

FILED
SUPREME COURT
STATE OF WASHINGTON
3/9/2018 2:30 PM
BY SUSAN L. CARLSON
CLERK

NO. 95013-0

SUPREME COURT OF THE STATE OF WASHINGTON

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.

SUPPLEMENTAL BRIEFING UNDER RAP 13.7(d)

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I. ARGUMENT

A. THIS COURT SHOULD NOT REWRITE UNAMBIGUOUS STATUTORY LANGUAGE UNDER THE GUISE OF INTERPRETATION

Contrary to what Steven and Timothy Fager (“the Fagers”) argue, (Petition for Review at 10-17), their interpretation of RCW 69.50.505(6) cannot be harmonized with the plain language of the statute. On its face, RCW 69.50.505(6) precisely delineates the type of proceeding in which a claimant may be entitled to attorney fees with the following phrase — “[i]n any proceeding to forfeit property under this title.” This phrase cannot be reasonably interpreted to mean anything but what it says. *State v Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). “Plain words do not require construction.” *Keller*, 143 Wn.2d at 276.

If a statute, such as RCW 69.50.506(6), is clear on its face, then its plain meaning should be derived from the language of the statute (and related statutes), not outside sources. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007); *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002); *Multicare Med. Ctr. v. Dep’t of Soc. Health Servs.*, 114 Wn.2d 572, 582, 70 P.2d 124 (1990). If the plain language is subject to only one interpretation, then this Court’s inquiry is at an end. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000); *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).

Here, the Fagers argue that this Court should ignore what the Legislature unambiguously said in RCW 69.50.505(6) and side with them because RCW 69.50.505(6) should be “read liberally,” *Guillen v. Contreras*, 169 Wn.2d 769, 777, 238 P.3d 1168 (2010), and “forfeitures are not favored,” *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 392, 208 P.3d 1189 (2009). Essentially, the Fagers invite this Court to read into RCW 69.50.505(6) an entitlement for attorney fees incurred in criminal proceedings that “served a dual or secondary purpose” for the civil forfeiture proceedings. (Petition for Review at 4).

While the Fagers would have this Court agree with them solely as a matter of public policy, (Petition for Review at 14-17), RCW 69.50.505(6) does not include, or even refer to, any phrase that would support the Fagers’ strained interpretation. Simply put, the unambiguous statutory language of RCW 69.50.505(6) does not create a separate entitlement for attorney fees incurred in other proceedings—whether related or unrelated, civil or criminal.¹ And this Court “‘must not add words where the legislature has chosen not to include them.’” *Lake*, 169 Wn.2d at 526 (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

¹ Certainly, the Legislature could have drafted a statute that contains such expansive language; but the Legislature chose not to do so.

Furthermore, and contrary to what the Fagers argue, (Petition for Review at 12-15), liberal construction of a statute does *not* mean that a court may read into the statute language that is not there. *See Klossner v. San Juan County*, 93 Wn.2d 42, 47, 605 P.2d 330 (1980) (“this court’s several decisions that the wrongful death statute is to be liberally construed do not mean we may read into the statute matters which are not there”); *King County v. City of Seattle*, 70 Wn.2d 968, 991, 425 P.2d 887 (1967); *Lowry v. Dep’t of Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (“We are not unmindful of the rule that the workmen’s compensation act shall be liberally construed in favor of its beneficiaries, but, where the language of the act is not ambiguous and exhibits a clear and reasonable meaning, there is no room for construction.”); *see also State v. Reis*, 183 Wn.2d 197, 214, 351 P.3d 127 (2015) (“It is not this court’s job to remove words from statutes or to create judicial fixes, even if we think the legislature would approve.”); *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.”); *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980) (“As attractive as the State’s proposed solution may be, we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.”).

