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CONSOLIDATED CASE NO. 97109-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,
Petitioner,

v.

TEAMSTERS LOCAL 117 SEGREGATED FUND, et al.,
Respondent/Cross-Appellant.

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL
EDUCATION AND ACTION FUND,
Respondent/Defendant.

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

JAY INSLEE, et al.,
Respondents/Defendants

SERVICE EMPLOYEES INTERNATIONAL UNION 775,
Respondent/Necessary Party.

**SERVICE EMPLOYEES INTERNATIONAL UNION
POLITICAL EDUCATION AND ACTION FUND'S
REPLY BRIEF ON CROSS APPEAL**

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INTRODUCTION

The undisputed evidence introduced below reveals that the Freedom Foundation (Foundation) is an organization dedicated to the destruction of public sector labor unions because of its ideological hostility to the “political left”; that it openly brags about “defunding” and “reducing the influence” of unions by making them spend money to defend themselves against its lawsuits; and that it views Fair Campaign Practices Act (FCPA) citizen’s actions as an essential part of this strategy. The evidence shows further that, as an application of this strategy, the Foundation alleged meritless and in some cases frivolous claims against the Service Employees International Union Political Education and Action Fund (PEAF) and Teamsters Local Union No. 117 (Local 117) through the citizen’s actions at issue in this consolidated appeal. Under RCW 42.17A.765(4)(b) (2012), the trial court was required to consider this evidence in ruling on respondents’ motions for attorneys’ fees. But the court did not, citing the procedural nature of its dismissals as reason not to decide whether the claims were brought without reasonable cause. That approach rewarded the Foundation for filing suits as procedurally defective as they were harassing and meritless.

In an effort to short-circuit an examination of its motives and claims on appeal, the Foundation claims that the trial court actually ruled

on the reasonable-cause question, so there is no need for this Court to evaluate that question anew or direct the trial court to consider it for the first time. To impute that holding to the court below, the Foundation twists itself in knots to read an express disavowal of a finding as a finding in its favor. The Foundation also suggests in passing that the trial court did not have to consider whether its claims were brought without reasonable cause. Section 765(4)(b)'s plain text and basic principles of statutory construction refute that theory.

The Foundation next tries to limit artificially the grounds for assessing reasonable cause, arguing that the Court may not inquire into its motives as an independent basis for awarding fees. The Foundation is wrong. The FCPA's language and the case law interpreting it make protection against harassing lawsuits an important statutory priority. Awarding reasonable attorneys' fees where, as here, a citizen's action plainly has a harassing design vindicates this priority.

The Foundation also tries to exclude evidence of its bad-faith motives by labeling the unions' claim a "smear" that should be stricken. But the Foundation cites no legal basis for striking its own publications and its agents' statements, which respondents introduced without objection below. A fair review of those statements shows that the Foundation's overarching goal in bringing these and other FCPA citizen's

actions against labor unions is to bleed them of financial resources—a “scorched earth” objective recognized as improper harassment.

Separately, the Foundation attempts to raise the bar for showing an action to be meritless by requiring the fee petitioner to show that an action lacked a viable legal theory. But RCW 42.17A.765(4)(b) authorizes fees for suits that lack factual merit even when they have a facially plausible legal theory. And in any event, several of the Foundation’s claims do lack any viable legal theory, warranting fees even under the Foundation’s preferred standard.

As a last line of defense, the Foundation argues that the Court must treat all the claims in each of its citizen actions together as one so that as long as it has lodged a single reasonable claim in a case, the Court cannot award fees even for patently unreasonable claims. Washington courts have definitively rejected this theory and allowed successful defendants to recover for individually meritless FCPA claims.

Accordingly, the Court should reverse the trial court and award PEAFF and Local 117 the reasonable attorneys’ fees they incurred in defending against the Foundation’s unreasonably brought citizen’s actions or at least the fees incurred in defending against those individual claims deemed unreasonable. Alternatively, the cases could be remanded to the

trial court for it to conduct the reasonable cause inquiry it originally sidestepped.

ARGUMENT

I. The trial court was required to but did not determine whether the Foundation's claims were brought without reasonable cause.

A. The Foundation mischaracterizes the trial court's reason for denying the fee petitions.

The Foundation first argues that the court below actually did engage in the required analysis and found in its favor. FF Ans. Br. 23. That contention cannot be squared with the record.

In both the PEAFF and Local 117 cases, the trial court found that “what’s dispositive for the Court is the procedural posture of this case.” RP 31:9-10 (4/12/19).¹ Based on this posture, the court expressly withheld a determination on reasonable cause, stating, “having a decision dismissing this case as early as it was *prevents the Court from making a decision one way or the other* of whether it was brought without reasonable cause.” RP 31:17–20 (4/12/19) (emphasis added). Because the trial court declined to “mak[e] a decision one way or the other,” it is not

¹ The trial court made this statement in connection with PEAFF’s fee petition. When Local 117 later brought its fee petition in a similar posture, the court largely restated its earlier position. RP 26:2–4 (5/3/19) (“I’m not saying these claims had zero merit. I’m not saying that they had a lot of merit. I can’t make that decision...”). To the extent the court’s ambiguous comments nonetheless suggest it ruled on the reasonable-cause question, *id.* at 24:24–26:7, it still abused its discretion by refusing to consider evidence of the Foundation’s harassing motives and the implausibility of the Foundation’s theories to support its underlying claims, due to the procedural posture of the dismissal.

true, as the Foundation claims, that the court weighed the evidence and found the respondents failed to meet their burdens of proof. Quite plainly, the trial court refrained altogether from assessing the evidence based on its mistaken belief that the procedural nature of the dismissal allowed it to avoid doing so.

That refusal to make the required ruling was reversible error. Section 765(4)(b) makes no exceptions for FCPA claims that were dismissed on procedural grounds. To read such an exception into the provision would not only contravene its plain language, it would also lead to perverse and counterintuitive results: citizens who bring FCPA claims without reasonable cause but through the correct procedure may be required to pay fees while citizens who bring equally or even more unreasonable claims may avoid paying fees if their claims have the *additional problem* of being procedurally defective. Surely, the Legislature did not intend procedural defects to serve as safe harbors for substantively unreasonable claims.

This Court should correct the trial court's error by reviewing the evidence not considered below and awarding respondents' fees.²

² The Foundation argues that the Court cannot independently make this determination because it would be a "factual finding that was unavailable to the trial court...." FF Ans. Br. 22. It is unclear what the Foundation means. To the extent it suggests that the evidence relied upon on in these cross-appeals was not available to the court below, it is factually incorrect; both respondents rely exclusively on evidence presented below. To

Alternatively, the Court may remand the issue and direct the trial court to review the evidence under the correct standard and render its own decision.

B. RCW 42.17A.765(4)(b) requires trial courts to determine whether dismissed citizen’s actions were reasonably brought.

The Foundation next argues that the trial court need not “in every case” decide whether a citizen’s action was brought without reasonable cause. FF Ans. Br. 23. It points to no authority for this proposition and fails to identify which kinds of cases allow courts to forego the reasonable-cause inquiry. In reality, the FCPA does not distinguish between types of dismissals of citizen’s actions. It mandates a reasonable cause analysis in all fee petitions following dismissals. As explained in Local 117’s opening brief, the first clause of Section 765(4)(b) assumes that when a successful FCPA defendant brings a fee petition, the court will as a matter of course decide whether the dismissed action was reasonably brought. *See* RCW 42.17A.765(4)(b) (“In the case of a citizen’s action that is dismissed and that the court also finds was brought without

the extent it means that this Court does not have jurisdiction to independently review the evidence and render an award, it is legally incorrect. Where a trial court “fail[s] to enter any finding” regarding the “lack [of] a factual or legal basis” supporting an action, there is nothing for an appellate court to defer to and the appellate court “may independently review evidence consisting of written documents and make the required findings.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). *Accord Matter of Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996). The trial court here did not enter factual findings on the reasonable-cause question but refrained from deciding the question altogether. Under *Bryant*, this Court may independently review the evidence presented and determine whether to award fees.

reasonable cause....”). Once the court renders this decision, the second clause gives it discretion to award or deny fees and to determine what amount of fees is reasonable. *Id.* (“...the court may order the person commencing the action to pay all costs of trial and reasonable attorneys’ fees incurred by the defendant.”). *See also* Local 117 Op. Br. 30–31.

The Foundation conflates the discretionary phrasing of the second clause with the mandatory phrasing of the first. That conflation is unwarranted. It also defies common sense. There would be no point for the statute to provide successful defendants with the right to bring a petition for fees, while at the same time giving the trial court license to summarily deny the petition without even reviewing its merits. *Cf. Green v. McCart*, 273 Ga. 862, 863, 548 S.E.2d 303 (Ga. 2001) (where statute provided party right to oral hearing on motion for new trial, failure to hold hearing could not be deemed harmless error without “render[ing] the mandated hearing a hollow right”) (citation omitted).

Additionally, the notion that a court can simply refuse to consider evidence of an absence of reasonable cause conflicts with Washington’s general fee-shifting statute, RCW 4.84.185. That law permits a prevailing party “[i]n any civil action” to recover its “reasonable expenses,” including attorneys’ fees, upon a showing that the non-prevailing party’s claims were “frivolous and advanced without reasonable cause.” RCW

4.84.185. In reviewing such a petition, the “judge *shall* consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause.” *Id.* (emphasis added).

