Court of Appeals Cause No. 58939-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF:

THE RECALL OF

JAY KINNEY, DAWN JANOW, KEN DEWITT,

& JOHN T. (TOM) SWOLGAARD,

AS COMMISSIONERS, BAINBRIDGE ISLAND

METROPOLITAN PARK & RECREATION DISTRICT

PETITION FOR REVIEW

Jay C. Kinney, WSBA #14053
200 Winslow Way W., Ste. 300
Bainbridge Island, WA 98110
Telephone: (206) 623-2300
Telefax: (206) 770-6198
Email: kinney@kinneylawgroup.com
Attorneys for the petitioners -- commissioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

STATUTES

A. IDENTITY OF PETITIONERS

Petitioners Jay Kinney, Dawn Janow, Ken DeWitt and John T. (Tom) Swolgaard are four of the five commissioners on the Bainbridge Island Metropolitan Park & Recreation District (BIMPRD) board. Mr. Kinney (WSBA #14053) is representing himself and the commissioners. Respondent Adam Hunt filed recall charges against them in May 2023. This Court consolidated the four recall cases into one appeal: CP 231-136 (Notice of Appeal in the Recall of Kinney case); CP 340-345 (Notice of Appeal in the Recall of Janow case); CP 448-453 (Notice of Appeal in the Recall of DeWitt case); CP 556-561 (Notice of Appeal in the Recall of Swolgaard case). This Court then remanded the case to the Court of Appeals.

B. COURT OF APPEALS DECISION

The August 27, 2024 Court of Appeals decision is attached at Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. May an attorney who files five intentionally frivolous recall petitions in bad faith against four public officials, to force them to take a specific action against their discretion, avoid sanctions under *In re Recall of Piper* if he also has a sincere belief that the public officials are not fulfilling their general duties and responsibilities to the community?

2. Is the Court of Appeals "totality of the circumstances" standard for evaluating a sanctions motion consistent with *Piper*?

3. When applying the standards set out in *Piper*, is an examination of the merits of the recall charges a necessary step in deciding a sanctions motion?

D. STATEMENT OF THE CASE

Mr. Hunt first appeared and spoke at a BIMPRD board meeting on March 2, 2023, demanding that the

commissioners plan and build a new swimming pool while his children were still young enough to enjoy it. CP 641, 722. He soon added a demand that the commissioners plan and build a field house at Sakai Park. CP 652, 723-24. The commissioners did not act fast enough to suit Mr. Hunt, so on May 1, 2023, he filed a recall lawsuit against each commissioner pursuant to Chapter 29A.56.[1] He brought the same five recall charges against each commissioner. The Kitsap County Prosecutor's Office prepared a ballot synopsis, and the Kitsap County Superior Court scheduled a sufficiency hearing pursuant to RCW 29A.56.140 on June 30, 2023.

At a BIMPRD board meeting on May 19, 2023, Mr. Hunt said "there was no need for a recall" and repeated "I am open to a dialogue about dismissal of the recall charges" if

[1] He did not seek to recall the fifth commissioner on the BIMPRD board because that commissioner was willing, at least, to build a new pool. CP 642.

the Board took steps to build the new pool and fieldhouse for which he advocated. He stated:

> I want to get rid of the recall charges, but I can't because you're not talking with us and coming together with/in [sic] the BIMPRD Policy Manual provisions for ad hoc citizen advisory committees that Mr. Lande already proposed. Let's work together and I'll get rid of the stupid recall OK. Let's have a dialogue about that.

CP 732. The Board rejected his quid pro quo:

> Commissioner Kinney said speaking for himself he thinks it is very dangerous business to have someone bring a recall charge to force the board to take a specific action. That is over the top. He is not ever going down the road of, do what I want when I want it or I am filing a recall, which is what Adam Hunt has done.

CP 674.

Instead, the commissioners voted for the Park District to pay for defense counsel pursuant to RCW 4.96.041(3) to represent them in the expedited court hearings. CP 675.

