiture Reform Act (CARA) of 2000, 28 USC § 2465(b)(1) (2006). *Id.* at 1318. The district court agreed, characterizing the criminal case as a "related proceeding" and finding the attorney fees incurred therein were recoverable in the civil forfeiture because the work was "useful and of a type ordinarily necessary to secure the final result obtained from the [forfeiture] litigation." *Id.* The district court reasoned:

> "[T]he work done by the claimants' attorneys in the criminal case was clearly useful as it directly resulted in the dismissal of the civil forfeiture case. In fact, the claimants were required to litigate the civil forfeiture case through the criminal case because of the stay imposed on the civil forfeiture case. . . . If the defendants were acquitted, as they were, then that result would not have had res judicata effect on this civil forfeiture case . . . . Thus, the acquittal in the criminal case directly led to the dismissal of the civil forfeiture case."

The Eleventh Circuit reversed the lower court and vacated the award. *Id.* at 1326.

Important to the appellate court's holding was the plain language of the statute: "On its face, the language of CAFRA's fee-shifting

provision appears to contemplate only the award of attorney fees incurred in the civil forfeiture action. *See* CAFRA § 4(a), 28 USC § 2465(b)(1) ("*[I]n any civil proceeding to forfeit property* . . . ."). The Court further ruled: "The express terms of CAFRA's fee-shifting provision do not go further and expressly allow the award of fees incurred in defense of a related criminal case in the civil forfeiture action if the claimants are acquitted of the criminal charges." *Id.* at 1320-21 (emphasis added).

Additionally, the Eleventh Circuit noted the distinction between the civil and criminal systems: "The purpose of defending a criminal prosecution is not to recover property, but to defend the accused's freedom." *Id.* at 1323. The goal of fee-shifting provision in the civil forfeiture statute was designed to allow claimants to recover fees for their efforts to recover their property, and not to allow recovery of fees for defending against criminal charges. *See id.*

Thus, the Eleventh Circuit concluded that the lower court's characterization as to why attorney fees were appropriate was "precisely why" it could not hold the fees were recoverable under CAFRA: "the fees were incurred in the defense of a criminal action, not a civil forfeiture action or proceeding in support of a civil forfeiture action[ ]" and the "fee-shifting provision does not expressly state that claimants in civil forfeiture proceedings can obtain in the civil proceeding those fees they incur as criminal defendants in a related criminal case." 579 F.3d at 1320-22.

The present case is nearly identical. Both cases involved similarly worded forfeiture statutes with the same three provisions:

| 28 USC 2465(b)(1)(A) | RCW 69.50.505(6) |
| --- | --- |
| • … [I]n any civil proceeding to forfeit property under any provision of Federal law | • In any proceeding to forfeit property under this title, |
| • in which the claimant substantially prevails, | • where the claimant substantially prevails, |
| • the United States Shall be liable for (A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant; … | • the claimant is entitled to reasonable attorney's fees reasonably incurred by the claimant. … |

With the exception that the criminal defendants in *317 Nick Fitchard Rd.* were acquitted, *317 Nick Fitchard Rd.* involved nearly identical factual circumstances to those here:

- Parallel proceedings: one a criminal prosecution, the other a civil forfeiture. *See* 579 F.3d at 1317 and CP 1, 86.
- The *in rem* civil forfeiture proceeding was stayed pending the outcome of the criminal prosecution. *See* 579 F.3d at 1317 and CP 34-35.
- The civil forfeiture action in both cases were dismissed only after lengthy and expensive courtroom proceedings in the criminal prosecutions prevented the *in rem* proceedings from continuing. *Compare* 579 F.3d at 1317-18 *with* CP 86.
- Both trial courts awarded approximately $300,000 in attorney's fees and costs. *See* 579 F.3d at 1319; CP 540.

Here, the clear, unambiguous language of RCW 69.50.505(6) only permits the trial court to award attorney fees to a party that substantially prevails "in any proceeding to forfeit property." RCW 69.50.505(6). Like in *MacGibbon*, there is no ambiguity in the language. *See MacGibbon*, 139 Wn. App. at 504-505. As the statutory language in *MacGibbon* limited attorney's fees to those incurred in proceedings under a specific chapter of the RCW, the language at issue here in RCW 69.50.505(6) limits attorney's fees to those in a specific "proceeding to forfeit property." *See id.* Just as the wife in *MacGibbon* could not recover fees incurred in a proceeding under a separate chapter (despite compelling policy arguments), the Fagers cannot recover fees incurred in a separate criminal "proceeding." *See id.*

Comparing the more typical "in any proceeding under this title" language in *MacGibbon* to the "[i]n any proceeding <u>to forfeit property</u> under this title" at issue here, the Legislature added language specifically intending to limit the available attorney's fees to proceedings <u>to forfeit property</u>. *See* RCW 69.50.505(6) (emphasis added); *MacGibbon*, 139 Wn. App. at 504. Had the legislature intended to allow criminal defendant's charged with drug crimes under RCW 69.50.401(1) to recover attorney's fees when there is also a separate civil forfeiture proceeding under RCW 69.50.505, it would have used the typical "any proceedings under this title" language, and omitted the "to forfeit property" restriction. But it did not. Instead, the legislature specifically limited the recoverable attorney's fees to those in "any proceeding to forfeit property [under Title 69 RCW]"

thereby excluding from recovery fees incurred in separate criminal proceedings under Title 69 RCW. RCW 69.50.505(6).

As in *Nick Fitchard Rd.*, the express terms of the civil forfeiture statute do not go further and allow the award of fees incurred in defense of a criminal case in a civil forfeiture action. 579 F.3d at 1320-21. Had the legislature intended to change the typical American Rule (where criminal defendants bear the costs) and allow the award of fees in criminal proceedings, it knows how to create such language and could have easily done so. The statutory language used does not state that fees may be recovered that are incurred in the defense of a criminal case, in any related proceeding, or for that matter, depending on a criminal defendant's purported, after-the-fact purpose of any related proceeding. Instead, the legislature intentionally limited the fees recoverable under RCW 69.50.505(6) to those fees "[i]n any proceeding to forfeit property." RCW 69.50.505(6).