Thus, under the general fee-shifting statute, the trial court is not permitted to ignore evidence presented by the prevailing party in deciding whether to award reasonable expenses. *Id.* It is difficult to see how the FCPA’s more particularized fee provision could allow trial courts to consider less than is required when reviewing fee petitions for civil actions generally (which, of course, include FCPA citizen’s actions).

II. The Court should award fees on the independently sufficient ground that the Foundation brought these actions to harass the respondents.

Moving to the merits of awarding attorneys’ fees, the Foundation argues that evidence of a harassing intent cannot support an unreasonable-cause finding. FF Ans. Br. 25–26. In the Foundation’s view, “a complainant[’s] motivations say nothing about ‘reasonable cause.’” *Id.* at 26. The Foundation is wrong.

A. Under the FCPA, harassment alone is a sufficient ground to award fees.

The FCPA seeks to deter not only frivolous citizen actions but also those designed to harass political opponents. This is made explicit in the statute’s declaration of policy, which cautions that “[i]n promoting []

complete disclosure, [] this chapter shall be enforced so as to insure that the information disclosed *will not be misused for arbitrary and capricious purposes* and to insure that all persons reporting under this chapter will be protected from *harassment and unfounded allegations* based on information they have freely disclosed.” RCW 42.17A.001(11) (emphasis added). The Washington legislature specifically added this language in 1975 in the course of amending the FCPA, at a time when the abuses of the citizen action provision—then commonly called the “bounty hunter” provision—were hotly debated. *See* Wash. Laws 1975 1st Ex. Sess. Ch. 294 c 1 § 1.

Courts are mindful of the FCPA’s anti-harassment goals. For instance, in upholding the facial constitutionality of the original version of FCPA citizen’s actions, this Court relied in part on the fact that the potential imposition of attorneys’ fees is “no small deterrent against frivolous *and harassing* suits.” *Fritz v. Gorton*, 83 Wn.2d 275, 314, 83 Wn.2d 275 (1974) (emphasis added). The Court of Appeals invoked *Fritz*’s formulation nearly thirty years later in construing Section 765(4)(b). *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n (“WEA”)*, 111 Wn. App. 586, 615, 49 P.3d 894 (2002) (“...the purpose of the Act’s provision for attorney fees in a citizen’s lawsuit was to prevent frivolous and harassing lawsuits”) (citing *Fritz*, 83 Wn.2d at

314). *Accord id.* at 613 n.20 (quoting RCW 42.17.010(11), the predecessor to RCW 42.17A.001(11)).

Notably, at least one court tasked with interpreting a similarly worded attorneys' fee statute analyzed the fee petition based on harassment as an independent ground. *See Corliss v. Hughes*, 179 Wn. App. 1032, *8–9 (Wash. Ct. App. 2014).³ In *Corliss*, the Court of Appeals evaluated whether a fee award was appropriate under RCW 23B.07.400(4), which permits prevailing defendants in derivative shareholder lawsuits to recover “reasonable expenses, including counsel fees ... if [the court] finds that the proceeding was commenced without reasonable cause.” In light of the similarity of that statute’s wording to Section 765(4)(b), *Corliss* agreed with *WEA* that the operative language was meant “to prevent frivolous and harassing lawsuits.” *Corliss*, 179 Wn. App. 1032 at *9 (citing *WEA*, 111 Wn. App. at 615). It then analyzed the frivolity and harassment issues separately. It first found that the underlying legal question “presented debatable issues of fact and law,” which precluded a frivolity finding. *Id.* *See also Madden v. Foley*, 83 Wn. App. 385, 391, 922 P.2d 1364 (1996) (a frivolous claim is one that is legally implausible on its face). It went on to find that the defendants “point to no evidence presented below to show that the lawsuit was

³ Pursuant to GR 14.1(a), *Corliss* is cited as nonbinding authority for its persuasive value.

brought to harass or for an improper purpose.” *Corliss*, 179 Wn. App. 1032 at *9. Based on these separate findings, the court reversed the fee award. *Id.* Although *Corliss*’s particular facts resulted in no fee award, its analysis shows that frivolity and harassment provide independent grounds for proving a lack of “reasonable cause.”

Finally, preventing recovery of attorneys’ fees in citizen actions that allege claims that are facially plausible but specifically intended to harass political opponents would give ideologically motivated actors free reign to abuse the FCPA. It is not especially difficult for a sufficiently motivated citizen to craft a legal theory for why its opponent should register as a political committee or, if it has, to identify defects—however minor—in its required reports. In enacting the FCPA, Washington’s voters never intended the law to be used as an instrument to carry out a particular citizen’s vendetta against its political adversaries. To endorse the Foundation’s theory would allow a citizen to do exactly that by hiding its malicious motives behind the fig leaf of facially plausible legal theories. This is not merely speculation. In recent years, the FCPA’s administrative complaint process and ensuing citizen’s actions have often been wielded as weapons to engage in politics by other means.⁴

⁴ An even cursory review of the complaints lodged with the PDC in the last five years reveals that a significant plurality has been lodged by a small circle of serial filers who exclusively target affiliates or supporters of one political party.

The Court should take this opportunity to curtail the increasing misuse of the FCPA. It can do this by holding that when a citizen's action has been dismissed and the evidence establishes that the citizen filed its lawsuit with the purpose of harassing the defendant, the trial court may award fees, even for claims with facially plausible legal theories.

B. The record establishes that the Foundation filed its citizen's actions to further its goal of "bankrupting" respondents, an objective that is recognized as a form of harassment.

The Foundation does not contest the overwhelming evidence of its scheme to "bankrupt" or "defund" respondents by forcing them to expend resources to defend themselves against lawsuits. The Foundation simply waves away this evidence as "little more than an effort to smear the Foundation and its mission." FF Ans. Br. 3. It then asks the Court to strike or ignore the evidence. *Id.* The Court should do neither. Instead, it should examine the undisputed, admissible evidence of the Foundation's motives behind these suits.

It is too late in the day for the Foundation to challenge the evidence at issue. The Foundation did not dispute the authenticity of any of these materials. Nor did it challenge their admissibility.⁵ Having failed to object to the evidence below, the Foundation cannot do so now. *See*

⁵ In fact, at argument below, the Foundation's counsel all but admitted the improper purposes they evinced. *See* RP 19:14–20:13 (4/12/19). The Foundation's counsel nonetheless claimed that such motives did not actually influence its lawsuits but offered no evidence in support of that claim. *Id.* at 20:13–21:2.

Sepich v. Dep't of Labor & Indus., 75 Wn.2d 312, 319, 450 P.2d 940 (1969) (“It is well settled that objections to evidence cannot be raised for the first time on appeal.”) (citation omitted); *Anderson v. Section 11, Inc.*, 28 Wn. App. 814, 817, 626 P.2d 1027 (1981) (same).

Even had the Foundation preserved an evidentiary objection for appeal, it does not now even attempt to explain the basis for any such objection.⁶ Nor would it be able to offer a credible theory for exclusion. The cited evidence comes from the Foundation’s own documents and statements. Local 117 Ans. Br. 6–8; PEAFF Ans. Br. 41–42. That material is admissible as a party-opponent admission. *See* ER 801(2).

The Foundation nonetheless insists, without legal authority, that the evidence “smears” the Foundation and its mission. If so, it is only because the Foundation’s own words have been offered against it. There is no rule of evidence that allows materials to be stricken or ignored because a party is embarrassed by their contents. The Court should consider it.

Looking to that evidence, the Foundation has made each step in its thinking plain for the world to see. The Foundation’s leaders have said that “what the Freedom Foundation want[s] to do is limit [labor unions’] influence, reduce their sphere of influence down to something that is

⁶ Although the Foundation cites RAP 10.3(a)(5) in a footnote (FF Rep. Br. 3 n.1), it does not explain its apparent belief that the cited evidence—which directly quotes the Foundation’s own documents and statements—is unfair or argumentative.

proportionate to their size and allow the conservative voice to be heard.” CP 451, 533.⁷ Based on that goal, the Foundation boasts that it goes about “reducing” unions’ influence by “mak[ing] the unions spend money on something they would rather not spend money on” because “every dollar they spend defending their idea is every dollar they don’t have to spend against [] good” conservative candidates. CP 451. The evidence further reveals how litigation, and in particular FCPA citizen suits, plays into this strategy. The Foundation specifically cites “litigation” as one of the central elements in its “proven plan for bankrupting and defeating” public section unions. CP 489; *accord* CP 456, 492. Among its litigation activities, the Foundation touts how it focuses on “enforc[ing] campaign finance laws against unions through investigations, complaints, and lawsuits.” CP 492. The Foundation’s FCPA activities are consistent with these express goals. As Local 117 explained, all of the Foundation’s citizen actions, administrative complaints, and related APA appeals filed in the last two years have been directed against labor unions and/or entities in contractual privity with labor unions. Local 117 Op. Br. 7–8.

That undisputed evidence more than suffices to establish the Foundation’s harassing motives behind these actions. *See* Local 117 Br. 6–

⁷ This brief cites the clerk’s papers in Case No. 97111-1, which contains evidence PEAFF submitted to the trial court below in *Freedom Foundation v. PEAFF*. The same evidence was also submitted by Local 117 in Case No. 97109-9 and is cited in Local 117’s Opening Brief in support of its Cross Appeal.