Less than 24 hours before the commissioners' briefing was due in those expedited proceedings, Mr. Hunt stipulated

to dismiss all of his charges with prejudice. He later emailed the commissioners an apology:

> Commissioners: I'd like to apologize for the correction of my perception that any of your efforts over many years working as unpaid public servants was undertaken with any sort of improper intent and/or intentions. I could have made a different choice to lead with dialogue & partnership versus assumptions and allegations.

CP 854.

Based on the Court's prior recall decisions, the commissioners asked the trial court to award the Park District its defense costs against Mr. Hunt. Briefly, the commissioners pointed out the fatal flaws in every recall charge that no competent attorney would have ignored. The commissioners have broad discretion in overseeing the Park District, and officials cannot be recalled for their discretionary acts absent manifest abuse of discretion. *In re Recall of Sandhaus,* 134 Wn2d. 662, 670, 953 P.2d 82 (1998). This eliminated charges 1 and 2. Mr. Hunt did not

identify a legal standard as a basis for charge 3, and if he had, he was required to present facts showing the commissioners intended to commit an unlawful act. *Id.* at 670; *In re Recall of Wade,* 115 Wn.2d 544, 549, 799 P.2d 1179 (1990). This eliminated charges 3 and 4. Finally, Charge 5 alleged a violation of the Open Public Meetings Act, RCW 42.30.010 et seq. This speculative charge lacked the factual specificity required. There was nothing in the petition indicating the time or place where the alleged illegal meeting took place. *Cole v. Webster,* 103 Wn.2d 280, 286, 692 P.2d 799 (1984). In addition, if there were a violation of the Open Public Meetings Act, Mr. Hunt presented no facts showing that any of the commissioners intended to violate the law. *Recall of Sandhaus,* 134 Wn2d. at 670. It is important to note that Mr. Hunt apologized to the commissioners and admitted they had done nothing wrong. CP 854.

In his response to the sanctions motion, Mr. Hunt was obligated to "reasonably identify the supporting information

and explain how it supports the charges." *In re Recall of Piper,* 184 Wn.2d 780, 789, 364 P.3d 113 (2015). He did not do so. Instead, he attacked the commissioners personally with a great deal of animosity, and talked up his own good faith, classic red herring arguments.

The trial court did not examine the basis of the recall charges at all to determine if they were "intentionally frivolous," the key first step the Court took in *Piper, In re Recall of Lindquist,* 172 Wn.2d 120, 258 P.3d 9 (2011), and *In re Recall of Pearsall-Stipek,* 136 Wn.2d 255, 961 P.2d 343 (1998). Instead, the trial court determined that Mr. Hunt could not be sanctioned unless his *sole* motivation to bring the charges was improper. The court stated:

> In this case, the Court cannot conclude that the petitioner's motivation was solely improper. While petitioner may have had more than one purpose in filing the petition, it cannot be said that he was not also motivated by a sincere belief that the respondents were not fulfilling their duties as elected officials. Accordingly, this court does not need to reach the

> matter of whether the recall petitions were without legal or factual sufficiency.

CP 230.

The commissioners filed an appeal with the Supreme Court, which transferred the case to the Court of Appeals. The Court of Appeals published decision is notable for a few reasons. First, the Court came to the mistaken impression that the trial court had indeed examined the recall and "explicitly found that Mr. Hunt did not act in bad faith because he had a sincere belief in the charges underlying the recall petition." Appendix A, p. 8. The trial court actually stated, "this court does not need to reach the matter of whether the recall petitions were without legal or factual sufficiency." CP 230.

Second, the Court of Appeals went on to say that "the case law, read as a whole, shows that in determining whether a petitioner acts in bad faith, the court must examine the totality of the circumstances." Appendix A, p. 8. The Court found (in error) that Mr. Hunt had a long, documented history

of public engagement and activism related to the BIMPRD board; and truly believed the Commissioners were not fulfilling their duties and responsibilities to the community.[2] Appendix, p. 8 . On this basis, the Court of Appeals upheld the trial court's denial of the commissioners' defense costs.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) Tests Established in RAP 13.4(b)

(a) The Court should accept review under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with the holding and analysis set out in the *Piper, Lindquist* and *Pearsall-Stipek* line of cases.