The Fagers’ tortured interpretation of RCW 69.50.505(6) cannot be harmonized with the plain language of the statute. It is they—not Clallam

County—who attempt to add language to this statute under the guise of interpretation. (Petition for Review at 12-15). While the Fagers question the public policy of RCW 69.50.505(6), (Petition for Review at 14), this Court cannot, under the guise of construction, substitute its view, the trial court’s view, or the Fagers’ view for that of the Legislature. *Courtright v. Sahlberg Equip., Inc.*, 88 Wn.2d 541, 545, 563 P.2d 1257 (1977); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 421, 832 P.2d 489 (1992); *see also Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

After all, this Court is “not a super legislature.” *Courtright*, 88 Wn.2d at 545. “This court should resist the temptation to rewrite an unambiguous statute to suit [its] notions of what is good public policy, recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function.’” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (quotations and citations omitted)). Therefore, departure from the unambiguous statutory language of RCW 69.50.505(6) is improper. *See Jackson*, 137 Wn.2d at 725. And the Fagers’ statutory interpretation of RCW 69.50.505(6) must fail.

B. ATTORNEY FEES UNDER RCW 69.50.505(6) ARE LIMITED TO ONLY THOSE FEES REASONABLY INCURRED IN CIVIL *IN REM* FORFEITURE PROCEEDINGS

1. The Plain Language of RCW 69.50.505 and Even its Legislative History Attest to its Civil Nature

Nevertheless, in an effort to support their argument, the Fagers rely on the assumption that the criminal proceedings against them were part

and parcel of the forfeiture proceedings against their property. (Petition for Review at 11). But this assumption is unreasonable and unfounded, as both this Court and the United States Supreme Court have rejected such a position. *See State v. Catlett*, 133 Wn.2d 355, 364-67, 945 P.2d 700 (1997); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991); *see also United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984) (“the forfeiture remedy cannot be said to be co-extensive with the criminal penalty”); *Various Items of Pers. Prop. v. United States*, 282 U.S. 577, 581-82, 51 S. Ct. 282, 75 L. Ed. 558 (1931).²

The United States Supreme Court has explained that criminal proceedings are *in personam*, while forfeiture proceedings against property are *in rem*. *Ursery*, 518 U.S. at 289. “In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished.” *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring) (quoting *Various Items*, 282 U.S. at 581).³ In a forfeiture proceeding, “[i]t is the

² There has been much debate about civil *in rem* forfeiture proceedings as they relate to the Fourth and Fifth Amendments to the United States Constitution. *See, e.g., Catlett*, 133 Wn.2d 355. The constitutionality of RCW 69.50.505(6), however, is not at issue in this appeal.

³ *See also United States v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL*, 579 F.3d 1315, 1323 (2009) (“The purpose of defending a criminal prosecution is not to recover property, but to defend the accused’s freedom.”).

property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.” *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring) (quoting *Various Items*, 282 U.S. at 581). In other words, *in personam* criminal proceedings are distinct from *in rem* forfeiture proceedings. *Ursery*, 518 U.S. at 288-89. And the United States Supreme Court has had little trouble in ruling that *in rem* forfeiture proceedings, like those under RCW 69.50.505, are civil—not criminal—in nature. *See Ursery*, 518 U.S. at 288-89; *89 Firearms*, 465 U.S. at 366 (“the forfeiture mechanism ... is not an additional penalty for the commission of a criminal act, but rather a separate civil sanction, remedial in nature”).⁴

Similarly, this Court has ruled that the plain language of RCW 69.50.505 and its legislative history attest to its civil nature. *Catlett*, 133 Wn.2d at 366. In 1989, among other things, the Legislature added real property to the types of property that could be seized and forfeited under the Uniform Controlled Substance Act (chapter 69.50 RCW). *See* Final Bill Report, 2SHB 1793 (1989). In amending the statute, the Legislature clearly announced, “*Seizure and forfeiture are civil processes and are independent of the outcome of any criminal charges that might be brought against the owner of the property.*” *See* Final Bill Report, 2SHB

⁴ Washington courts frequently look to federal civil forfeiture law to interpret state civil forfeiture law. *Guillen*, 169 Wn.2d at 778 n.5; *City of Bellevue v. Cashier’s Check for \$51,000.00 & \$1,130.00 in U.S. Currency*, 70 Wn. App. 697, 701, 855 P.2d 330 (1993) (citing *Rozner*, 116 Wn.2d at 351).

1793 (1989) (emphasis added).⁵ In fact, this Court has stated, “With respect to the property itself, *forfeiture is strictly a civil proceeding in rem.*” *Rozner*, 116 Wn.2d at 351 (emphasis added).