8, 30–35. See also *Van De Graaf v. Van De Graaf*, No. 36282-5-III, 2019 WL 4072509, at *3 (Wash. Ct. App. Aug. 29, 2019) (upholding grant of suit money and fees against litigant who “engaged in scorched earth litigation practices designed to impose financial hardship on [his adversary] ... by attempting to force [her] to waste resources”)⁸; *Fastov v. Christie’s Int’l PLC*, 574 F. Supp.2d 39, 43 (D.D.C. 2008) (awarding fees when plaintiff’s “own words” established that he “initiated this lawsuit with the bad faith intent to subject the defendants to ‘the worst and most costly’ litigation in the defendants’ experience”); *In re Disciplinary Proceedings Against Arthur*, 272 Wis.2d 252, 258, 680 N.W.2d 758 (Wis. 2004) (attorney misused judicial process by filing meritless litigation against opponents in order to “caus[e] them to expend time and money defending against harassing claims or lawsuits”); *In re Scarbrough*, 516 B.R. 897, 914-15 (Bankr. W.D. Tex. 2014) (“An injury that is recognizable for purposes of willful and malicious fraud is forcing another person to expend unnecessary money and time.”); *Cooper v. City of Plano*, No. 4:10-CV-689, 2011 WL 4899997, at *3 (E.D. Tex. Sept. 22, 2011), *adopting report*, 2011 WL 4900002 (E.D. Tex. Oct. 14, 2011)

⁸ As in *Van De Graaf*, the Foundation’s “[s]corched earth litigation is designed to impose costs on all involved, often with the goal of leaving the winner with a pyrrhic victory.” *Id.* at *3. Pursuant to GR 14.1(a), *Van De Graaf* is cited as nonbinding authority for its persuasive value.

(sanctioning plaintiff for bringing “frivolous actions with the sole intent of forcing the City to unnecessarily expend the greatest amount of government funds possible on attorney’s fees to defend the City Defendants against the frivolous claims”).⁹

The Foundation cannot avoid the import of its statements simply by claiming that they have no application to the particular citizen actions now before the Court. The Foundation need not declare every time it files a citizen action that the individual lawsuit is an instantiation of its overall goal to defund labor unions, especially where it has admitted that “litigation” is part of its strategy in achieving that goal. *Supra* at 13–14. *See Wright v. Barnard*, 248 F. 756, 763 (D. Del. 1917) (fraud can be shown through circumstantial evidence because those who contemplate it “do not proclaim their nefarious purpose from the housetops”); *Haynes v. Bunting*, 152 Va. 395, 147 S.E. 211, 213 (Va. 1929) (reaching same conclusion because “[t]he doer of an illegal act is not wont to proclaim his unlawful purpose”); *State v. Loughbom*, 9 Wn. App. 2d 1015, *12 (Wash. Ct. App. 2019) (court must rely on circumstantial evidence to show

⁹ In addition to its improper purpose for filing the instant citizen actions, the Foundation has engaged in harassing litigation conduct. As Local 117 explained, where it had the opportunity to engage in discovery, the Foundation served canned, pattern requests on the defendants, largely regarding financial activities that have nothing to do with electoral activities. Local 117 Op. Br. 12–13; *see also* SEIU 775 Ans. Br. 4 n.3. It also served new discovery requests and sought to cram numerous depositions into the brief window between Local 117’s filing on a dispositive motion and the date the motion was noted to be heard. Local 117 Op. Br. 13–14.

prosecutorial misconduct because “[a] prosecutor will likely never concede to malevolent intent”).¹⁰ Such a requirement would set the bar impossibly high. The Court may draw reasonable inferences from the Foundation’s out-of-court statements. Here, the evidence shows that these suits fell neatly within the Foundation’s articulated strategy of using litigation to bleed the resources of public sector unions.

III. The record establishes that the Foundation’s claims lacked reasonable cause even apart from the Foundation’s motives.

The Foundation argues that its claims were reasonably grounded because, at least in the Local 117 case, some of its action survived a motion to dismiss. FF Ans. Br. 24. Thus, the argument goes, the Foundation was able to assert a “viable legal theory” and so its claims were not frivolous. *Id.* But even a non-legally-frivolous claim can lack reasonable cause on other grounds, as is the case here.

A claim that is not legally “frivolous,” i.e., a claim that invokes some plausible legal theory, can still lack “reasonable cause” if the claim lacks factual support, does not implicate a novel legal issue, or involves *de minimis* allegations in which the public has no interest. The Foundation’s claims here failed in each respect.¹¹ For instance, in *WEA*, the Court of Appeals upheld the trial court’s award of attorneys’ fees despite the fact

¹⁰ Pursuant to GR 14.1(a), *Loughbom* is cited as nonbinding authority for its persuasive value.

¹¹ Local 117 addresses the claims against it in its separate reply brief.

“that the trial court allowed th[e] claim [against the defendant] to survive summary judgment” and be adjudicated at trial. *WEA*, 111 Wn. App. at 616.¹² The claim at issue there was thus not frivolous. *See, e.g., In re Estate of Wegner v. Tesche*, 157 Wn. App. 554, 563–64, 237 P.3d 387 (2010) (although action brought by estate’s personal representative was ultimately unsuccessful, it was not frivolous in part because “the trial court denied [defendant’s] motion to dismiss”); *accord North Pacifica, LLC v. City of Pacifica*, 274 F. Supp.2d 1118, 1123-24 (N.D. Cal. 2003) (claim that survives a dispositive motion is not frivolous); *Gal v. Viacom Int’l, Inc.*, 403 F. Supp.2d 294, 308 (S.D.N.Y. 2005) (same). Yet, the *WEA* court still upheld the fee award because “the claim ... failed for lack of proof, and presented no undetermined issue of law or matter of public interest.” *WEA*, 111 Wn. App. at 616.

The same is true here.

First, the Foundation’s claims against PEAFF are indefensible and fail for lack of proof.¹³ Claims I and II alleged that PEAFF was obliged to file a statement of organization and submit reports pursuant to RCW

¹² The Foundation actually notes that *WEA* upheld a fee award in this posture. FF Ans. Br. 24, n.20. It argues that this fact refutes the argument that fees cannot be awarded at the post-trial stage. *Id.* But Local 117 never made the argument the Foundation attributes to it. Local 117 noted only that Section 765(4)(b) identifies dismissal, as opposed to post-trial judgment, as the trigger for the reasonable cause determination. Local 117 Op. Br. 30. That means a trial court could award fees at the post-trial stage, as it did in *WEA*, or earlier, if the case is dismissed at the pre-trial stage. The point is not that waiting until after trial to award fees is impossible, only that it is not necessary.

¹³ Local 117 addresses the claims against it in its separate reply brief.

42.17A.205 and RCW 42.17A.235, respectively. CP 8–9. These claims were premised on the notion that PEAFF improperly reported as an out-of-state committee. More specifically, the Foundation argued that PEAFF spent more than 20% of its aggregate expenditures for all its nationwide political activity in Washington during the months of January and February 2016 and also by year’s end. CP 4–8. This theory turned on a fundamental misreading of the PDC regulation defining “out-of-state political committees.”

That regulation provides that an entity is considered out-of-state, in part, if it spends “*less* than twenty percent of its aggregate expenditures for all political campaign activity nationwide *at any point* in any calendar year” on Washington political activity. WAC 390-16-049(2)(b)(iii) (emphasis added). The Foundation brazenly turned this provision on its head to argue that PEAFF constituted an in-state committee because it spent *more* than 20% of its nationwide electoral expenditures in Washington at a particular (cherry-picked) point in 2016. But the Foundation’s own tabulations revealed that for most months of 2016—i.e., at *multiple* points in the calendar year—PEAFF’s Washington expenditures were less than 20% of its national expenditures, thereby establishing under the plain terms of WAC 390-16-049(2)(b)(iii) that PEAFF appropriately reported to the PDC as an out-of-state political committee. CP 503–05. The

Foundation's Claims I and II are facially implausible and, by its own calculations, factually unsupported.

Claim III alleged a violation of RCW 42.17A.442, which sets forth a \$10-from-10 Washington voter requirement. CP 10. This requirement is unconstitutional on its face, as at least one trial court has decided, resulting in an agreed permanent injunction by the State barring its enforcement. CP 185–202, 204–07, 514–15.¹⁴ Because this claim was legally defective, Claim III lacked reasonable cause under any conceivable standard.

Claim IV alleged that PEAFF improperly completed particular fields on its C5 out-of-state committee reports and filed certain of its C5 reports between 1 to 18 days beyond the reporting deadlines. CP 10. Yet the record shows PEAFF accurately completed these fields. CP 516–17. Likewise, the Foundation's lateness allegations systematically failed to account for weekends and holidays, resulting in several inaccurate calculations and claims. *Id.* More importantly, though, the PDC has repeatedly found that isolated instances of belatedly filed reports or minor errors in completing individual report fields are *de minimis* and do not constitute "material" violations of the FCPA warranting enforcement actions. *Id.*

¹⁴ The injunction binds all agents of the State and persons acting on their behalf, CP 205–06, which includes the Foundation insofar as it acts on behalf of the State in pursuing a citizen's action.