(b) The Court should accept review under RAP 13.4(b)(3) because it involves a significant question of law under the Constitution of the State of Washington, and RAP 13.4(b)(4) because it involves an issue of substantial public

[2] Mr. Hunt first showed up at a BIMPRD board meeting just two months before he filed his recall petitions. CP 145. Two months is not a long history of involvement.

interest that should be determined by the Supreme Court. The State Constitution guarantees the right of recall, but the 1976 and 1984 amendments to RCW 29.82 "clearly disclose an intent by the Legislature to limit the scope of the recall right and free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations." *Teaford v. Howard,* 104 Wn.2d 580, 584, 707 P.2d 1327 (1985). The Court of Appeals decision changes the balance the Court has struck in *Piper, Lindquist and Pearsall-Stipek.*

(2) The Court of Appeals decision changes the standards and procedures set out in *Pearsall-Stipek*, *Lindquist* and *Piper*.

The Court of Appeals decision changes the standards and analytic approach set out in the *Pearsall-Stipek, Lindquist* and *Piper* line of cases. Both public officials facing recall charges and the citizens who bring them need a

clarification of the standards. Litigation is expensive and emotionally draining for both sides. The rules must be clear.

(a) Bad faith is inherent in filing a knowingly frivolous recall petition to create leverage for a quid pro quo.

There is never a good reason for a recall petitioner to intentionally file a knowingly frivolous recall petition. Bad faith is inherent in the action. Mr. Hunt's community concerns should not outweigh his political tactics. It is one thing to advocate for change. It is another to file four frivolous recall petitions and then offer to withdraw them to force four public officials to change their discretionary decisions.

The Court in *Pearsall-Stipek, Lindquist* and *Piper* set out a procedure for trial courts to follow when deciding upon sanctions. First, the trial court must analyze the basis of the charge to determine if it is "intentionally frivolous." If it is,

then the court may impose sanctions if it finds that the petitioner had a bad faith motive for the action. Examples of bad faith motives in these cases include:

- Repeated and wholly meritless efforts to recall the official. *Pearsall-Stipek*, 136 Wn.2d at 267.

- Filing the charge directly before an election; making a serious, baseless allegation; refusing to respond to discovery and explain their motivation; misquoting case law; refusal to attend the sufficiency hearing; refusal to respond to discovery. *Lindquist*, 172 Wn.2d at 137-138.

- Filing the charge with no real intent to successfully recall the official; filing to force an official to retire and thus reshape the PUD board; acknowledging that the charges were not based on any misconduct; repeated and wholly

meritless efforts to recall the official. *Piper*, 184 Wn.2d at 791.

Surely, the recall petitioners in these cases would say that they were concerned citizens with a sincere belief that the elected officials were not fulfilling their duties and responsibilities to the community. The decisions in *Pearsall-Stipek*, *Lindquist* and *Piper* give no indication that the recall petitioner's community concerns could outweigh the bad faith inherent in intentionally filing known frivolous charges. There was no examination of the totality of the circumstances in these cases. There was no requirement (as the trial court used here) that the petitioner's motivation be "solely improper." The Court of Appeals decision is a clear change in the law.

The trial court and the Court of Appeals did not follow the procedure set out in *Pearsall-Stipek*, *Lindquist* and *Piper*. Instead of analyzing the basis of the recall charges, the lower

courts accepted an exculpatory excuse. The Court of Appeals decision makes it virtually impossible for a local govermnental body to recovery defense costs against someone who files an intentionally frivolous recall petition for purposes of political harassment or leverage because that person can always assert a "sincere belief" sufficient under the lower court's ruling to avoid responsibility for their frivolous filing.

(b) The Court of Appeals decision establishes that filing a recall petition to create political leverage is acceptable.

The Court of Appeals stated that "... Hunt's conduct in filing the recall petitions, even as part of an ongoing campaign to inspire change in the Board's decisions, did not rise to the level of bad faith demonstrated in *Lindquist* and *Piper*." Appendix A, p. 8. In other words, filing a frivolous recall petition to create political leverage is excusable. This

will certainly give rise to an increase in recall cases throughout our State.