It is important to note that the attorney fee provision at issue in RCW 69.50.505(6) was not enacted until 2001,⁶ or almost 12 years after the Legislature announced that “[s]eizure and forfeiture are civil processes,” *see* Final Bill Report, 2SHB 1793 (1989), or almost 10 years after this Court stated that “forfeiture is strictly a civil proceeding in rem,” *Rozner*, 116 Wn.2d at 351, or almost four years after this Court ruled that “the plain language of RCW 69.50.505 and its legislative history attest to its civil nature.” *Catlett*, 133 Wn.2d at 366.

As this Court has stated, “[T]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.” *Price v. Kitsap Transit*, 125 Wn. 2d 456, 463-64, 886 P.2d 556 (1994). Here, the language of RCW 69.50.505(6) contains no expression of intent to override the Legislature’s own view from 1989 that “[s]eizure and forfeiture are civil processes.” *See* Final Bill Report, 2SHB 1793 (1989). In fact, in amending the statute in 2001, the Legislature specifically

⁵ The Legislature’s statement reflects the United States Supreme Court’s long-held understanding that civil *in rem* forfeitures are independent of criminal *in personam* punishments. *See Ursery*, 518 U.S. at 293-96 (Kennedy, J., concurring).

⁶ Laws of 2001, chapter 168, § 1(f); *see also Guillen*, 169 Wn.2d at 775.

referred to RCW 69.50.505 as “[t]he *civil* forfeiture statute.” See Final Bill Report, ESHB 1995 (2001) (emphasis added).

Moreover, the language of RCW 69.50.505(6) contains no expression of intent to override this Court’s statement that “forfeiture is strictly a civil proceeding in rem.” Compare Final Bill Report, ESHB 1995 (2001) with *Rozner*, 116 Wn.2d at 351. And the language of RCW 69.50.505(6) contains no expression of intent to override this Court’s ruling that “the plain language of RCW 69.50.505 and its legislative history attest to its civil nature.” Compare Final Bill Report, ESHB 1995 (2001) with *Catlett*, 133 Wn.2d at 366.

In short, the language of RCW 69.50.505(6) contains no expression of intent to expand the applicability of RCW 69.50.505(6) to criminal *in personam* proceedings—regardless of whether criminal *in personam* proceedings “served a dual or secondary purpose,” (Petition for Review at 4), for the civil *in rem* forfeiture proceedings.⁷ A priori, “any proceeding to forfeit property,” see RCW 69.50.505(6), refers only to a civil *in rem* proceeding, not a criminal *in personam* proceeding. Thus, attorney fees under RCW 69.50.505(6) must be limited to those fees reasonably incurred by the claimant in any civil *in rem* proceeding to forfeit property.

⁷ The Fagers utterly fail to address the legislative history of RCW 69.50.505(6) anywhere in their Petition for Review.

2. The Eleventh Circuit Court of Appeals Has Held that Attorney Fees Incurred in the Defense of a Criminal Action, Even if Related to a Civil Forfeiture Action, Cannot Be Awarded Under a Civil Forfeiture Fee-Shifting Provision Similar to RCW 69.50.505(6)

The Fagers are not the first claimants to inject uncertainty and confusion into a civil *in rem* forfeiture statute in an attempt to recover yet more attorney fees. In *United States v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL*, 579 F.3d 1315, 1317 (2009), the federal government filed a civil *in rem* forfeiture complaint under 18 U.S.C. § 981(a)(1)(A) (2006) against two of a corporation's bank accounts and a parcel of real property where the corporation was located. The federal government moved to stay the civil forfeiture proceeding on the basis that civil discovery would adversely affect its ability to conduct a related criminal investigation or the prosecution of a related criminal case. *317 Nick Fitchard Road*, 579 F.3d at 1317. The district court judge granted the government's motion. *317 Nick Fitchard Road*, 579 F.3d at 1317.

Subsequently, the federal government filed a criminal indictment against the corporation and its president. *317 Nick Fitchard Road*, 579 F.3d at 1317. The criminal case was assigned to a different district court judge, who, after a seven-day bench trial, acquitted all defendants. *317 Nick Fitchard Road*, 579 F.3d at 1317.