Ignoring the plain language of RCW 69.50.505(6) and citing no authority, the trial court held: RCW 69.50.505(6) allows claimants to recover fees in a separate proceeding if "the primary purpose behind the incurred fees was to prevent the forfeiture." CP 540. But RCW 69.50.505(6) provides no language that allows a court to award fees incurred in a separate proceeding based on a factual finding of a criminal defendant's asserted after-the-fact, self-serving, and subjective 'primary purpose' for defending a criminal prosecution. *See* RCW 69.50.505(6). The Legislature, not the trial court, is the proper authority to determine

whether adding language to RCW 69.50.505(6) to allow attorney's fees when there is such a factual finding is appropriate. *See MacGibbon*, 139 Wn. App. at 506; *see also Kilian*, 147 Wn.2d at 21.

Like in *MacGibbon*, a party's subjective intent, the reason a party acted, or the assertion that the policy behind on statute applies equally to another, does not allow the trial court to convert the plain language of "any proceeding to forfeit property" to allow an award of attorney's fees incurred in a separate proceeding. *See MacGibbon*, 139 Wn. App. at 506. RCW 69.50.505(6) does not allow an award of attorney's fees incurred in a criminal prosecution regardless of how related the proceeding is to a separate civil forfeiture proceeding, or how strongly the trial court feels that a different interpretation would make better policy. *See id.* Policy issues "must be addressed to legislature, not this court." *MacGibbon*, 139 Wn. App. at 506. When the statute is unambiguous the court must apply the plain meaning without adding language. *Kilian*, Wn.2d at 21.

Moreover, if RCW 69.50.505(6) truly and plainly allowed an attorney's fees for work done in a criminal prosecution under Title 69 RCW, the Fagers would have moved the criminal court, or this Court on appeal of the dismissal of the criminal charges under RCW 69.50.401(1), to award fees under RCW 69.50.505(6). The Fagers did not move for fees in the criminal matters, and for good reason: RCW 69.50.505(6) does not allow attorney's fees for work done in the defense of criminal prosecutions under RCW 69.50.401(1).

The trial court may not rewrite an unambiguous statute so it conforms to policy the trial court, or anyone else other than the legislature, would have desired. The Washington Supreme Court has long held that if an individual is unhappy with an unambiguous statute, the remedy is to petition the legislature for a change in the law. *Manker v. American Sav. Bank & Trust Co.*, 131 Wn. 430, 438, 230 P. 406, 409 (1924) (*en banc*). The Legislature is the proper body to conduct studies, evaluate the impact on the budget and federal funding that may be affected by a change, and weigh the varied policy considerations of the requested change. The trial court erred when it interpreted RCW 69.50.505(6) to reach the result it desired rather than what the Legislature intended through the plain language of the statute.

RCW 69.50.505(6) affirmatively limits the award of attorney's fees to proceedings "to forfeit property." The Fagers' criminal prosecutions were not proceedings to forfeit property. This fact alone is fatal to any claim for attorney's fees for work done in defense of the criminal prosecutions without the need for further inquiry.

**(2) Even if RCW 69.50.505(6) was ambiguous – it is not – the rules of statutory construction do not permit the strained interpretation the trial court adopted.**

Notably, the trial court did not find RCW 69.50.505(6) ambiguous when it states, "[i]n any proceeding to forfeit property under this title," nor could it. (CP 540). A statute is ambiguous "if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because

different interpretations are conceivable." *Kilian*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). There is no ambiguity here. The statute limits the award of attorney fees to work performed in <u>any proceeding to forfeit property</u>. RCW 69.50.505(6).

Even if RCW 69.50.505(6) was ambiguous, no rule of statutory construction permits the trial court to award attorney's fees for work performed in a separate criminal proceeding.

**i. A statutory waiver of sovereign immunity must be interpreted strictly.**

As an initial matter, RCW 69.50.505(6) renders the State or its arms liable for attorney's fees and, thus, amounts to a partial waiver of sovereign immunity, which must be strictly construed in favor of the State. *See e.g.*, *Ardestani v. I.N.S.*, 502 U.S. 129, 130, 112 S. Ct. 515, 517, 116 L. Ed. 2d 496 (1991). The Washington Supreme Court recently reaffirmed this longstanding rule: "waivers of sovereign immunity 'must be construed strictly in favor of the sovereign' 'and not' 'enlarge[d] . . . beyond what the language requires." *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272, 284, 333 P.3d 380, 386 (2014) (*en banc*). This Court has also ruled: "A statutory waiver of sovereign immunity . . . will apply only in those circumstances specifically delineated by statute" and that it will "not read into a statute provisions that are not there; nor . . . modify a statute by construction." *State v. Thiessen*, 88 Wn. App. 827, 829, 946 P.2d 1207, 1208 (1997) (internal citations omitted).

In *Thiessen*, Mr. Thiessen successfully defended himself against criminal assault charges. *Thiessen*, 88 Wn. App. at 828. In RCW 9A.16.110(2), the Legislature partially waived sovereign immunity to allow a person "found not guilty by reason of self defense" to recover a broad range of damages including attorney's fees, lost time, and other expenses involved in the person's defense. *Id.* at 829 n. 1. The trial court awarded Mr. Thiessen $3,250 for reimbursements under RCW 9A.16.110(2) and statutory interest. *Id.* at 828. The State appealed the award of interest. *Id.* The statutory interest award was apparently premised on either RCW 9A.16.110 (self-defense reimbursement), RCW 4.56.115 (general statute setting interest on judgments), or RCW 4.56.115 (allowing interest against the state and is political subdivisions for judgments based on tortious conduct). *Id.* The Court of Appeals reversed the award of interest. *Id.* It ruled that the doctrine of sovereign immunity requires the State to consent before a court can hold it liable for interest on 905 debts, and strictly construed the statutes purporting to waive sovereign immunity for interest. *Id.* at 829. Turning first to the two statutes without a clear waiver of sovereign immunity, it found: "Neither RCW 4.56.110, which provides for interest on judgments generally, nor RCW 9A.16.110(2), which provides for self-defense reimbursement, authorize interest on reimbursement awards [against the State or its subdivisions.]" *Id.* Addressing the RCW 4.56.115, which contains a limited waiver of immunity for interest on "judgments founded on the tortious conduct of the [S]tate," the Court found: the self-defense interest award was not

"founded on the [State's] tortious conduct" or based on an independent cause of action." *Id.* at 829-30. Accordingly, it held "the waiver of sovereign immunity in RCW 4.56.115" did not apply. *Id.* at 830.

There is sound policy for construing statutes that waive sovereign immunity strictly. Construing waivers of sovereign immunity that allow damages against the State according only to the statute's express and plain meaning protects the State from unanticipated losses. When the Legislature waives sovereign immunity it does so expressly so the State and its arms can plan and insure against such losses. Any amendment or expansion of a limited waiver of sovereign immunity must be done by clear Legislative action, not judicial function.