In *Piper,* the Court found the recall petitioners were in bad faith because they did not have a real intent to remove Piper from office. Mr. Hunt did not intend to remove the four commissioners from office. He just wanted to direct policy. In the future, recall petitioners across the State who disagree with a policy decision by local government can depend on the Court of Appeals decision to immunize them in similar situations under the totality of the circumstances standard.

(c) A lack of a sincere belief in the sufficiency of the recall charges is evidence of a bad faith motive.

The Court of Appeals noted:

> Our Supreme Court's language in *Piper* indicates that bad faith is being "motivated by something other than a sincere belief in the sufficiency of the recall charges." 184 Wn.2d at 791. The natural implication from the Supreme Court's language is that

> one cannot act in bad faith if they are motivated by a sincere belief in the sufficiency of the recall charges.[3]

Appendix A, p.8. A positive statement of this rule would be, one acts in bad faith if they do not have a sincere belief in the sufficiency of the recall charges. The existence of this sincere belief should be based on an objective standard. *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 220, 829 P.2d. 1099 (1992).

The commissioners' briefs established that the recall charges were baseless and no reasonably competent attorney would have filed them. In his responses in both the trial court and the Court of Appeals, Mr. Hunt was obligated to "reasonably identify the supporting information and explain how it supports the charges." *Piper,* 184 Wn.2d at 789. He did not do so. The Court should make it clear that a recall petitioner is required to explain the legal and factual basis of

[3] The language in *Piper* echoes the language in *Pearsall-Stipek:* ". . . Mr. Bennett's persistence suggests that he may be motivated by spite rather than by a sincere belief in the sufficiency of the recall charges." 136 Wn.2d at 267.

the charges in every case. Bad faith will be established if the recall petition is unable or unwilling to justify filing a frivolous recall petition (as is the case here). CP 854; *Lindquist,* 172 Wn.2d. at 138. The trial court and the Court of Appeals decisions relieved Mr. Hunt of this showing. The Court of Appeals decision sets a precedent where such a showing is unnecessary. A change of this magnitude should come from the Supreme Court.

F. CONCLUSION

This case raises critical statewide issues about the standards and analytical steps in the imposition of sanctions in frivolous recall cases. The Court of Appeal's decision to adjudicate the existence of a bad faith motive under the "totality of circumstances" test, without an examination of the basis for the recall charges as was done in *Pearsall-Stipek, Lindquist* and *Piper,* is a stark departure from Supreme Court precedents. The Supreme Court should make

this change, if it is warranted – not the Court of Appeals. Review is merited under RAP 13.4(b)(1), (b)(3) and (b)(4).

This Court should accordingly:

1. Reverse the Court of Appeals and unequivocally confirm for our State's elected officials, recall petition filers and superior courts that *Pearsall-Stipek, Lindquist* and *Piper* remain the law of our State without being effectively overridden or nullified by the "sincere belief" immunity theory applied by the lower court's published decision;

2. Remand to the superior court for the damages amount determinations the commissioners have requested; and

3. Award attorney's fees and cost on appeal to the commissioners.

RAP 17.17(b) & (c)(1) Word Limit Certification:

I certify that this Petition for Review, exclusive of words contained in appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits) contains 3278 words (not more than 4000).

RESPECTFULLY SUBMITTED September 26, 2024.

Kinney Law Group, PLLC

/s/ Jay C. Kinney
Jay C. Kinney, WSBA #14053
200 Winslow Way W., Ste. 300
Bainbridge Island, WA 98110
Telephone: (206) 623-2300
Telefax: (206) 770-6198
Email: kinney@kinneylawgroup.com

Attorneys for the petitioners

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date given below I caused to be served in the manner noted below copies of this pleading upon the designated parties as shown below:

Counsel for William Adam Hunt
William Adam Hunt, WSBA 54529
14320 Komedal Road NE, Bainbridge Island, WA 98110
VIA EMAIL AT:
adam@fundthefieldhouse.org
adamhunt@gmail.com