After the acquittal, the federal government filed a motion to dismiss the civil forfeiture case. *317 Nick Fitchard Road*, 579 F.3d at 1317-18. The claimants then argued that the dismissal entitled them to

attorney fees under the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), 28 U.S.C. § 2465(b)(1) (2006). *317 Nick Fitchard Road*, 579 F.3d at 1318. The fee-shifting provision in CAFRA provided in pertinent part:

[I]n any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—

(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant; [and]

(B) post-judgment interest, as set forth in Section 1961 of this title.

28 U.S.C. § 2465(b)(1) (2006).

The district court agreed with the claimants, opining that they were entitled to attorney fees not only in defending the civil forfeiture proceedings, but also in defending the criminal proceedings. *317 Nick Fitchard Road*, 579 F.3d at 1318. Among other things, 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] had been convicted in the criminal case, then the property would have been immediately subject to forfeiture. If the defendants were acquitted, as they were, then that result would not have had res judicata effect on this civil forfeiture case.... [T]he government had no intention of pursuing the civil forfeiture case after [the defendants] were acquitted. Thus, the acquittal in the criminal case directly led to the dismissal of the civil forfeiture case. Indeed, the only way for the claimants to obtain a dismissal of the civil forfeiture case was by obtaining an acquittal in the criminal case.

317 Nick Fitchard Road, 579 F.3d at 1318 (quoting *United States v. Certain Real Prop.*, 556 F. Supp. 2d 1252, 1261-62 (N.D. Ala. 2008)).

On appeal, however, the Eleventh Circuit Court of Appeals reversed and vacated the district court's award of attorney fees, holding that "attorney fees incurred in the defense of a criminal action, even if related to a civil forfeiture action as in the present case, cannot be awarded under [the civil forfeiture's fee-shifting provision]." *317 Nick Fitchard Road*, 579 F.3d at 1319.

The Eleventh Circuit Court of Appeals noted that, "[o]n its face, the language of [the civil forfeiture's] fee-shifting provision appears to contemplate only the award of attorney fees incurred in the civil forfeiture action." *317 Nick Fitchard Road*, 579 F.3d at 1320.⁸ The Eleventh Circuit Court of Appeals then took exception with the district court's justification for awarding attorney fees incurred in defending the criminal proceedings:

The district court's characterization states precisely why we cannot find that the attorney fees incurred in defending the

⁸ The Eleventh Circuit Court of Appeals also was guided by principles of sovereign immunity, which bar the award of attorney fees without explicit congressional authorization. *317 Nick Fitchard Road*, 579 F.2d at 1320. This Court, too, has been guided by principles of sovereign immunity when analyzing awards against the State. *See, e.g., Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 171 Wn.2d 54, 248 P.3d 83 (2011) (a waiver of sovereign immunity can be either express or implied). Here, for reasons already stated, the Legislature neither expressly waived nor impliedly waived sovereign immunity for attorney fees incurred in criminal *in personam* proceedings when it enacted RCW 69.50.505(6).

criminal case are recoverable in the civil forfeiture action under the auspices of [the civil forfeiture’s fee-shifting provision]: 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.

317 Nick Fitchard Road, 579 F.3d at 1320.

As with RCW 69.50.505(6), the civil forfeiture fee-shifting provision at issue in *317 Nick Fitchard Road* did not “expressly allow the award of fees incurred in defense of a related criminal case in the civil forfeiture action if the claimants [were] acquitted of the criminal charges.” *317 Nick Fitchard Road*, 579 F.3d at 1320. As with the legislative history of RCW 69.50.505(6), the Eleventh Circuit Court of Appeals found no evidence, when viewing the civil forfeiture fee-shifting provision at issue in *317 Nick Fitchard Road*, that “Congress implicitly provided that the fees incurred in defense of a related criminal case can be recouped in the civil case.” *317 Nick Fitchard Road*, 579 F.3d at 1322. And as this Court should do with RCW 69.50.505(6), the Eleventh Circuit Court of Appeals resisted the temptation to rewrite the civil forfeiture fee-shifting provision at issue in *317 Nick Fitchard Road* in order to fashion an additional protection where Congress chose not to do so. *317 Nick Fitchard Road*, 579 F.3d at 1321-22.