Despite the Washington Supreme Court's mandate that partial waivers of sovereign immunity must be strictly construed, the Fagers argued RCW 69.50.505(6) must be liberally construed, and the trial construed RCW 69.50.505(6) so liberally that it contravened RCW 69.50.505(6)'s plain meaning. (CP 299). The liberal construction banner relied on by the trial court to contort the plain meaning of the statute was apparently based on two cases cited by the Fagers, *Snohomish Reg'l Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 329 (2009) and *Guillen v. Contreras*, 169 Wn.2d 769, 777, 238 P.3d 1168, 1171 (2010), as amended (Dec. 21, 2010). Neither of these cases, however, overrule *sub silentio* the long standing Washington law that requires partial waivers of sovereign immunity to be interpreted strictly. When both cases are examined closely they do not stand for the

proposition that the trial court can liberally construe a statutory waiver of sovereign immunity to contradict the plain meaning of the statute.

In *Snohomish Reg'l Drug Task Force*, the drug task force moved for summary judgment to forfeit six properties because the claimants did not notify the seizing agency of their interest the property within 90 days despite claimants' attorneys having entered notices of appearances in the actions. 150 Wn. App. at 389-91. Before the trial court, the drug task force argued that the notices of appearance merely advised the parties and the court that the claimants were represented by counsel, but failed to describe the claimants' "claim of ownership or right to possession" of the items to be forfeited as required in the statute. *Id.* at 398. The trial court granted summary judgment for the drug task force, finding that the claimants failed to give timely written notice contesting the forfeiture. *Id.* at 397. This Court reversed holding that the notice of appearances met the statutory requirement because there was no requirement for the notice of claim to contain anything more than the claimants' "contact information so that further proceedings could be scheduled." *Id.* In reaching this holding, this Court correctly pointed out that "forfeitures are not favored" and that statutes allowing for forfeiture of one's property should not be strictly construed in favor of forfeiture; rather forfeiture statutes should be liberally construed to allow claimants a full adversarial hearing prior to the forfeiture of their property. *Id.* at 393, 400.

Comparatively here, the Court is <u>not</u> interpreting statutory language <u>allowing a forfeiture</u>; rather it is interpreting language <u>allowing</u>

attorney's fees against the State which implicates a waiver of sovereign immunity. *See id.* Although a statute allowing for the forfeiture of property by the State should be construed against the State and in favor of the property holder, a statute allowing attorney's fees against the State must be strictly construed in favor of the State because of its sovereign immunity. *Real Prop. Known as 20803 Poplar Way*, does not overrule long standing Washington law providing that waivers of sovereign immunity must be strictly construed in favor of the State. *See id.*

Similarly, *Guillen v. Contreras* does not overrule Washington law, nor does it allow for such a liberal interpretation of a waiver of sovereign immunity that would allow attorney's fees in a separate criminal proceedings to be awarded in a civil proceeding under RCW 69.50.505(6). *See Guillen*, 169 Wn.2d at 775 (only considering the meaning of "substantially prevails"). In *Guillen*, after an apparent drug deal gone wrong resulted in the death of a young man, the police seized the deceased's car, $57,990 found near what resembled a kilogram of cocaine in the home where the deceased passed, and $9,342 in case found on the body during the autopsy. *Guillen*, 169 Wn.2d at 771-74. The deceased's infant son was served with a notice of intent to forfeit the car and the $9,342. *Id.* at 772. A woman living at the home was separately served with a notice of intent to forfeit the $57,990. *Id.* at 772-73. The two forfeiture matters were joined for a single hearing. *Id.* at 773. The deceased's family was awarded the car and the $9,342, and the city prevailed on the forfeiture of the $57,990. *Id.* The family moved for

attorney's fees arguing they "substantially prevailed" in the forfeiture proceeding. *Id.* The trial court reasoned that it could not determine based on the result if either party "substantially prevailed" and denied an award of attorney's fees. *Id.* at 772. The Court of Appeals upheld the trial court's decision based on "prevailing party" jurisprudence. *Id.* at 775.

The Washington Supreme Court, however, reversed and remanded to the trial court. *Id.* at 780. It noted that RCW 69.50.505(6) allowed attorney's fees in two instances: (1) against the State when a party "substantially prevails," and (2) between two or more claimants alleging rights to a piece of property when one is the "prevailing party." *Id.* 774-75. The Court reasoned that under the elementary rules of statutory construction the Legislature must have intended "substantially prevails" to mean something different than "prevailing party." *Id.* at 776-77. In determining the legislature's intent when using the "substantially prevail[ing]" party language rather than the "prevailing party" language, the Court turned to the legislative history. *Id.* at 777. The Court reasoned that when the Governor partially vetoed the bill, he noted that it provides greater protection to citizens whose property is subject to forfeiture. *Id.* at 777 n. 3. The Court therefore concluded that the Legislature intended "substantially prevailing" to be read more liberally than "prevailing party," and thus held an award of attorney's fees was allowed when a claimant receives "substantial relief—something more than nominal—as opposed to receiving half or more of what they sought." *Id.* at 777. The

Court also noted that his approach was in accordance with the federal courts' approach to attorney's fees in civil forfeiture cases. *Id.* at 778.

Notably, the *Guillen* Court, only interpreted the ambiguous "substantially prevails" under the long standing, elementary statutory interpretation principal of meaningful variation, nothing more. *Id.* at 776-77. Since the Legislature used "substantially prevails" rather than "prevailing party" the Court considered that difference to be significant and interpreted the language accordingly. *Id.* To the extent the *Guillen* Court asserted the statute as a whole should be construed liberally, that assertion is *dicta* unnecessary to reach its legal conclusion on its interpretation of "substantially prevails." There is no indication that the *Guillen* Court overruled the long standing law that statutes waiving sovereign immunity must be interpreted strictly in favor of the State, or for that matter, that statutes abrogating the American Rule should be construed narrowly. *See id.* The *Guillen* Court did not even address the issues of sovereign immunity or the American Rule and therefore cannot have made a ruling regarding either. *See id.*

Here, applying the same "meaningful variation" rule of statutory interpretation used in *Guillen* to the language at issue here, the Legislature changed the typical "in any proceeding under the title" language to "any proceeding to forfeit property under this title." RCW 69.50.505(6) (emphasis added). As the *Guillen* Court reasoned, this change from the more typical language is significant, and should be given meaning. *See Guillen*, 169 Wn.2d at 776-77. The Legislature limited a recovery of

attorney's fees to proceedings to forfeit property because it intended to exclude an award of fees incurred in the defense of a separate criminal proceeding under Title 69 RCW. A close reading of *Guillen* and application of the meaningful variation rule of statutory interpretation here supports reversal of the trial court's order. *See id.*

Similarly, the *Guillen* Court's reliance on the federal court's approach, and understanding it did not overrule long standing Washington law regarding waivers of sovereign immunity and the American Rule, also support reversal of the trial court's order. *See id.* The trial court's order not only contradicts federal precedent, but it also departs from long standing Washington law regarding waivers of sovereign immunity and the interpretation of statutes abrogating the common law American Rule. The *Guillen* Court's decision was not an instruction to the trial courts to no longer follow the federal approach or to disregard long standing Washington law.