Next, the Foundation's unmeritorious claims also failed to raise any novel legal questions or issues of public interest. *WEA*, 111 Wn. App. at 616. Claims I and II involved a misguided attempt to invert the meaning of an unambiguous regulation. Claim III may have at one time implicated an interesting constitutional question but that question has since been resolved. And Claim IV concerns undisputedly prosaic issues in PEAFF's C5 reports, such as the adequacy of its statement of purpose, reference to out-of-state contributors, and dates of submission. Those issues are neither novel nor of significant public interest.

IV. The Court may award attorneys' fees for individual claims.

The Foundation argues at length that this Court must find that each of its citizen actions lacked reasonable cause *in toto* before awarding attorneys' fees. FF Ans. Br. 27–29. *WEA* addressed this question directly and held that a court may award fees “for a single claim” because “[t]he policy of discouraging frivolous citizen actions is furthered more by awarding attorney fees to individual claims brought without reasonable cause than by allowing frivolous claims to enjoy the safe haven of meritorious ones.” *WEA*, 111 Wn. App. at 615.

Although it acknowledges *WEA* in passing, the Foundation essentially asks this court to overrule that decision by construing the word “action” differently from the Court of Appeals' construction. FF Ans. Br.

27–29. There is no basis to alter *WEA*’s well-reasoned analysis. That decision correctly observed that awarding fees for individual claims deters citizens from attaching frivolous claims to meritorious ones. *WEA*, 111 Wn. App. at 615. Moreover, the Foundation asks the Court to import the meaning of the term “action” from a different statutory regime. FF Ans. Br. 27–28. There is no basis to do so.¹⁵

Accordingly, the Court should not disturb *WEA*. To the extent the Court finds some of the Foundation’s claims had reasonable cause, it may still award fees on account of the claims that lacked it.

CONCLUSION

For the foregoing reasons, PEAFF respectfully requests that the Court reverse the trial court’s denial of attorneys’ fees and issue an award for reasonable attorneys’ fees or, in the alternative, remand the issue to the trial court with directions to consider the evidence presented.

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¹⁵ The Foundation places significant weight on the Court of Appeals’ decision in *Utter v. BIAW*, 176 Wn. App. 646, 675, 310 P.3d 829 (2013). Nothing in that decision, however, suggested that the action as a whole had to lack reasonable cause before fees could be awarded. *Id.* at 675–76. The Foundation would read into the court’s citation of RCW 4.84.185 that holding even though the court did not address the question. In any case, this Court reversed *Utter* on appeal and remanded for the plaintiffs to pursue the case. *Utter v. BIAW*, 182 Wn.2d 398, 435, 341 P.3d 953 (2015). That holding entirely obviated the occasion for consideration of prevailing-defendant fees.

Respectfully submitted this 6th day of January, 2020.

A handwritten signature in black ink, reading "Darin M. Dalmat". The signature is written in a cursive style with a horizontal line underneath it.

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DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding document with the Washington State Supreme Court using the appellate efileing system, which will provide notice of such filing to all required parties.

Executed this 6th day of January, 2020, at Seattle, Washington.


Jennifer Woodward, Paralegal

Appendix

179 Wash.App. 1032

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.Harry and Betty May CORLISS, husband
and wife; Timothy Corliss; and Scott Corliss,
as individuals and derivatively on behalf
of [Washington Rock Quarries](#), Appellants,

v.

Larry P. HUGHES and Jane Doe Hughes,
husband and wife and their marital community;
Harry Hart and Beth Hart, husband and wife
and their marital community, Respondents.

No. 69432-4-I.

|

Feb. 18, 2014.

Appeal from King County Superior Court; Hon. [Michael J. Heavey](#), J.**Attorneys and Law Firms**[Richard Miles Stanislaw](#), [Christopher Wright](#), Watt, Tieder,
Hoffar & Fitzgerald, LLP, Seattle, WA, for Appellants.[George William Akers Jr.](#), Montgomery Purdue Blankinship
& Austin, [Christian Linville](#), [Lawrence Ballis Linville](#),
Linville Law Firm PLLC, Seattle, WA, for Respondents.[George William Akers Jr.](#), Montgomery Purdue Blankinship
& Austin, [Christian Linville](#), [Lawrence Ballis Linville](#),
Linville Law Firm PLLC, Seattle, WA, for Other Parties.

UNPUBLISHED OPINION

[SPEARMAN](#), A.C.J.

*1 The main issue on appeal is whether the trial court properly granted the summary judgment motions of Larry and Jane Doe Hughes and Harry and Beth Hart, thereby dismissing the lawsuit of Harry, Betty, Timothy, and Scott Corliss¹ and Washington Rock Quarries, Inc. (WRQ) under the statute of limitations. Larry Hughes and Harry Hart, together with Harry, Timothy, and Scott Corliss, own WRQ.

The lawsuit, alleging claims for usurpation of a corporate opportunity, negligent misrepresentation, and breach of fiduciary duty, was based primarily on Hughes and Hart's purchase of the King Creek Pit and Kapowsin Quarry, property in which WRQ conducted its mining business, without informing the Corlisses and without offering WRQ the opportunity to purchase the property. The Corlisses contend the trial court erred in ruling as a matter of law that they were put on notice of their claims by (1) Larry Hughes' September 2005 letter to Harry Corliss and (2) information received by John Carrosino, the Corlisses' alleged agent, in 2007. We conclude that (1) Harry Corliss had notice through the September 2005 letter but there is an issue of material fact as to whether he was a director of WRQ or a mere shareholder at the time; (2) there is an issue of material fact regarding whether statements to Carrosino bound the Corlisses; and (3) the Corlisses' claims based on a post-sale amendment to the King Creek lease and the re-permitting of the King Creek Pit were properly dismissed for other reasons. We reverse in part, affirm in part, and remand.

FACTS

WRQ is in the business of mining and selling sand, gravel, and rock. Until 1993, its stock was owned 50 percent by Harry Hart (Hart) and 50 percent by Edward Duggan. That year, Larry Hughes (Hughes) learned of the opportunity to purchase Duggan's shares and informed his friend Harry Corliss (Harry).² Harry indicated his desire to purchase half of Duggan's shares but requested that they be registered primarily in the name of his sons, Timothy (Tim) and Scott (Scott) Corliss. The Corlisses and Hughes purchased Duggan's WRQ stock, and the shares were thereafter owned as follows: Hart—50 percent; Hughes—25 percent; Tim—12.25 percent; Scott—12.25 percent; and Harry—0.50 percent. The Corlisses own their stock as individuals.

Since 1993, Hart has been WRQ's president and Hughes has been its secretary/treasurer. Scott was WRQ's vice president from 1993 until 2004 or 2007. Hughes, Hart, and Beth Hart have held three of the four seats on the board of directors. Harry was a director from 1993 until sometime in 2004 to 2006, when he was replaced by Scott due to deteriorating health.³

WRQ leased the King Creek Pit and the Kapowsin Quarry (collectively, "the pits") from International Paper (IP) until 2005. In 2003, IP notified WRQ that it would be cancelling

the leases, leaving WRQ with five years to operate in the pits. Hughes and Hart, without informing the Corlisses, negotiated with IP to buy the pits and, in June 2005, formed Rainier Resources, LLC (RR) for that purpose. RR is owned equally by the Hughes and Hart families. RR purchased the King Creek pit (for \$4,000,000) and Kapowsin pit (for \$3,000,000), closing the sales on September 22, 2005 and March 30, 2006, respectively. Since the purchases, RR has honored IP's leases with WRQ and has not changed their terms, with the exception of adding a "backhaul" provision to the King Creek lease in September 2005. Hughes and Hart also re-permitted the King Creek pit so that a greater area of the pit could be mined. WRQ paid the re-permitting costs.

*2 On or about August 19, 2005, Scott sent Hughes a letter regarding WRQ. The letterhead stated "Corliss Resources" and the footer of the letter included the address "P.O. Box 487, Sumner, Washington 98390." Clerk's Papers (CP) at 122. On September 2, Hughes responded by letter addressed to "Harry B Corliss, Corliss Resources, P.O. Box 487, Sumner, WA 98390," though its salutation was "Dear Scott."⁴ Hughes wrote, "You also should be aware that I have purchased the gravel pit and the rock quarry from International Paper. I will honor the terms of the lease International Paper has with Washington Rock."⁵ CP at 116, 150.

In 2007, as part of estate planning for Harry and Betty and to gather information about the Corliss family's investment in WRQ, Scott asked John Carrosino, the president of Corliss Resources, Inc. (CRI, a company owned by Tim, Scott, and Harry), to learn more about WRQ and its value. Carrosino met with Hart on April 5, 2007. After the meeting, Carrosino requested copies of the leases for the pits. Sometime between April 5 and May 8, Hughes told Carrosino that he and Hart had purchased the pits. On May 8, however, Hart gave Carrosino the original leases showing IP as the lessor/landholder. That day, Carrosino emailed Hart, expressing confusion over the inconsistency between the documents showing IP was the owner of the land and Hughes' and Hart's statements in conversation that they owned the pits. He requested Hart's help in clarifying who owned the pits. The next day, Carrosino had a phone conversation with Hart, who did not state the leases were incorrect or that he and Hughes had purchased the pits. Carrosino continued to seek information about ownership. In a June 6 email to Hart, Carrosino wrote,

The two pieces of material I do not have and would very much like to

get from you is the actual purchase of the real estate under the two pits operating at Washington Rock and the related amended or assigned leases with related royalty agreements. I would like to have copies of the documents that support the leases you and Pat have as land owners with Washington Rock as compared to the old leases with the prior owners that are now no longer the land lords [sic].