3. This Court May Not Rewrite an Unambiguous Statute to Suit the Fagers’ Notions of What Is—or Is Not—Good Public Policy

Given that no contractual provision, statutory provision, or well recognized principle of equity entitled the Fagers to an award of attorney fees that they incurred in the criminal *in personam* proceedings, the

“American Rule” applied to these attorney fees in this case. *Panorama Vill. Condo. Owners Ass’n Bd. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 191, 692 P.2d 867 (1984). Under the “American Rule,” the Fagers bore the attorney fees that they incurred in the criminal *in personam* proceedings. See 25 David K. DeWolf, Keller W. Allen, Darlene Barrier Caruso, WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 14:16 (3d ed.).⁹

While the Fagers argue that they will have only a “pyrrhic victory” without an award of attorney fees that they incurred in the criminal *in personam* proceedings,¹⁰ (Petition for Review at 14), and that the

⁹ There is nothing in the legislative history of RCW 69.50.505(6) that indicates the Legislature was troubled by the fact that claimants in a civil *in rem* forfeiture proceeding, who also are defendants in a criminal *in personam* proceeding, bear the costs of their criminal defenses under the traditional “American Rule.” Thus, this Court should not endorse the Fagers’ attempt to create a new right of recovery by using RCW 69.50.505(6) as an end-run around the “American Rule.”

¹⁰ The Fagers conveniently fail to address anywhere in their appellate briefing that they already had an opportunity to recover the attorney fees that they incurred in the criminal proceedings. Clerk’s Papers (CP) at 401-35. In December 2014, the Fagers filed and served a “Complaint for Violation of Civil Rights and Personal Injury” in the United States District Court for the Western District of Washington. CP at 401-35. The Fagers included 15 federal and state claims in their Complaint, including a state claim for malicious prosecution. CP at 430-31. In January 2015, the district court dismissed the federal claims with prejudice and dismissed the state claims without prejudice. CP at 455. (Subsequently, the Ninth Circuit Court of Appeals affirmed the dismissal and the United States Supreme Court denied a petition for writ of certiorari. *Fager v. Olympic Peninsula Narcotics Enforcement Team*, 700 Fed. App. 569 (9th Cir.

application of chapter 69.50 RCW will result in “judicial inefficiency,” (Petition for Review at 15), these arguments are better directed to the Legislature. *See Sedlacek*, 145 Wn.2d at 390; *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). The Fagers’ arguments, even assuming *arguendo* that they are sound from a policy standpoint, do not reflect the current status of the law in Washington.¹¹

As such, this Court may not read into RCW 69.50.505(6) matters that are not in it. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 605 (1990). This Court may not create legislation under the guise of interpreting RCW 69.50.505(6). *Associated Gen. Contractors v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996 (1994). And this Court should refuse the temptation to rewrite an unambiguous statute to suit the Fagers’ notions of what is—or is not—good public policy. *See Sedlacek*, 145 Wn.2d at 390; *Jackson*, 137 Wn.2d at 725; *see also Roberts v. Dudley*, 140 Wn.2d 58, 79, 993 P.2d 901 (2000) (Talmadge, J., concurring). Therefore, the Fagers’ statutory interpretation of RCW 69.50.505(6) must fail.

2017), *cert. denied*, 138 S. Ct. 740 (2018).) Rather than refile their state claims in state court (presumably because their state law claims would be barred by the statute of limitations), the Fagers simply waited six months and filed their motion for attorney fees under RCW 69.50.505(6). CP at 286-303.

¹¹ This Court is obliged to give the plain language of a statute its full effect, even when the results may seem unduly harsh. *Geschwind*, 121 Wn.2d at 841.

C. Timothy Fager Was Not, Is Not, and Cannot Be a Claimant Under RCW 69.50.505

With a classic obfuscation argument, (Petition for Review at 17-19), the Fagers attempt to divert this Court's attention from the undeniable fact that Timothy Fager *never* filed a notice of claim in the civil forfeiture proceedings, nor did he move to intervene in the civil forfeiture proceedings. Clerk's Papers (CP) at 31, 355-60. As such, Timothy Fager is not a party entitled to his reasonable attorney 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 serve written notice of his or her claim within 90 days of the actual seizure. RCW 69.50.505(5). It is the service of this claim of ownership that affords the claimant a "reasonable opportunity to be heard as to the claim or right." RCW 69.50.505(5). But if the claimant does not timely serve a claim of ownership, then the property "shall be deemed forfeited." RCW 69.50.505(4); *see also* RCW 10.105.010(4).