Accordingly, the trial court erred when it interpreted RCW 69.50.505(6) against the State, so liberally as to give no meaning to the phrase in a "proceeding to forfeit property," and disregarded the federal approach.

**ii. Notwithstanding a strict interpretation, the Legislature did not intend Title 69 RCW to abrogate the American Rule nor is "any proceeding to forfeit property" superfluous.**

"[S]tatutes in derogation of the common law must be construed narrowly." *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159

Wn.2d 292, 303, 149 P.3d 666, 672 (2006) (*en banc*) (citations omitted). The common law in Washington is the American Rule, which provides that both parties bear their own attorney's fees, and has long been held applicable to criminal proceedings. *See State v. Sizemore*, 48 Wn. App. 835, 838-39, 741 P.2d 572 (1987) (noting chap. 4.84 RCW does not apply to criminal proceedings; finding that "[n]o statutory authority exists for the award of attorney fees at trial"; and citing the legal maxims that "'costs are the creature of statue' and there is 'no inherent power in the courts to award costs' absent express statutory authority."); *See also e.g.*, *City of Sequim v. Malkasian*, 157 Wn.2d 251, 284, 138 P.3d 943 (2006). The Washington Supreme Court has declined to construe statutes to modify the American Rule unless the statute is explicit in doing so. *Cosmopolitan Eng'g Grp., Inc.*, 159 Wn.2d at 303, 306.

First, when the language of the statute is unambiguous, the Legislature's intent should be determined from the language of the statute without resort to extrinsic sources. *Kilian*, 147 Wn.2d at 20. As discussed above, nothing in the plain language of the RCW 69.50.505(6) shows the Legislature explicitly intended to allow criminals charged with drug crimes to recover their criminal defense fees in abrogation of the American Rule. If the legislature intended to explicitly allow criminal defendants charged with drug crimes to recover their attorney's fees, it could have done so by at the very least removing from the attorney's fees provision the limitation that fees are only recoverable in "any proceeding to forfeit property." *See* RCW 69.50.505(6); *Cosmopolitan Eng'g Grp.*,

*Inc.*, 159 Wn.2d at 306. The Legislature, however, explicitly limited recoverable fees to those in "any proceeding to forfeit property." RCW 69.50.505(6).

Second, although the need to resort to extrinsic sources in itself is conclusive evidence that the Legislature did not explicitly abrogate the American Rule for criminal defendants charged with drug crimes, the legislative history also does not support the trial court's strained interpretation of RCW 69.50.505(6). The trial court did not cite, nor has Clallam County found, anything in the legislative history that indicates the Legislature was troubled by the fact that civil forfeiture claimants who are also criminal defendants bear the costs of their criminal defenses under the traditional American Rule. If the Legislature had concerns about a criminal defendant bearing the costs of his or her defense, or wanted to change the long standing American Rule for criminal defendants, it could have easily drafted language to allow criminal defendants to recover their attorney's fees incurred in defense of criminal charges. It did not. Instead, it limited the recoverable fees to those in a proceeding to forfeit property. RCW 69.50.505(6).

While Governor Locke indicated that RCW 69.50.505(6) provides greater protection to people whose property was wrongfully seized in a forfeiture action, those protections were: (1) law enforcement assumed the burden of proof in any forfeiture proceeding, and (2) claimants could recover their reasonable attorney's fees if they were the substantially prevailing party in any proceeding to forfeit property. Laws of 2001, ch.

168, § 1(e) – (f).[12] There is no indication from Governor Locke or the Legislative history that the goal of providing greater protection to civil forfeiture claimants extends so far as to allow criminal defendants to recover attorney's fees incurred in a separate criminal proceeding. *See Id.*

RCW 69.50.505(6) was not intended to serve as an end-run around the American Rule, nor is it intended to create a windfall whenever a related prosecution ends with anything other than a criminal conviction. Providing a windfall to those with dismissed drug crimes because of a successful motion to suppress (rather than actual innocence) would eviscerate the Legislature's intent to deter crime by removing the profit incentive from drug trafficking. *See* Laws of 1989 ch. 271, § 211.

Moreover, the Legislature is presumed to be aware, if a criminal defendant believes he was subject to malicious prosecution he has a recognized cause of action in tort. *See Clark v. Baines*, 150 Wn.2d 905, 911, 84 P.3d 245 (2004). There is nothing in Title 69 RCW or the legislative history that suggests the legislature intended to remove the long-established elements and burdens of a malicious prosecution claim and permit a claimant to receive the legal costs in their criminal defense simply by demonstrating "something more than nominal" relief in their civil forfeiture proceeding. *See Guillen*, 169 Wn.2d at 777.

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[12] *See also* House Floor Debate, Representative Dickerson, 4/5/2001 (2:20 – 3:51) ftp://ftp.leg.wa.gov/Pub/Audio/; Senate Floor Debate, Senator Constantine, 4/12/2001 (31:04 – 32:30) http://www.digitalarchives.wa.gov/Record/View/62F7DBA81D341A0035C2E525AE9A2B0D (last visited Feb. 6, 2016).

Furthermore, when looking at the explicit intent of RCW 69.50.505(6), the Court should not interpret the statute so it renders the "[i]n any proceeding to forfeit property" language superfluous. *Kilian*, 147 Wn.2d at 21; *see also e.g.*, *Stone v. Chelan Cty. Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736, 739 (1988) (*en banc*). The plain language of "[i]n any proceeding to forfeit property" in RCW 69.50.505(6) indicates that attorney's fees must be for work done in a "proceeding to forfeit property." To interpret the attorney's fees statute to allow recovery of fees in criminal proceedings or any other proceeding than one to forfeit property would render the Legislature's specification of the proceeding meaningless. The statute should be construed to give meaning to the Legislature's explicit use of "[i]n any proceeding to forfeit property." Nothing in the legislative history indicates the legislature intended the result reached by the trial court.