Counsel for Kitsap County
Alan L. Miles, WSBA 26961
Kitsap County Prosecutor's Office, 614 Division St
Port Orchard, WA 98366
VIA EMAIL AT:
AMiles@kitsap.gov

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

Executed on September 26, 2024, at Seattle, Washington.

s/ Jay C. Kinney
Jay C. Kinney

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

August 27, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Recall of:

JAY KINNEY, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT,

In the Matter of the Recall of:

DAWN JANOW, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT,

In the Matter of the Recall of:

KEN DEWITT, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT,

In the Matter of the Recall of:

JOHN T. (TOM) SWOLGAARD, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT.

No. 58939-7-II

ORDER GRANTING MOTION TO PUBLISH AND PUBLISHING OPINION

Respondent, William Hunt, filed a motion to publish this court's opinion filed on May 29, 2024. After consideration, the court grants the motion. It is now

ORDERED that the final paragraph in the opinion which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

FOR THE COURT

PANEL: Jj. Lee, Cruser, Che

LEE, JUDGE

Filed
Washington State
Court of Appeals
Division Two

May 29, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Recall of: JAY KINNEY, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT, In the Matter of the Recall of: DAWN JANOW, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT, In the Matter of the Recall of: KEN DEWITT, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT, In the Matter of the Recall of: JOHN T. (TOM) SWOLGAARD, AS COMMISSIONER, BAINBRIDGE ISLAND METROPOLITAN PARK & RECREATION DISTRICT.	No. 58939-7-II UNPUBLISHED OPINION

LEE, J. — Four commissioners (collectively the Commissioners) of the Bainbridge Island Metropolitan Parks & Recreation District Board (the Board), who were the subject of recall petitions filed by William A. Hunt, appeal the superior court's order denying their motion for

attorney fees. We hold the superior court did not abuse its discretion in denying the Commissioners' request for attorney fees. Accordingly, we affirm.

FACTS

On May 1, 2023, Hunt filed recall petitions against the following commissioners: Jay Kinney, Dawn Janow, Ken Dewitt, and John T. Swolgaard. The recall petitions alleged five charges: (1) failure to initiate, direct, and administer park and recreation activities, primarily related to allegations that the commissioners failed to follow through on community desires to develop Sakai Park; (2) gross mismanagement of public funds; (3) material misrepresentations made in a grant agreement related to Sakai Park; (4) improper conversion of the Sakai Park property; and (5) violation of the Open Public Meetings Act, chapter 42.30 RCW.

On May 12, as required by statute, the Kitsap County Prosecutor filed petitions in the superior court to determine the sufficiency of the recall charges. On May 24, the parties filed a stipulated order of dismissal. The recall charges were dismissed with prejudice.

Following the dismissal, the Commissioners filed a motion for attorney fees. The motion alleged that Hunt had brought the recall charges against the Commissioners in an attempt to pressure the Commissioners to do what Hunt wanted in regard to developing Sakai Park. The Commissioners argued that the recall charges were frivolous. The Commissioners also alleged that Hunt filed the recall petitions in bad faith because Hunt's motivation for filing the petitions was to put pressure on the Commissioners. The Commissioners argued that "deploying a frivolous recall process for political ends constitutes bad faith." Clerk's Paper (CP) at 91.

In response to the Commissioners' motion for attorney fees, Hunt explained his long history of public participation with the Board regarding parks and recreation in general, and specifically, Sakai Park. Hunt explained his intent "to help improve the recreational opportunities

for kids and the [broad] Bainbridge Island community." CP at 192. Hunt included extensive documentation of his public statements urging Board accountability for Sakai Park development, emails to some of the individual commissioners regarding the Sakai Park planning process, and letters of support from the community.

After a hearing, the superior court entered a written order denying the Commissioners' motion for attorney fees. The written order explained the case law governing the award of attorney fees in recall petitions. The superior court noted that a recall petition must be filed in bad faith to support an award of attorney fees. The superior court found:

> In this case, the Court cannot conclude that the petitioner's motivation was solely improper. While petitioner may have had more than one purpose in filing the petition, it cannot be said that he was not also motivated by a sincere belief that the respondents were not fulfilling their duties as elected officials. Accordingly, this court does not need to reach the matter of whether the recall petitions were without legal or factual sufficiency.