Before commencing the civil forfeiture in this case, Clallam County conducted a title search, which identified Steven Fager, the Discovery Bay Village Wellness Collective, Inc. ("DBVWC, Inc."), and the Lucille M. Brown Living Trust as having a known interest in the real property subject to civil forfeiture. CP at 7-13. Importantly, the title search did *not* identify Timothy Fager as having a known interest in the

real property. CP at 7-13. Thus, under RCW 60.50.505(3), Clallam County was not required to notify Timothy Fager. Instead, under RCW 69.50.505(3), Clallam County simply was required to notify Steven Fager, DBVWC, Inc., and the Lucille M. Brown Living Trust, which it did on October 9, 2009. CP at 14-17.

Moreover, the facts are undisputed that Steven Fager was the only individual and/or entity to timely serve a notice of claim. CP at 31. The notice of appearance filed by Steven Fager's attorney was on behalf of Steven Fager only. CP at 31. And neither Steven Fager nor his attorney informed Clallam County that Timothy Fager had any known right or interest in the real property. CP at 31, 355-60.¹²

DBVWC, Inc., first asserted an interest in the real property via Steven Fager's summary judgment motion, which was filed on April 24, 2015. CP at 51-64. Even then, *more than five years and six months* after Clallam County had filed the Summons and Notice of Intended Seizure and Forfeiture, (CP at 14-17), DBVWC, Inc., still had not served a notice of claim. Even assuming *arguendo* that this statement was sufficient to notify Clallam County of DBVWC, Inc.'s interest in the real property, it was made well outside the 90-day window under RCW 69.50.505(5) for DBVWC, Inc., to notify Clallam County in writing of its claim to

¹² Thus, this case is unlike *Espinoza v. City of Everett*, 87 Wn. App. 857, 862, 943 P.2d 387 (1997), *review denied*, 134 Wn.2d 1016 (1998), where the claimant's attorney informed the city that he represented a group of unidentified individuals who were lawful owners of a large sum of money that was seized by the city.

ownership. In fact, from October 9, 2009, until April 24, 2015, there was nothing in the record to alert Clallam County that DBVWC, Inc., (or even Timothy Fager) contested the seizure and forfeiture. *Contra Snohomish Reg'l Drug Task Force*, 150 Wn. App. at 396-97.

Despite the Fagers' argument to the contrary, (Petition for Review at 18-19), RCW 69.50.505 places the burden of establishing a compensable interest on the person or entity claiming it, not on the seizing law enforcement agency. *See Key Bank of Puget Sound v. City of Everett*, 67 Wn. App. 914, 920, 841 P.2d 800 (1992) ("There is no basis for concluding that the Legislature intended to encourage or permit piecemeal adjudication of interests in forfeited property."), *review denied*, 121 Wn.2d 1025 (1993).

Moreover, Timothy Fager's status as a shareholder in DBVWC, Inc., does not afford him personal standing in the civil forfeiture proceeding. A corporation is an entity created by statute, which is distinct and apart from the shareholders of the corporation. *In re Linderman*, 20 B.R. 826, 828 (W. D. Wash. 1982).¹³ "Accordingly ownership of corporate stock does not vest the shareholder with a pro rata share of ownership in corporate property." *In re Linderman*, 20 B.R. at 828; *Christensen v. Skagit County*, 66 Wn.2d 95, 97, 401 P.2d 335 (1965) ("An

¹³ *See Grayson v. Nordic Co., Inc.*, 92 Wn.2d 548, 599 P.2d 1271 (1979); *Christensen v. Skagit County*, 66 Wn.2d 95, 97, 401 P.2d 335 (1965); *California v. Tax Commission of State*, 55 Wn.2d 155, 346 P.2d 1006 (1959); *see also Northwest Cascade, Inc.*, 187 Wn. App. 685, 702, 351 P.3d 172 (2015).

individual shareholder has no property interest in physical assets of the corporation.”); *Apostolic Faith Mission of Portland, OR. v. Christian Evangelical Church*, 55 Wn.2d 364, 347 P.2d 1059 (1960); *California v. Tax Commission of State*, 55 Wn.2d 155, 157, 346 P.2d 1006 (1959) (“An individual shareholder has no property interest in its physical corporate assets.”). Thus, while Timothy Fager may have been a “majority shareholder” in DBVWC, Inc., (Petition for Review at 5), this interest alone could not afford him personal standing as a claimant under RCW 69.50.505, let alone to recovery of attorney fees that he incurred in his personal—and separate—criminal *in rem* proceeding.