**iii. The trial court's interpretation leads to absurd results.**

The statutory interpretation the trial court erroneously adopted should be rejected as it leads to unlikely, absurd, and strained consequences. *See Kilian*, 147 Wn.2d at 21 ("The Court must also avoid constructions that yield unlikely, absurd or strained consequences.").

First, as the Fagers argued and the trial court found, the criminal charges were brought and pursued by the Jefferson County Prosecutor. (CP 535) (Finding of Fact No. 1). However, the trial court ordered Clallam County to pay for the attorney's fees the Fagers incurred in that

Jefferson County prosecution. (CP 540). Once again, there is nothing in RCW 69.50.505(6) that authorized or allowed the trial court to order Clallam County to pay for the legal defense costs the Fagers incurred defending criminal charges brought and pursued by the Jefferson County Prosecutor on behalf of the State.

Such an unconscionable result is even more pronounced in other circumstances. For example, if a city busts a large cocaine operation on a piece of land and then initiates a civil forfeiture of the property, the city's municipal court does not have jurisdiction to prosecute the felony. Thus, the matter will be referred to the county prosecutor for the State to initiate prosecution. Since there is a criminal prosecution pending, the civil forfeiture matter will likely be stayed. Meanwhile, the city has no control over the felony criminal prosecution. The criminal prosecution could be lengthy, result in a dismissal for many reasons including technicalities over which the city has no control, or simply result in an acquittal due to a persuasive defense attorney raising 'reasonable doubt.' But under the trial court's interpretation of RCW 69.50.505(6), the city would be liable for the all the attorney's fees incurred in the criminal proceeding brought by the State despite the stay in city's separate civil proceeding.

Second, the trial court's strained interpretation of RCW 69.50.505(6) apparently required almost five pages of factual findings relating to the Fagers' asserted, after-the-fact "primary purpose" for defending against the criminal charges. (CP 535-539). Nothing in the plain language of the statute, its legislative history, or any appellate

opinion suggests that the Legislature intended to reward some, but certainly not every successful criminal defendant, based on a trial court's factual finding of the criminal defendant's asserted "primary purpose" for defending against criminal charges. Under such reasoning a city initiating forfeiture proceedings may never know if it will be subject to paying a claimant's fees incurred in defending a criminal prosecution by the State until after the criminal prosecution is complete. If the criminal defendant gets an acquittal for any reason, she may then make a filing in the civil forfeiture action saying the only reason she defended the criminal prosecution was to prevent the forfeiture of her property. The city must then litigate the legitimacy of the defendant/claimant's asserted "primary purpose" for defending the criminal charges. The trial court's interpretation creates additional unnecessary litigation never intended by the statute, and creates the potential for financial strapped cities and counties to be liable for huge attorney fees awards they could not plan for.

As a practical matter, upholding the trial court's strained interpretation of RCW 69.50.505(6) will also likely spell an end to civil forfeiture proceedings, and adversely affect prosecution of drug crimes. The Legislature found civil forfeiture was necessary because: "state and local governmental agencies incur immense expenses in the investigation, prosecution, adjudication, incarceration, and treatment of drug-related offenders and the compensation of their victims; drug-related offenses are difficult to eradicate because of the profits derived from the criminal activities . . . and [forfeiture] will provide a significant deterrent to crime

by removing the profit incentive of drug trafficking." Laws of 1989 ch. 271 § 211. Why would a local government entity initiate a civil forfeiture when it could be liable for attorney's fees incurred in a separate criminal proceeding by the State, particularly, when the government entity could be liable simply because charges are dismissed due to the criminal defense attorney calling the only expert on a key issue? (*See* CP 87). If government entities stop initiating civil forfeiture actions, the Legislature's intent when enacting the statute will be thwarted.

Additionally, the trial court's interpretation of RCW 69.50.505(6) leads to absurd results that are quite pronounced here. The Fagers brought a separate action for malicious prosecution in federal court requesting as damages their attorney's fees incurred in the defense of their criminal prosecutions. (CP 401-435). That case was dismissed in January of 2015. (CP 455). Six months after that case was dismissed, the Fagers sought recovery of the same criminal defense fees in the present action. (CP 286-303). The trial court awarded the Fagers their criminal defense fees despite their malicious prosecution claims being dismissed, and without requiring the Fagers to prove the long standing elements of malicious prosecution. (CP 534-541). The trial court's interpretation thus creates an end run around proving a claim for malicious prosecution and, had the Fagers prevailed on their malicious prosecution claim, would have created duplicative damage awards. There is no indication that the Legislature intended to allow those charged with drug crimes, and only those charged

with drug crimes, to circumvent the requirements of proving a malicious prosecution to obtain such damages.

The trial court's order should be reversed to prevent such absurd and unconscionable results.

### B. Timothy Fager Failed To Satisfy The Statutory Prerequisites Of RCW 69.50.505 And Is Not Entitled To An Award Of Attorney Fees In This Forfeiture Action.

While neither Steven nor Timothy are entitled to an award of attorney's fees in this civil forfeiture action for the legal defense work in their criminal actions, there is an additional reason the trial court erred when awarding attorney's fees to Timothy. Timothy never filed a written claim in the underlying forfeiture, nor did he move to intervene in the civil proceeding. As such, Timothy is not a party entitled to his reasonable attorney's fees under RCW 69.50.505(6).

RCW 69.50.505(5) requires any person claiming an interest in property subject to forfeiture to notify the seizing agency, in writing, of his or her claim of ownership. In cases involving real property, the claimant must submit written notice of his or her claim within 90 days of the actual seizure. RCW 69.50.505(5). It is the filing of the claim that triggers the right to a "reasonable opportunity to be heard" on their claim. RCW 69.50.505(5). If a notice of claim is not timely filed, the property is forfeited and the purported owner cannot demand a proceeding to contest the seizure. *See* RCW 69.50.505(4); RCW 69.50.505(5); RCW 10.105.010(4).

The plain language of RCW 69.50.505(6) reads "where the *claimant* substantially prevails, the *claimant* is entitled to reasonable attorneys' fees reasonably incurred by the *claimant*." (Emphasis added). A timely filed notice of claim is a condition precedent to becoming a party that may substantially prevail in any forfeiture action. *See Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005) (a party must intervene and prevail on his own claims if he is to be a prevailing party entitled to relief); *Junkin v. Anderson*, 12 Wn.2d 58, 72, 120 P.2d 548, 123 P.2d 759 (1941) ("[T]he term party may be defined as an interested litigant whose name appears of record as a plaintiff or defendant, or in some other equivalent capacity, and over whom the court has acquired jurisdiction.").