CP at 43. Hart never gave the requested documents to Carrosino. Concluding that Hughes and Hart did not own the pits, Carrosino did not inform any of the Corlisses of Hughes' and Hart's statements that they had purchased the pits. According to Scott's and Tim's declarations, Scott learned of the purchase of the pits in April 2009 when Hart told him during a meeting that Hughes purchased the pits, and Tim learned of the purchase after that meeting.⁶

On February 8, 2012, the Corlisses, individually and derivatively on behalf of WRQ, brought an action against Hughes and Hart, alleging that they never informed the Corlisses of the negotiations or purchase of the pits or of the re-permitting of the King Creek pit. The complaint alleged claims for usurpation of a corporate opportunity, negligent misrepresentation, and breach of fiduciary duty. Hughes and Hart filed motions for summary judgment based on the three-year statute of limitations under [RCW 4.16.090](#). They argued that the Corlisses had notice of their claims in 2005 from Hughes' letter and in 2007 through Carrosino. The trial court granted both Hughes' and Hart's motions. It denied the Corlisses' motion for reconsideration. The court awarded Hughes and Hart attorney's fees and expenses under [RCW 23B.07.400](#). The Corlisses appeal from the orders granting summary judgment and awarding attorney's fees.

DISCUSSION

Statute of Limitations

*3 The Corlisses contend the trial court erred in ruling that their claims were barred by the statute of limitations.⁷ We review summary judgment de novo. [Jones v. Allstate Ins. Co.](#), 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The parties

agree that all claims are governed by RCW 4.16.080(4), which states that a three-year statute of limitations applies to “[a]n action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.” The statute begins to run when the plaintiff discovers, or by reasonable diligence would have discovered, the cause of action.  *First Maryland Leasecorp v. Rothstein*, 72 Wn.App. 278, 282, 864 P.2d 17 (1993). The question of when the plaintiff discovered or could have discovered such facts is one of fact. *Sherbeck v. Estate of Lyman*, 15 Wn.App. 866, 869, 552 P.2d 1076 (1976). The party seeking to toll the statute of limitations based on the discovery rule has the burden to show the fraud could not have been discovered until three years before the commencement of the action.  *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn.App. 502, 518, 728 P.2d 597 (1986).

I. September 2005 letter

The Corlisses contend there are multiple questions of fact involving Hughes' 2005 letter, including whether Harry received the letter and whether he was competent enough in 2005 to understand it.⁸ But we conclude that this issue is not properly before us. As Hughes notes, these arguments were made for the first time in the Corlisses' motion for reconsideration. These arguments were not closely related to a position asserted previously and depended on new facts; thus, they are not properly before this court.⁹  *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn.App. 221, 231, 272 P.3d 289 (2012) (party bringing motion for reconsideration may preserve issue for appeal that is closely related to position previously asserted and does not depend on new facts). The trial court did not err in ruling on summary judgment that Hughes' letter gave Harry notice of the purchase of the pits in 2005.

II. Hughes' and Hart's statements to Carrosino

The Corlisses contend there are genuine issues of material fact in dispute regarding whether Carrosino received notice of the purchase of the pits and whether he was an agent for any of the Corlisses. Hughes denies there are any material facts in dispute on these issues. Hart concedes that questions of fact exist whether Carrosino was an agent of any Corliss

when he performed his task and whether he acquired notice that Hughes and Hart purchased the pits, but argues that reasonable minds could only conclude that Carrosino acted on behalf of the Corlisses' entire 25 percent interest in WRQ and that Hughes and Hart told him that they purchased the pits.¹⁰ We conclude there is an issue of fact as to whether Hughes' and Hart's representations to Carrosino bound the Corlisses or, stated differently, whether Carrosino's knowledge of their representations should be imputed to the Corlisses.

*4 An agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control. *Moss v. Vadman*, 77 Wn.2d 396, 402–03, 463 P.2d 159 (1970). For an agent's knowledge to be imputed to a principal, the knowledge must be relevant to the agency and the matters entrusted to the agent.  *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wn.App. 311, 316–17, 627 P.2d 1352 (1981).

The existence of a principal-agent relationship is a question of fact unless the facts are undisputed. The question of control or right of control is also one of fact for the jury. But if the facts are undisputed and, without weighing the credibility of witnesses, there can be but one reasonable conclusion drawn from the facts, the nature of the relationship between the parties becomes a question of law.

 *O'Brien v. Hafer*, 122 Wn.App. 279, 284, 93 P.3d 930 (2004) (quotation marks and citations omitted). The burden of establishing agency is on the party asserting it. *Id.*

First, we conclude that, as a matter of law, Carrosino was Scott's agent because he acted on Scott's behalf and was subject to Scott's control while he carried out his task. Scott's declaration establishes that, for various reasons (including estate planning), he authorized and directed Carrosino to “gather some information about the financial performance of WRQ and to help determine its value.” CP at 459. The Corlisses argue that because Carrosino was employed by CR, he was not Scott's agent. But they cite no authority

for the proposition that a person can only be an agent for the entity that pays him. They also argue that there can be no agency because Scott did not control the manner of Carrosino's performance. The argument is not well taken. "The negligence of the agent is imputed to the principal, because he has the right to control the acts of the agent. It is the existence of the *right of control*, not its exercise, that is decisive." *Paqarigan v. Phillips Petroleum Co.*, 16 Wn.App. 34, 37, 552 P.2d 1065 (1976) (emphasis added) (quoting *Poutre v. Saunders*, 19 Wn.2d 561, 545, 143 P.2d 554 (1943)). A principal's control over the manner of performance is critical where the agent harms a third party and the third party asserts a claim against the principal, as in the cases cited by the Corlisses.¹¹ But this case does not involve the Corlisses' liability vis-a-vis Carrosino.

We also conclude there is no issue of fact that Carrosino was acting on behalf of Harry and Tim. At his deposition, Scott described the purpose of directing Carrosino to look into WRQ as being to assess the Corlisses' investment in WRQ. He testified that the Corliss family wanted to know more about its ownership interest in WRQ and the general business of WRQ. He noted that Hart had expressed interest in buying the family's shares. Carrosino, likewise, stated in his declaration that his task was for the Corliss family's benefit. He stated that he was asked by Scott to look into the Corliss family's investment in WRQ because the family had little information about the operations or financial performance of WRQ. His goal was "to gather information for the Corliss family to determine next steps." CP at 487. Carrosino made similar statements in his deposition, testifying that his primary mission was to "lend a hand to gather information and advise him *and his other shareholders* " of the value of WRQ. (Emphasis added). CP at 62 He testified that the Corliss family was conducting estate planning for Harry and Betty and that the valuation of WRQ was to be used for that purpose. With this evidence, Hughes and Hart meet their initial burden of showing a lack of an issue of fact that Scott had Harry and Tim's authority to direct Carrosino to investigate the Corlisses' interest in WRQ. Where a defendant meets the initial burden of showing the absence of an issue of material fact, the inquiry shifts to the plaintiff; if the plaintiff fails to make a showing sufficient to establish the existence of an essential element in the plaintiff's case, the trial court should grant the motion for summary judgment.  *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

*5 The Corlisses assert that Scott did not have Tim or Harry's authority to act as an agent. They point to the following statement in Tim's declaration:

18. At no time in 2007 to 2008 did I authorize John Carrosino to act as my agent with respect to WRQ or any of my other personal interests or investments.

CP at 464. But this is a conclusory statement of fact. An affidavit in support of or in response to a motion for summary judgment fails to raise a genuine issue of fact where it sets forth ultimate facts, conclusions of fact, conclusory statements of fact, or legal conclusions. *Snohomish County v. Rugg*, 115 Wn.App. 218, 224, 61 P.3d 1184 (2002). Furthermore, Tim stated that he "never had a role or say in the operation or management of WRQ" and had never been a part of conversations between Hughes, Hart, Scott, or Harry. CP at 463. This shows a lack of effort to maintain his shares independently and supports the inference that the other Corlisses were authorized to deal on his behalf.

The Corlisses also argue that Carrosino was not an agent for any of them because he could not affect their legal relations or those of WRQ. But the ability to affect legal relations is not an essential element to the creation of an agency relationship; it is merely an attribute of an agency relationship once created. "Consent and control are the essential elements of an agency." *Moss v. Vadman*, 77 Wn.2d at 403; see also *Restatement (Second) of Agency § 1* (1958) ("The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act."). The Corlisses' reliance on *Moss* to argue otherwise is misplaced. In that case, the court held only that an agency relationship was not created because the alleged agent had no intent to create agency, did not consent to agency, and did not submit himself to the control of the alleged principals. *Moss*, 77 Wn.2d at 403. The court mentioned an agent's ability to affect legal relations because the facts of the case involved the alleged agent's ability to bind the principal to a real estate purchase and sale agreement. But this case does not involve Carrosino's assertion of legal relations on behalf of the Corlisses.