Finally, it is a “red herring” for the Fagers to claim that Clallam County somehow waived an objection to Timothy Fager’s status in the motion for attorney fees under RCW 69.50.505(6). (Petition for Review at 8, 18). Regardless of how the Fagers may have characterized themselves in the motion, (CP at 286-304), the facts are undisputed that, as of the date of the motion, June 25, 2015, the *only* person who served a written notice of his claim, and was entitled to attorney fees under RCW 69.50.505(6), was Steven Fager. CP at 31. Thus, any objection to Timothy Fager’s status at that time would have been superfluous and unnecessary.

To the extent the Fagers still question whether Clallam County timely objected, (Petition for Review at 18), Clallam County nevertheless filed a written objection to the findings of fact and conclusions of law proposed by the Fagers. CP at 523. Clallam County specifically noted, “Reference to ‘claimants’ should be replaced with another term. [Clallam

County] argue[s] that there is only one claimant – Steven Fager. Tim Fager is not a party to the case. [Clallam County] recommend[s] that ‘Fagers’ be substituted for ‘claimants.’” CP at 523-24. Clallam County also argued during a hearing before the trial court that “Tim Fager is not a party to this case.” Report of Proceedings (RP) at 43, 67.

Simply put, Timothy Fager failed to meet his burden of timely preserving his interest. *See Key Bank of Puget Sound*, 67 Wn. App. at 920.¹⁴ He was not—is not, and cannot be—a “claimant” under either RCW 69.50.505(5) or (6). And he waived his rights under RCW 69.50.505 by not timely serving a claim of ownership to the property. *See* RCW 69.50.505(4).

D. THE FAGERS ARE NOT ENTITLED TO THEIR ATTORNEY FEES ON APPEAL

The general principle in Washington is that those entitled to an award of attorney fees below also are entitled to attorney fees on appeal, *Xieng v. Peoples National Bank of Washington*, 63 Wn. App. 572, 587, 821 P.2d 520 (1991), *aff’d*, 120 Wn.2d 512, 844 P.2d 389 (1993). But because the Fagers are not the prevailing parties on appeal, they are not

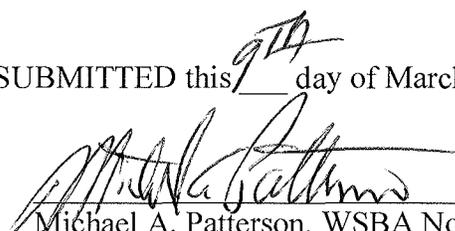
¹⁴ The issue is not, as the Fagers argue, (Petition for Review at 19), whether Clallam County had notice that it could be liable for attorney fees. The issue is that Timothy Fager did not even substantially comply with the requirements of RCW 69.50.505. *See, e.g., City of Seattle v. Pub. Employment Relations Comm’n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (2014) (“In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.”).

entitled to attorney fees and costs under RAP 18.1(a) and RCW 69.50.505(6).

II. CONCLUSION

For the foregoing reasons, Clallam County respectfully requests that this Court affirm the Court of Appeal's opinion.

RESPECTFULLY SUBMITTED this ^{9th} day of March, 2018.



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CERTIFICATE OF SERVICE

I, Christopher Moore, hereby certify that I served the foregoing SUPPLEMENTAL BRIEFING UNDER RAP 13.7(d) on the following individual(s):

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

DATED this 9th day of March, 2018 at Seattle, Washington.

/s/Christopher Moore
Christopher Moore, Legal Assistant

PATTERSON BUCHANAN FOBES & LEITCH

March 09, 2018 - 2:30 PM

Transmittal Information

Filed with Court: Supreme Court
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Superior Court Case Number: 09-2-00413-6

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