While the requirement for a written claim requires only that the claimant give the seizing agency minimal notice of the claimant's identity, and a notice of appearance from the claimant's attorney is sufficient, a claimant still must provide timely notice. *Espinoza v. City of Everett*, 87 Wn. App. 857, 867, 943 P.2d 387 (1997); *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 401, 208 P.3d 1189 (2009).

In *Snohomish Regional Drug Task Force*, the seizing agency initiated a forfeiture action against real property owned by Yatin Jain. 150 Wn. App. at 390. A few days later, Yatin Jain conveyed to a family member, Vijay Jain, a quitclaim deed to the real property subject to forfeiture. *Id.* The attorney representing Yatin, and the attorney

representing Vijay, timely entered notices of appearance in the forfeiture action. *Id.* The appellate court held these two notice of appearance constituted sufficient written notice under RCW 69.50.505(5). *Id.* at 401.

In *Espinoza*, the seizing agency initiated a forfeiture action against a vehicle in which cash was found inside. 87 Wn. App. at 861-62. The seizing agency notified the registered owner of the forfeiture regarding the vehicle, but not the money. *Id.* at 862. In response, the registered owner's attorney timely mailed a letter to the seizing agency, informing it that his client claimed ownership and a right of possession to the vehicle. *Id.* However, in the same letter, the attorney also indicated that he represented a "group of individuals" that were the lawful owners of cash also seized by the government. *Id.* The attorney did not explicitly identify the individual members of the group claiming the cash, but requested a hearing for both the vehicle and the money. *Id.* The appellate court found that the claimants, including the unidentified members of the group, had timely informed the government of their claims through their attorney's letter. *Id.* at 867.

In *Key Bank of Puget Sound v. City of Everett*, 67 Wn. App. 914, 916, 841 P.2d 800 (1992), law enforcement seized a vehicle used to deliver cocaine. The seizing agency served the bank that had a possessory interest in the vehicle of the seizing agency's intent to forfeit the car. *Id.* The bank never responded to the notice, and filed no written claim. *Id.* The bank subsequently filed a replevin action against the municipality to recover its interest in the vehicle. *Id.* The Court of Appeals held the bank

could not recover its interest in property because it failed to timely file a written claim contesting the forfeiture. *See id.* at 920.

Here, Clallam County commenced the civil forfeiture on October 9, 2009, providing notice to all known individuals/entities that had an interest in the property. (CP 14-17). A title search identified Steven Fager, DBVWC, Inc. and the Lucille M. Brown Living Trust as having a known interest in the realty subject to forfeiture. (CP 7-13).

Only Steven timely filed a notice of appearance. (CP 31). By its very terms, this notice of appearance was specific to Steven Fager alone, and it made no reference to the DBVWC, the Lucille M. Brown Living Trust, Timothy Fager, or any other unidentified members with interest in the property.[13] (CP 31). No one other than Steven filed a timely notice of claim or appearance.

The first time DBVWC, Inc. asserted an interest in the property, via Steven's motion for summary judgment, was well outside the 90-day window required by RCW 69.50.505(5). (CP 51-52 (motion for summary judgment stating it was filed by Steven "in his individual capacity as well as in his role as DBVWC's representative."). Like in *Key Bank*, DBVWC's untimely notice was insufficient. *See Key Bank of Puget Sound v*, 67 Wn. App. at 920.

[13] Additionally, the notices of substitution filed (8/11/20 and 4/24/2015) in the civil forfeiture pertain solely to Steven Fager. (CP 37-38, 45-47).

To the extent Timothy is relying on his interest in DBVWC and DBVWC late filed 'notice' of claim, Timothy's position suffers from another fatal flaw: Timothy's interest in DBVWC does not afford him personal standing in the civil forfeiture action. A corporation is a "separate person." RCW 1.16.080; RCW 69.50.101(cc). Moreover, "a corporation's shareholders have no property interest in that corporation's physical assets because the corporations are separate organizations with different privileges and liabilities from the shareholders." *Northwest Cascade, Inc. v. Unique Construction*, 187 Wn. App. 685, 702, 351, P.3d 172 (2015) (*citing Christensen v. Skagit County*, 66 Wn.2d 95, 97, 401 P.2d 335 (1965)). Timothy was never a "claimant" under RCW 69.50.505(6) that could be entitled to attorney's fees. (See also CP 287 (Steven's motion for attorney's fees not including Timothy as a "claimant"). While Timothy may have a financial stake in DBVWC, that interest did not afford him personal standing in the civil forfeiture action, let alone to recovery attorney's fees he incurred in his personal and separate criminal proceeding.[14]

While Timothy never asserted a personal claim to ownership of the property, the first time he even asserted a claim for attorney's fees was after the County voluntarily moved to dismiss the forfeiture action. (CP 107 (motion to dismiss filed on May 26, 2015); CP 286 (Motion for

[14] Moreover, the State of Washington never charged DBVWC with a crime. Thus, DBVWC did not incur any attorney's fees or defense costs through a criminal prosecution.

attorney's fees filed on June 25, 2015)). Timothy only asserted a claim for attorney's fees via Steven's motion for attorney's fees. (CP 164). Even if such a filing constituted notice of a claim of personal ownership, it was filed almost six years after the forfeiture had commenced (CP 1), well after the county moved to dismiss (CP 107), and well outside the 90-day window required by RCW 69.50.505(5). Therefore, Timothy is not entitled to any remedy under RCW 69.50.505. *See e.g.*, *Key Bank*, 67 Wn. App. at 920.

The portion of the attorney's fees (apparently) awarded to Timothy for Mr. Dixon's representation of Timothy in Timothy's criminal proceedings, $85,314.67, should be vacated.

**C. The trial court erred by entering various unnecessary and speculative factual findings.**

The trial court adopted findings of fact submitted by the Fagers that contain an abundance of superfluous material and all too little of the facts needed to properly resolve central legal issues. For example, the trial court did not find Timothy timely filed a notice of claim in the civil forfeiture proceeding sufficient to have standing to assert a claim for attorney's fees as required under RCW 69.50.505(4). The trial court also did not make a finding regarding which fees were incurred by Steven as opposed to Timothy. The trial court also did not make a finding regarding what fees were awarded for work actually performed in the civil forfeiture proceeding, and what fees were awarded for work performed in the Fagers' criminal proceedings.