The Corlisses also cite *Zoda v. Eckert, Inc.*, 36 Wn.App. 292, 674 P.2d 195 (1983), but that case did not state that an alleged

agent's power to affect the alleged principal's legal relations was required to create an agency relationship. *See id.* at 295–96 (agency requires that principal shall have right of control over agent). Moreover, other cases discussing agency have not mentioned any requirement that the alleged agent have the power to affect the alleged principal's legal relations. *See, e.g.,*  *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App. 229, 268–69, 215 P.3d 990 (2009);  *Goodman v. Boeing Co.*, 75 Wn.App. 60, 85–86, 877 P.2d 703 (1994).

*6 Next, we conclude there is also no genuine issue of fact that Hughes and Hart's statements to Carrosino put the latter on notice. “The statute begins to run when the fraud should have been discovered, and a clue to the fact which if followed up diligently would lead to discovery is in law equivalent to discovery.” *Bay City Lumber Co. v. Anderson*, 8 Wn.2d 191, 211, 111 P.2d 771 (1941) (quoting *Noves v. Parsons*, 104 Wn. 594, 177 P. 651 (1919)). Reasonable minds could not disagree that Hughes and Hart's statements were a clue that they owned the pits. Although Hart failed to give Carrosino the updated leases, the Corlisses do not dispute that Carrosino could have obtained ownership information from third-party sources.¹²

But we conclude there is a genuine issue of material fact as to whether Hughes' and Hart's statements to Carrosino bound any of the Corlisses.

The principal is not bound by a notification directed towards an agent whose duties or apparent duties have no connection with the subject matter to which the notification relates. It must be given to one who has, or appears to have, authority in connection with it, either to receive it, to take action upon it, or to inform the principal or some other agent who has duties in regard to it....

 *Roderick*, 29 Wn.App. at 316–17 (citing *Restatement (Second) of Agency* § 268, comment C at 585 (1958)). “The reason for this rule is that it would be unreasonable to impute knowledge to an employer from an employee who would not likely pass such knowledge along.” *Id.*

The evidence below showed that Carrosino did not inform the Corlisses of Hughes' and Hart's statements because he believed that the issue of who owned the pits was not necessary to his task of determining the amount of payments due under the leases. Carrosino also did not tell the Corlisses because he concluded that Hughes and Hart did not own the pits, where their statements were inconsistent with the leases they provided to him and they did not send him updated leases showing otherwise. Under these circumstances, we conclude it is not the case that reasonable minds could come to only one conclusion on the issue of whether the scope of Carrosino's agency required him to inform the Corlisses of Hughes and Hart's statements. “[I]n situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted.” *Preston v. Duncan*, 55 Wn.2d 678, 681–82, 349 P.2d 605 (1960).

III. *Effect of notice to Harry or Carrosino on Corlisses' claims*

The next issue is what effect notice to Harry through the letter and notice to all three Corlisses through Carrosino (if found) would have on whether the Corlisses' claims are barred by the statute of limitations. The Corlisses concede the claim for usurpation of a corporate opportunity is a derivative claim belonging to WRQ,¹³ but contend the trial court erred in dismissing all of the claims because each Corliss has independent claims for breach of fiduciary duty and negligent misrepresentation based on Hughes and Hart's concealment of the purchase of the pits.¹⁴ They contend a separate discovery rule analysis must be done for each Corliss for each claim.

*7 In response, Hughes contends all of the Corlisses' claims are derivative, not individual. We agree. “[A] stockholder may maintain an action in his own right against a third party ... when the injury to the individual resulted from the violation of some special duty owed to the stockholder *but only when that special duty had its origin in circumstances independent of the stockholder's status*  *as a stockholder.*” *Sound Infiniti v. Snyder*, 145 Wn.App. 333, 352, 186 P.3d 1107 (2008), *affirmed on other grounds*,  169 Wn.2d 199, 237 P.3d 241 (2010) (quoting *Sabev v. Howard Johnson & Co.*, 101 Wn.App. 575, 585, 5 P.3d 730 (2000) (emphasis and alterations in original)). Therefore, in *Sound Infiniti*, a minority

shareholder could maintain personal damage claims against majority shareholders in their individual capacities only if the claims arose from something other than shareholder status. *Id.*

The Corlisses cite several cases for the general proposition that shareholders in closely held companies owe one another fiduciary duties.¹⁵ They contend that Hughes and Hart, as directors and officers, owed such duties to them. Likewise, they cite cases for the proposition that Hughes and Hart are liable for negligent misrepresentation.¹⁶ But they do not explain or provide authority specifically addressing why they had an individual, as opposed to derivative, right to sue in these circumstances. They do not explain how they were individually harmed or how their claims are based on something other than their status as stockholders. We conclude the Corlisses' claims are all derivative claims on behalf of WRQ.

In a shareholder derivative suit, “both the cause of action and the judgment thereon belong to the corporation.”  *LaHue v. Keystone Inv. Co.*, 6 Wn.App. 765, 780, 496 P.2d 343 (1972).¹⁷ The stockholders in a derivative suit stand in the shoes of the corporation and are subject to the same defenses against which the corporation is subjected.  *Id.* at 779. Thus, the next question is whether notice to Harry through the letter and/or notice to all three Corlisses through Carrosino (if the latter is found) constituted notice to WRQ of the claims based on the purchase of the pits.

Harry received notice in September 2005 through Hughes' letter. But the parties dispute whether Harry was a director or only a shareholder at that time, and the evidence creates an issue of fact as to this issue.¹⁸ If he was a director, his knowledge would be imputed to WRQ. See  *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn.App. 502, 518, 728 P.2d 597 (1986) (notice to officer and director is notice to corporation). However, if he was merely a shareholder, the issue of notice to WRQ is unclear. The parties do not address under what circumstances a shareholder's knowledge is imputed to a corporation (particularly a closely held corporation with limited shareholders) where the shareholder brings a derivative action. The parties are left to address this issue on remand. If notice to all of the Corlisses in 2007 (through Carrosino) is found on remand, then notice to WRQ is imputed through Scott, whom all parties agree took over as a director for Harry no later than May 2006.

Other Claims

*8 The Corlisses contend the trial court erroneously dismissed two of their claims for other alleged wrongs because Hughes and Hart presented no evidence that the statute of limitations ran as to those claims.¹⁹ They assert they did not find out about these wrongs until after February 2009.

First, the Corlisses assert a claim based on a post-sale amendment to the King Creek lease.²⁰ The amendment allowed WRQ to use the King Creek property for the deposit of backhaul material and required WRQ to pay RR the greater of \$1.50 per ton or 80 percent of the dump fee or tipping fee collected by WRQ for material hauled from off-site and dumped into the King Creek pit.²¹ The Corlisses contend this amendment created a new source of revenue for RR at WRQ's expense.

Hart argues that WRQ suffered no damage as a matter of law because backhaul is a right, not an obligation, under the amended lease and WRQ's sharing of profits with RR when it elects to backhaul materials does not support a claim. He points out that Scott agreed a backhaul feature is important and desired. The Corlisses do not dispute that a backhaul feature is desirable, and they offer no persuasive argument in reply, only contending that, but for the amendment, all backhaul revenue would have remained with WRQ. But as the parties agree, the previous lease did not permit WRQ to use the King Creek pit to deposit backhaul material. We conclude this claim was properly dismissed.

Second, the Corlisses assert a claim based on Hughes and Hart's re-permitting and expanding the King Creek pit. At the time of RR's purchase of the pits, the King Creek mining permit allowed mining on 68.8 acres of the 580-acre site. The re-permitting expanded that area to five times its size. WRQ paid for the costs for the new permit. The Corlisses contend it was wrongful to have WRQ pay for a permit that would enrich RR when RR can terminate or elect not to renew WRQ's lease at any time.

Hughes and Hart contend this claim was properly dismissed because WRQ was already obligated under the pre-existing lease to pay the costs of permit expansion.²² Scott testified that WRQ would have had to pay for the cost of expanding the permits even if Hughes and Hart had not purchased the pits.

Scott also testified that WRQ did not overpay for the permit expansion and that it “got a great deal.” CP at 95. Hughes and Hart also contend that WRQ's expansion of its King Creek permits means more material was available to WRQ for mining than before, and thus more income is available for WRQ. They contend the fact that they, as landlords, may also benefit from the expansion of WRQ's permits does not alone give rise to a cause of action for damages. The Corlisses offer no response to these arguments and we conclude this claim was also properly dismissed.

Attorney's Fees to Hughes and Hart Below

The Corlisses appeal the trial court's award of attorney's fees to Hughes and Hart. The court awarded fees under [RCW 23B.07.400\(4\)](#), which provides:

*9 On termination of the [derivative] proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

This court reviews an award of attorney's fees for abuse of discretion. [State ex rel. Quick–Ruben v. Verharen](#), 136 Wn.2d 888, 903, 969 P.2d 64 (1998).

The Corlisses contend the trial court failed to enter findings of fact or conclusions of law and that such failure alone defeats the award of fees, citing [Mahler v. Szucs](#), 135 Wn.2d

398, 957 P.2d 632 (1998).²³ But the court's order indicated that the basis for the award was that there was no genuine issue of material fact that the statute of limitations had run. Likewise, Hart contends on appeal that the Corlisses' action lacked reasonable cause because it was commenced outside of the statute of limitations.