CP at 230. The superior court denied the Commissioners' motion for attorney fees.

The Commissioners appeal.

ANALYSIS

A. SUPERIOR COURT'S BAD FAITH DETERMINATION

The Commissioners argue that the superior court erred in denying their motion for attorney fees by misapplying the law and creating a "'sincere belief'" immunity that shields a petitioner from paying attorney fees even when they have filed a frivolous petition in bad faith. Br. of Appellant at 42. We disagree.

"An award of attorney fees is left to the trial court's discretion and will not be disturbed absent a clear showing of abuse." *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 265, 961 P.2d 343 (1998).

RCW 29.A.56.140[1] provides, in relevant part:

> [T]he superior court shall have conducted a hearing on and shall have determined, *without cost to any party*, (1) whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed, and (2) the adequacy of the ballot synopsis.

(Emphasis added.) However, RCW 4.84.185 provides, in relevant part:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action. . . .
>
> The provisions of this section apply unless otherwise specifically provided by statute.

In *Pearsall-Stipek*, our Supreme Court held that the apparent conflict between the two statutes should be resolved in favor of the voter, not the elected official. 136 Wn.2d at 266. Therefore, "the superior court may not award expenses and attorney fees under RCW 4.84.185 against a recall petitioner who brings a merely frivolous recall petition." *Id.* However, the cost prohibition in RCW 29.A.56.140 "does not mean . . . that the courts are powerless to respond to intentionally frivolous recall petitions brought for the purposes of harassment." *Id.* CR 11 and the courts' inherent equitable powers allow an award of attorney fees against a petitioner who brings a recall petition in bad faith. *Id.* at 266-67.

Pearsall-Stipek recognized that the petitioner's actions suggested "that he may be motivated by spite rather than by a sincere belief in the sufficiency of the recall charges." *Id. at* 267. However, the superior court's attorney fee award was reversed because there was no specific finding that the petitioner acted in bad faith. *Id.*

---

[1] *Pearsall-Stipek* cites to former RCW 29.82.023 (1984). 136 Wn.2d at 265. Former RCW 29.82.023 was recodified as RCW 29.A.56.140 in 2003. LAWS OF 2003, ch. 111, § 2401. There were no substantive changes made to the statute affecting this opinion.

Our Supreme Court again addressed attorney fees in recall petitions in *In re Recall of Lindquist*, 172 Wn.2d 120, 136, 258 P.3d 9 (2011). In *Lindquist*, our Supreme Court reaffirmed the standard set in *Pearsall-Stipek*: attorney fees may not be awarded for defending against a "merely frivolous" petition but may be awarded against petitioners who file in bad faith. *Id.* Our Supreme Court held "[s]ufficient evidence shows that petitioners brought the recall petition with charges they knew to be frivolous, they did so for the purpose of harassment, and they acted in bad faith throughout the recall process." *Id.* The court also explained, "Petitioner's inability to justify filing a frivolous recall petition on the eve of an election, coupled with their refusal to explain their motivations, support the trial court's award of attorney fees." *Id.* at 138.

Finally, in *In re Recall of Piper*, 184 Wn.2d 780, 785-86, 364 P.3d 113 (2015), our Supreme Court reiterated that whether to award attorney fees for a frivolous recall petition is dependent on whether the recall petition was filed in bad faith. *Piper* relied on the standards applied in *Pearsall-Stipek* and *Lindquist*, noting that merely filing a frivolous petition is not sufficient to justify attorney fees, but rather, the petitioner must file a frivolous petition in bad faith. *Id.* at 787. In *Piper*, the petitioners challenged the superior court's finding that they acted in bad faith based on comments made in the superior court's oral ruling. *Id.* at 791-92. But our Supreme Court rejected this argument because the superior court's written findings included a finding that the petitioner's filed a frivolous petition in bad faith. *Id.* And our Supreme Court explicitly noted that petitioners' persistence in pursuing multiple frivolous recall petitions, "suggests that they were motivated by something other than a sincere belief in the sufficiency of the recall charges." *Id.* at 791.