Under CR 52, as construed by several decisions of the Washington Supreme Court, it is necessary for the trial court to make ultimate findings of fact concerning all issues material to resolving the legal question decided. *Mayes v. Emery*, 3 Wn. App. 315, 321, 475 P.2d 124, 129 (1970). As a corollary, it is unnecessary for the trial court to make findings regarding every item of evidence submitted in a case, and the trial court should not enter findings of fact that are irrelevant or unnecessary to resolution of the legal issues. *See Bowman v. Webster*, 42 Wn.2d 129, 134, 253 P.2d 934, 937 (1953) (*en banc*) (listing cases). When, as here, the factual findings are so incomplete or irrelevant as to deprive the appellant the opportunity to challenge them in consideration of the legal question to be resolved on appeal, appellate courts have remanded with instructions to the trial court to enter findings as set forth in the appellate court's opinion with the appropriate conclusions of law. *See id.* at 939; *see also Mayes*, 3 Wn. App. at 321.

While the central inquiry in this appeal is whether the trial court applied the proper legal interpretation to RCW 69.50.505(6), which if decided in the County's favor makes the majority of the court's factual findings irrelevant, the County challenges several findings as superfluous, or unsupported by the record as detailed below.

(1) Finding of Fact No. 3: the corporation that had a possessory interest in the property subject to forfeiture was the "Discovery Bay Village Wellness Collective."

First, the title report shows no entity named the Discovery Bay Village Wellness Collective. (CP 7, 9, 12). There is no evidence in the record, such as a report from the Secretary of State's business registration website that shows any entity registered as "Discovery Bay Village Wellness Collective." Third, the Fagers and the Court frequently refer to the Fagers as operating a water company on the property (CP 163, 167, 461, 490, 536 at ¶ 4).

(2) Finding of Fact 3: the value of the property subject to forfeiture was over $500,000.

The title report shows the assessed value of the property, when the forfeiture proceeding began was $33,900 for Parcel A, and $85,200 for Parcel B. (CP 9, 12). While Steven signed a declaration stating the property value was over $500,000, there is no foundation for Steven's assessment. (CP 167) There is no indication Steven has any qualifications to determine the value of the real estate. (CP 167). It is unclear if he is even limiting his valuation to the real estate, or how he arrived at the valuation. (*See* CP 167) Since Steven only refers to the "property seized" rather than the real property specifically, is he including the street value of the marijuana strains that were seized on the property? Steven's assessment is simply too speculative, contradicted by the assessment records, and irrelevant to the legal issue before the court.

(3) Finding of Fact No. 8: The State of Washington would have pursued the criminal prosecution if Steven Fager had first moved to suppress in the civil forfeiture action.

First, there is no evidence that the State of Washington made any representation it would continue criminal proceedings if the forfeiture actions were dismissed. If evidence was suppressed in the forfeiture proceeding before the superior court, there would be no reason to believe a different result would be obtained in the criminal prosecutions. Moreover, the Fagers' assertion that the criminal proceeding would have continued even if they first succeeded in the civil forfeiture proceeding directly contradicts the narrative they are trying to construct now, *i.e.* that the only reason they were prosecuted was to obtain a forfeiture. If that was true, then if the forfeiture was dismissed, then the State – according to Fager's narrative – would have no reason to continue to prosecute.

(4) Finding of Fact 14: that the State of Washington's conduct in the criminal prosecution supports a higher than average award of attorney's fees, and that the County continued to unnecessarily delay after the resolution of criminal prosecution.

First, this finding of fact really relates to the central legal issue of whether attorney's fees incurred in the defense of a criminal prosecution can be awarded under RCW 69.50.505(6). That error is addressed at length above. Second, the finding of fact that contentious litigation occurred in the civil forfeiture proceeding is belayed by the record. The day before Mr. Dixon appeared and moved for summary judgment in this proceeding, Steven Fager's prior counsel filed a Joint Status Report requesting additional time for "settlement negotiations." (CP 43). While the contents of those negotiations or the parties' positions are not part of the record, nor would they be admissible, it is clear the County was

willing to attempt to work out a resolution to avoid unnecessary motion practice just as had occurred with several other forfeiture actions. (CP 349-99). Indeed, the County moved to voluntarily dismiss the forfeiture action when it was clear that a negotiated resolution would not occur because of Mr. Dixon's expeditiously filed motion for summary judgement after his notice of appearance. (CP 107-109).

(5) Finding of Fact No. 15(d) & (e): that the Fagers reasonably incurred the approximately $295,000 in defending the civil forfeiture action, and that the amount was reasonable regarding the work performed in the civil forfeiture action.

First, this finding of fact relates primarily to the central legal conclusion regarding whether attorney's fees incurred in the defense of criminal proceedings are awardable under RCW 69.50.505(6). The County's assignment of error to an award of attorney's fees for work performed in the criminal proceeding as not compensable under RCW 69.50.505(6) is addressed at length above. The civil forfeiture action was stayed for nearly five years, and there was only a handful of filings . (CP 35, 42, 308-309). The billing statements attributable to work performed in the civil forfeiture action are broken down with citations to the record in the attached Appendix. The amount attributable to the work actually performed in the civil forfeiture action is $20,571.92. (Appendix at pp. 1-2) Although the county believes that a phone call rather than drafting a motion for summary judgment would have resulted in the County voluntarily dismissing the civil forfeiture action without unnecessarily increasing attorney's fees, the County does not contest that the $20,571.92

for work actually performed in the civil forfeiture proceeding was reasonable. As a legal issue, the County contests the remainder of the amount awarded, approximately $275,000, as not compensable because it was not for work in the civil forfeiture proceeding despite whether the work was reasonable for the criminal proceedings.

(6) Finding of Fact No. 15(g): Steven and Timothy Fager are entitled to reimbursement.

Again, this is really a legal conclusion on the interpretation of RCW 69.50.505(6) couched as a factual finding. The County addresses this legal error at length above. Timothy is not entitled to reimbursement. Steven is entitled to reimbursement under RCW 69.50.505(6) for work performed "in [the] forfeiture proceeding," which amounts to $20,571.92, but not fees for work performed in his criminal proceeding.

(7) Findings of Fact 6-11, 14-15: there was more than one claimant in the civil forfeiture proceeding.