We reverse the award of fees to Hughes and Hart. This court has stated, in a case involving a similar statute, which provided for attorney's fees in a citizen's action that is dismissed and “which the court also finds was brought without reasonable cause,” that the purpose of the statute was to prevent frivolous and harassing lawsuits. [State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n](#), 111 Wn.App. 586, 615, 49 P.3d 894 (2002) (citation omitted).²⁴ Here, the statute of limitations issue presented debatable issues of fact and law. That the trial court decided these issues in favor of Hughes and Hart was not a proper basis for finding the lawsuit lacked reasonable cause. Hughes and Hart point to no evidence presented below to show that the lawsuit was brought to harass or for an improper purpose.

Attorney's Fees on Appeal

Hughes and Hart request attorney's fees on appeal under [RCW 23B.07.400](#). We deny the request. The Corlisses' appeal is not commenced without reasonable cause.

Reversed in part, affirmed in part, and remanded.

WE CONCUR: [DWYER](#) and [SCHINDLER](#), JJ.

All Citations

Not Reported in P.3d, 179 Wash.App. 1032, 2014 WL 645413

Footnotes

- 1 Harry and Betty are husband and wife and the parents of Timothy and Scott.
- 2 For clarity, the Corlisses will be referred to by their first names. No disrespect is intended.
- 3 The parties dispute when Harry was replaced by Scott. In the same declaration submitted in opposition to summary judgment, Scott states at one point that he replaced Harry on the board of directors in 2004 and at another point that he replaced Harry in June 2005. The May 3, 2006 meeting minutes for WRQ's annual meeting of stockholders and directors indicate that Scott took Harry's place on the board of directors in May 2006.
- 4 It is evident from the substance of the letter that it was written in response to Scott's letter, although both parties' discussion of the letter describes it as written to Harry.

- 5 Betty Corliss wrote to Hughes in March 2006, seeking assistance with an unrelated lawsuit. Hughes responded on March 8, 2006 and enclosed a copy of his September 2, 2005 letter. Hughes and Hart do not argue that the letter to Betty was sufficient to trigger the statute of limitations.
- 6 There is no evidence from Harry in the record.
- 7 The Corlisses also argue that even if the statute of limitations bars their claims, the trial court should have applied equitable tolling. We do not reach the issue given our disposition of this appeal.
- 8 The Corlisses make several other arguments with respect to Hughes' 2005 letter. They argue that there is no evidence of who lived or worked at the address to which the letter was sent. They are mistaken. The footer of Scott's letter to Hughes set forth the same address to which Hughes sent his letter to Harry. The Corlisses also argue that Hughes and Hart may not rely on the letter to show that notice was given because the statement on which they rely is false. Specifically, they point out, the letter falsely states that Hughes, not RR, purchased the pits. This argument is not well taken. The gist of the Corlisses' lawsuit is that Hughes and Hart usurped a corporate opportunity by purchasing the pits; the opportunity to WRQ was lost when someone other than WRQ bought the pits. The letter gave notice to Harry as to Hughes' purchase of the pits, regardless of whether it was through RR.
- 9 We also conclude that even if this issue is properly before this court, the trial court did not abuse its discretion in denying the motion for reconsideration. This court reviews a trial court's decision on a motion for reconsideration for abuse of discretion. [Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.](#), 140 Wn.2d 517, 537, 998 P.2d 856 (2000). First, Hughes' testimony that he sent the letter was un rebutted, and Scott's testimony showed the letter was received at CRI's office and maintained in its files. Second, the Corlisses' evidence of Harry's incompetence consisted of Scott's testimony that his dad had two bad falls in 2004 and 2005 and that, starting in 2004, Harry gradually "started to let go a little bit." CP at 717. Contractual capacity is strongly presumed; the party alleging incapacity bears the burden of proving incapacity by clear, cogent, and convincing evidence. [Page v. Prudential Life Ins. Co. of Am.](#), 12 Wn.2d 101, 109, 120 P.2d 527 (1942). It must be shown that the person had "no reasonable perception or understanding of the nature and terms" of the information. *Id.* The trial court did not err in ruling that the Corlisses' evidence failed to create a genuine issue of material fact that Harry could not have had a reasonable understanding of the letter in 2005. Moreover, when a new theory is presented to the trial court for the first time in a motion for reconsideration, the trial court may refuse to consider it. [Wilcox v. Lexington Eve Inst.](#), 130 Wn.App. 234, 241, 122 P.3d 729 (2005).
- 10 While both parties agree there are disputed issues of material fact with respect to whether Carrosino was an agent for any of the Corlisses, neither party specifically describes the disputed issues of fact. It appears the parties' arguments are instead about the legal conclusions that can be drawn from the facts.
- 11 See [Barker v. Skagit Speedway, Inc.](#), 119 Wn.App. 807, 814–15, 82 P.3d 244 (2003) (no agency where plaintiff sought to hold defendant liable for alleged agent's negligence where defendant did not have control over alleged agent); [Bloedel Timberlands Dev., Inc. v. Timber Industries, Inc.](#), 28 Wn.App. 669, 674–75, 626 P.2d 30 (1981) (logging contractor was agent for timber company, such that company was liable for its trespass, if company controlled the manner of contractor's performance by controlling cutting of timber).
- 12 Carrosino did not seek documentation regarding ownership from Hughes, WRQ's attorney, the Pierce County Recorder, the Pierce County Treasurer, the Pierce County Assessor, or the Washington State Department of Natural Resources.
- 13 See [Wagner v. Foote](#), 128 Wn.2d 408, 413, 908 P.2d 884 (1996) (corporate opportunity doctrine centers on misappropriation of business opportunities belonging to corporation).
- 14 They also contend each of them had independent claims based on the backhaul amendment to the King Creek lease and the re-permitting of the King Creek pit, but as we will explain those claims were properly dismissed for other reasons.
- 15 The Corlisses cite [Lang v. Hougan](#), 136 Wn.App. 708, 150 P.2d 622 (2007); [Arneman v. Arneman](#), 43 Wn.2d 787, 264 P.2d 256 (1953); and [Hay v. Big Bend Land Co.](#), 32 Wn.2d 887, 204 P.2d 488 (1949).
- 16 The Corlisses cite [Haberman v. Wash. Pub. Power Supply Sys.](#), 109 Wn.2d 107, 744 P.2d 1032 (1987); [Boonstra v. Stevens–Norton, Inc.](#), 64 Wn.2d 621, 393 P.2d 287 (1964); and [Oates v. Taylor](#), 31 Wn.2d 898, 199 P.2d 924 (1948).
- 17 Although direct recovery to shareholders may be allowed under exceptional circumstances, resulting in a "forced distribution of corporate assets to shareholders," a judgment in favor of the individual stockholders is improper where third party rights of higher priority are involved. [LaHue](#), 6 Wn.App. at 780–81. As Hughes points out, the Corlisses make no argument regarding exceptional circumstances.

- 18 Hughes and Hart contend Scott took over as a director for Harry in May 2006, as shown by meeting minutes. The Corlisses contend Scott took over as a director in June 2005, pointing to Scott's statement in his declaration that he officially took over as a director in June 2005. Scott further stated in his declaration that no meeting took place on June 6, 2005 and suggests the minutes were manufactured by WRQ's attorney (also Hughes' attorney in this suit). He stated that the 2005 annual meeting was not held until May 3, 2006. The meeting minutes for the June 6, 2005 do not bear the signature of Hughes (WRQ's secretary), although the minutes for other years do.
- 19 Hughes and Hart do not argue the statute of limitations ran as to these claims.
- 20 As Hart points out, no mention of this claim or the facts underlying it is mentioned in the complaint. The claim is mentioned for the first time in the Corlisses' opposition to Hughes' motion for summary judgment. Below, however, Hughes and Hart did not argue in their reply brief that the claim was improperly before the trial court.
- 21 The amendment was signed by Hughes for RR and Hart for WRQ.
- 22 The King Creek lease with WRQ states at Article 10:
10. **Statutory Compliance and Permits.** Lessee shall be responsible, at its cost, for securing the necessary Pierce County permits. If an Environmental Impact Statement is required to secure any Pierce County permits, its cost shall be shared equally by Lessor and Lessee. Lessee shall be responsible, at Lessors cost, for securing any DNR or surface mining permits. Lessor's total cost for its obligations pursuant to this paragraph shall not exceed \$40,000.00. Any cost reimbursement by Lessor to Lessee for any permit expenses may, at Lessor's option, be through a Royalty credit to Lessee.
CP at 142. The November 2003 amendment to the King Creek lease acknowledges that the lessor's obligation to reimburse lessee for certain costs as set forth in Article 10 has been satisfied. Thus, under the terms of the King Creek lease any further permitting was the responsibility of WRQ.
- 23 The Corlisses do not challenge the amount of the fee award, only its basis. Thus, to the extent the trial court did not enter specific findings supporting the amount of the award, such failure does not affect the Corlisses' claim.
- 24 The statute in *Evergreen Freedom Foundation* provided:
[I]n the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

 [Evergreen Freedom Foundation](#), 111 Wn.App. at 615 n. 23 (quoting former RCW 42.17.400(4)(2002)).