First, the only notices of appearances were filed on behalf of Steven. (CP 30-33, 37-38, 44-45). Second, Steven is repeatedly referred to as the claimant, the one who prevailed, and the one seeking reimbursement. (*See e.g.* CP 481 ("Steve Fager has prevailed and he is now seeking reimbursement."). Third, the Court never found that Timothy, or anyone else timely filed a notice of claim within the statutory time period. RCW 69.50.505(4). There is no evidence in the record showing any claimant other than Steven timely filed a notice of claim. He was the only claimant.

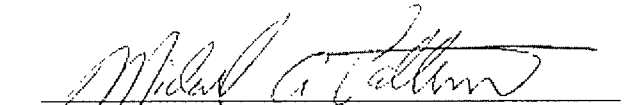
(8) Finding of Fact No. 9, 15(c), and Legal Conclusion No. 2: the primary purpose for incurring the attorney's fees in the criminal proceeding was to prevent the civil forfeiture.

The Fagers conceded that "it is not necessary for [the trial court] to make a finding [regarding the primary purpose for the Fager's opposing the criminal proceedings.]" (CP 484). Indeed, the primary purpose of the Fagers' actions in the criminal proceeding is irrelevant to the legal question here, *to wit*: the interpretation of RCW 69.50.505(6). Despite the Fagers conceding and therefore the County not requesting a hearing or discovery on the "primary purpose" issue, the trial court held: "where the primary purpose behind the incurred fees was to prevent the forfeiture, the statute allows for reimbursement of those fees." (CP 540). The trial court's finding is superfluous because RCW 69.50.505(6) does not allow recovery of attorney's fees depending on a trial court's finding of a criminal defendant's after-the-fact, subjective intent in defending a criminal prosecution.

## VI. CONCLUSION

Based on the arguments presented above, Clallam County respectfully requests this Court reverse the award of fees and costs; remand this matter back to the trial court with directions to award Steven $20,571.92, the costs and attorney's fees for work actually performed in the civil forfeiture proceeding, and deny all other requests for fees or costs.

DATED this 16th day of February, 2016.



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*OPNET v. Certain Real Property*
Court of Appeals of the State of Washington, Division II
Cause No. 481840-7

BRIEF OF APPELLANTS

# APPENDIX

**Steven Fager - Breakdown of Fees**

| Attorney (Dates Rep.) | Work performed in forfeiture | Fees requested in forfeiture | Fees the County does not dispute as properly awarded in the forfeiture proceeding | Total criminal defense fees |
|---|---|---|---|---|
| Steinborn (9/12/09-8/9/10) | Not. of Appear.(CP 30)<br>Agreed stay (CP 34) | $10,000<br>(CP 170) | $2,000<br>(No billing statements provided (CP 160)) | $25,000<br>(CP 160) |
| Ramirez (8/9/10-4/7/15) | Notice of Withdrawal and Substitution (CP 37)[15] | $0<br>(CP 170) | $0 | Unknown |
| Hass (No Appearance) | None | $180,477.33<br>(CP 170; 204) | $0 | $196,907.33<br>(CP 203) |
| Dixon (4/7/15-9/18/15) | Notice of Withdrawal and Substitution (CP 46);<br>Motion for summary judgment prior to voluntary dismissal (CP 51)<br><br>Motion for attorney's fees (e.g. CP 286)<br><br>Responding to objections to proposed findings (CP 525) | $85,314.67[16]<br>(CP 170, 208),<br><br>$6,575 (CP 505-506)<br><br>$2,000<br>(CP 540) | $18,571.92 total as shown below:<br><br>($9,996.50 was originally billed to Steven for civil forfeiture case (CP 261-264)<br><br>$6,575 for work on attorney's fees motion (CP 505-506), and<br><br>$2,000 for responding to objections to findings of fact and conclusions of law<br>(CP 540)) | Not Applicable as Mr. Dixon did not represent Steven in Steven's criminal proceeding. |
| Woodford and Dupree (Experts) | No expert testimony in civil forfeiture cases | $11,094.64[17]<br>(CP 302) | $0 | $11,094.64 |
| **Totals** | | **$295,461.64**[18] | **$20,571.92** | **$233,001.97** |

[15] Mr. Ramirez did not provide any billing in support of his fees incurred in the civil forfeiture matter. Mr. Ramirez's former partner, Mr. Hass, provided billings for work Mr. Hass and Mr. Ramirez did defense of Steven's criminal charges; however, that billing does not show an entry for any work in the civil forfeiture matter. Since discovery on this attorney's fees issue was not allowed, it is unclear if Mr. Ramirez opened a separate billing matter for his representation of claimant Steven in the civil forfeiture matter.

[16] This is the same $85,314.67 that Timothy also requested.

[17] Total of Dr. Woodford and Alan Dupree's expert witness fees, Mr. Dixon and Dr. Woodford's motel expenses, and Dr. Woodford's airfare.

[18] It is unclear from the record why the amount awarded, $295,185.64, is $276 less than the amount requested. The $295,461.64 total also includes the same $85,314.67 that was requested by Timothy.

**Timothy Fager - Breakdown of Fees**

| **Attorney (Dates Rep,)** | **Work performed in forfeiture** | **Fees requested in forfeiture** | **Fees the County does not dispute as properly awarded in the forfeiture proceeding** | **Total criminal defense fees** |
|---|---|---|---|---|
| Dixon (No Appearance) | Never entered a notice of appearance on Timothy's behalf | $85,314.67 (CP 164; 208) | $0 | $88,744.81 (CP 230-260)<br><br>(Mr. Dixon's declaration mentions $98,741.73 (CP 208) paid by the Fagers, this amount appears to be the $88,744.81 billed to Timothy (CP 230-260) and $9,996.50 billed to Steven for his representation of Steven in the civil forfeiture matter (CP 261-264)) |
| **Totals** | | **$85,314.67** | **$0** | **$88,744.81** |

## CERTIFICATE OF SERVICE

I, John Carlo Balcita, hereby declare that on this 16th day of February, 2016, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

| ATTORNEY NAME & ADDRESS | METHOD OF DELIVERY |
|---|---|
| Brian Wendt<br>Clallam County Prosecuting Attorney's Office<br>223 East Fourth St., Suite 11<br>Port Angeles, WA 98362 | ■ Electronic Mail |
| James R. Dixon<br>Dixon & Cannon, Ltd.<br>601 Union Street, Suite 3230<br>Seattle, WA 98101 | ■ Electronic Mail<br>■ Legal Messenger |

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

DATED this 16th day of February, 2016 at Seattle, Washington.

John Carlo Balcita, Legal Assistant