2019 WL 4072509

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1UNPUBLISHED OPINION
Court of Appeals of Washington, Division 3.In the Matter of the Marriage of,
Lori VAN DE GRAAF, Respondent,

v.

Rod D. VAN DE GRAAF, Appellant.

No. 36282-5-III

FILED AUGUST 29, 2019

Appeal from Yakima Superior Court, 11-3-00982-6,
Honorable Elisabeth Michelle Tutsch, Judge.**Attorneys and Law Firms**

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Opinion[Korsmo, J.](#)

*1 This is Van de Graaf II. See *In re Marriage of Van de Graaf*, no. 35133-5-III (Van de Graaf I), for details. At issue is the propriety of trial court orders directing appellant Rod Van de Graaf (Rod) to pay “suit money” to respondent Lori Van de Graaf’s attorneys (Lori) to defend against the Van de Graaf I appeal. We affirm.

PROCEDURAL HISTORY

The facts are known to the parties and will not be recited here, although interested persons can find some of the information in our Van de Graaf I opinion. After five years of litigation, the trial court awarded both parties an equal seven-figure distribution of assets, although there was comparatively little in the way of liquid assets since the primary holdings were businesses and real estate. Rod was ordered to pay Lori \$6,000 per month in support and make a transfer payment of approximately \$1.17 million, in addition to paying Lori \$58,675 for attorney fees expended in the trial court. Rod appealed to this court; we upheld those awards in Van de Graaf I.

Rod had stopped paying spousal support in late 2016 and, after the decree of dissolution entered, did not make the transfer payment and did not pay the attorney fee award. As a result, in the early days of the appeal, Lori had no income. Rod later resumed paying the spousal maintenance and stayed the transfer payment and the attorney fee judgment by posting a supersedeas bond.

Lori sought \$65,000 in “suit money” from Rod to pay for her appellate attorneys. Yakima County Superior Court Commissioner Elisabeth Tutsch eventually ordered Rod to pay \$30,000 to the appellate attorneys. As a result of contempt motions, Rod made a payment of \$10,000 that he alleged was loaned to him by his sister. The remaining \$20,000 was never paid.

Meanwhile, extensive enforcement actions occurred in the trial court, requiring Lori to expend fees on attorneys in that court as well as on appeal.¹ She sought additional suit money. Commissioner Tutsch eventually ordered Rod to pay an additional \$80,000 in suit money on top of the \$30,000 previously ordered. Clerk’s Papers at 13. He appealed that ruling to this court. The single \$10,000 payment is the only suit money advanced by Rod to this point, leaving him \$100,000 in arrears on those orders.

This court considered this appeal without hearing argument during its March 2019 docket week.

ANALYSIS

The primary issue presented in this appeal involves the commissioner’s suit money orders.² Lori also seeks her attorney fees in this court due to Rod’s intransigence, while he defends that argument by insisting that he is entitled to

attorney fees due to Lori's pursuit of the fees despite his inability to pay and her improper briefing in the trial court. We address first the suit money argument before jointly, although briefly, considering the attorney fee arguments.

Suit Money

*2 Rod argues that Lori was financially able to finance her own appeal and that he is not able to do so. We defer to the trial court's factual findings to the contrary.

Advance payment of attorney fees to support an appeal is authorized by [RCW 26.12.190\(1\)](#) and [RAP 7.2\(d\)](#). [Stringfellow v. Stringfellow](#), 53 Wn.2d 359, 360-361, 333 P.2d 936 (1959);  [In re Parentage of J.H.](#), 112 Wn. App. 486, 499, 49 P.3d 154 (2002). [RCW 26.09.140](#) and [RCW 26.12.190](#) authorize the court to award "suit money" on any basis that "may appear just and equitable" "after considering the financial resources of both parties." An award of suit money is appropriate where the requesting party demonstrates a need for advance fees for appeal, and the other party has the ability to pay. *E.g.*,  [Baker v. Baker](#), 80 Wn.2d 736, 748-749, 498 P.2d 315 (1972) (award of suit money pending appeal was not an abuse of discretion where all of the income producing community property and practically all of the parties' liquid assets were controlled by the nonrequesting spouse); [Stringfellow](#), 53 Wn.2d at 360 (trial court should have awarded suit money, alimony, and attorney fees for trial fees where husband retained control and management of the community assets awarded to wife through the use of a supersedeas bond, wife received no alimony or attorney fees at trial, and the only assets available to her were the family residence, a car, and her personal effects).

We review an award of suit money for abuse of discretion. [Bennett v. Bennett](#), 63 Wn.2d 404, 417-418, 387 P.2d 517 (1963). Discretion is abused when it is exercised on untenable grounds or for untenable reasons.  [State ex rel. Carroll v. Junker](#), 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Rod argues that Lori received the largest liquid asset, a retirement account, making her the person most capable of paying for her appellate fees. There are multiple problems with this argument. First, the account is not a true liquid asset. The nature of a retirement account is such that when a party withdraws money prematurely from an account, significant financial penalties and taxes attach to the transaction, increasing the party's current costs and reducing future

retirement benefits. Second, Rod was the person who received the most liquid asset—his income from the family cattle business partnership with his siblings. During the post-decree litigation, he has been taking a reduced monthly draw of \$7,800 from that operation. Rod possessed the most liquid assets.

On the other side of the ledger, Rod's claim of inability to pay fell on deaf ears in the trial court. The commissioner disbelieved Rod and found him in contempt. The commissioners of both this court and the Washington Supreme Court denied his numerous emergency motions for similar reasons—Rod simply did not demonstrate his inability to pay. The sudden reduction in income resulting from his reduced monthly draw from the family business appeared suspicious, and he did not provide business records to support his claim that reduced business income necessitated the reduction. In addition, his own monthly expenses were minimal. There was testimony that the family businesses paid for Rod's housing and other expenses and there was no evidence that he had any additional expenses other than his support obligation. In addition, he was expending large sums to prosecute the appeals in this case. He also owned significant personal property.

*3 In sum, the record reflected both that Rod had an ability to pay and that Lori did not. The decision to award suit money to her was understandable. There was no abuse of discretion.

Additionally, we believe that the trial court also was free to consider the nature of this litigation in reaching its decision. The original trial judge, the Honorable Michael McCarthy, found that Rod was intransigent and engaged in scorched earth litigation practices designed to impose financial hardship on Lori. On appeal, Rod continued to spend large sums on his attorneys, supposedly based on loans from his parents and sister. The desire to spend money he did not have while refusing to pay his court-ordered suit money obligation could be seen as just one more instance of attempting to force Lori to waste resources. This, too, would justify the suit money award.

The suit money orders were well within the discretion of the commissioner. There was no error.

Attorney Fees

We jointly consider the competing arguments concerning attorney fees on appeal. We award Lori her attorney fees

for briefing of this appellate cause number due to Rod's intransigence.

Attorney fees may be awarded on appeal in dissolution cases when one party has need for an award and the other party has the ability to pay. [RCW 26.09.140](#). They also may be awarded on appeal due to intransigence. *In re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999); *Eide v. Eide*, 1 Wn. App. 440, 445-446, 462 P.2d 562 (1969).

In Van de Graaf I, this court awarded Lori her fees on appeal due to Rod's intransigence. We do so again here.

There is no right to appeal a civil case at public expense, except in a few very narrow circumstances. *E.g.*, *In re Marriage of King*, 162 Wn.2d 378, 174 P.3d 659 (2007). Accordingly, most litigants who cannot afford a discretionary civil appeal either represent themselves or forego the appeal altogether. Here, Rod has chosen a different path—partial payment of appellate expenses through the largesse of his family. We use the word “partial” purposefully. Scorched earth litigation is designed to impose costs on all involved, often with the goal of leaving the winner with a pyrrhic victory. Here, Rod's efforts to extensively litigate without cost to himself and to force Lori to bear significant costs (or give up) while refusing to pay the suit money is just another example of his intransigence. He simply cannot claim poverty while pursuing expensive, discretionary litigation. No rational person would borrow and spend many times the original suit money order to challenge that award.

That conclusion, along with the trial court's rejection of his claims of inability to pay, eliminates Rod's argument that Lori

has been improperly pursuing payment from him. As to his claim that Lori's trial court briefing was deficient, we see no error. More importantly, Rod has not demonstrated how the motion for additional suit money harmed his ability to defend against the claim. By that point, the trial court had already awarded the first \$30,000 in suit money, Rod still had not paid the judgment to Lori, and the court and parties were well aware of the extensive litigation in both the trial court and this court concerning the decree. Referring the trial court to the files and previous rulings in the case was adequate notice of why Lori was seeking more suit money. Litigation continued with no payments from Rod and expenses for both parties mounting quickly. Rod has not demonstrated reversible error occurred.

*4 We grant Lori her reasonable attorney fees for the briefing and motions filed under this cause number, subject to her timely compliance with [RAP 18.1](#).

The judgment is affirmed.

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

WE CONCUR:

[Lawrence-Berrey](#), C.J.

[Siddoway](#), J.

All Citations

Not Reported in Pac. Rptr., 2019 WL 4072509

Footnotes

¹ Many of these actions are at issue in Van de Graaf IV.

² The initial order was originally part of Van de Graaf I, but we have moved our consideration of that issue to this case.

BARNARD IGLITZIN & LAVITT

January 08, 2020 - 9:53 AM

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