Here, the Commissioners assert that the superior court's order creates a sincere belief immunity that shields a petitioner from paying attorney fees even when the petition was frivolous and filed in bad faith. This is a misrepresentation of the superior court's order. The superior court

explicitly found that Hunt did not act in bad faith because he had a sincere belief in the charges underlying the recall petition; the court did not create a sincere belief immunity to the general rule that the superior court may award attorney fees as a sanction for filing a frivolous petition in bad faith.[2]

The Commissioners also argue that because they presented some evidence that the recall petition may have been filed, in part, to serve an improper purpose, then the superior court must have erred by finding that Hunt did not act in bad faith. However, the case law, read as a whole, shows that in determining whether a petitioner acts in bad faith, the court must examine the totality of the circumstances. *See Lindquist*, 172 Wn.2d at 138 (examining petitioners' purpose in bringing a frivolous petition for harassment, timing of the petition in relation to an election, the petitioners' conduct during the recall process, and the petitioner's refusal to explain their motivations to the superior court to determine bad faith); *Piper*, 184 Wn.2d at 791-92 (considering all of petitioners' conduct including continued pursuit of multiple frivolous recall petitions).

Hunt had a long, documented history of public engagement and activism related to the Board's activities. And it is clear from the record that Hunt truly believed the Commissioners were not fulfilling their duties and responsibilities to the community. Moreover, considering that the recall statutes are meant to be construed in favor of the voter, and attorney fees are presumptively not awarded for responding to recall petitions, Hunt's conduct in filing the recall petitions, even as part of an ongoing campaign to inspire change in the Board's decisions, did not rise to the level of bad faith demonstrated in *Lindquist* and *Piper*.

[2] Our Supreme Court's language in *Piper* indicates that bad faith is being "motivated by something other than a sincere belief in the sufficiency of the recall charges." 184 Wn.2d at 791. The natural implication from the Supreme Court's language is that one cannot act in bad faith if they are motivated by a sincere belief in the sufficiency of the recall charges.

Taking the totality of the circumstances into consideration, the superior court did not abuse its discretion in determining that Hunt did not act in bad faith. Because the superior court did not abuse its discretion in determining that Hunt did not act in bad faith, the Commissioners are not entitled to an award of attorney fees.

B. ATTORNEY FEES AND SANCTIONS ON APPEAL

The Commissioners request attorney fees on appeal under RAP 18.1, arguing that because they are entitled to attorney fees for responding to the recall petitions, they are also entitled to attorney fees for this appeal. RAP 18.1 provides a party the right to recover reasonable attorney fees on appeal, so long as applicable law grants the party the right to attorney fees. RAP 18.1(a). However, for the reasons explained above, the Commissioners do not have the right to recover attorney fees in this case because Hunt did not file the recall petitions in this case in bad faith.

Hunt requests sanctions be imposed against the Commissioners under RAP 18.9 for filing a frivolous appeal. "An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012). Here, although the Commissioners do not prevail on their appeal, the appeal is not so devoid of merit as to warrant sanctions because the Commissioners made a reasoned argument based on their interpretation of relevant Supreme Court precedent. Accordingly, Hunt's request for sanctions under RAP 18.9 is denied.

The superior court's order denying the Commissioners' motion for attorney fees is affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Cruser, C.J.

Che, J.

KINNEY LAW GROUP

September 26, 2024 - 2:28 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	58939-7
Appellate Court Case Title:	In the Matter of the Recall of Jay Kinney et al.
Superior Court Case Number:	23-2-00858-0

The following documents have been uploaded:

- 589397_Petition_for_Review_20240926142714D2386393_7646.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review no. 58939-7-II.pdf

A copy of the uploaded files will be sent to:

- AMiles@kitsap.gov
- adam@fundthefieldhouse.org
- ahearne@foster.com
- bob.sterbank@foster.com
- christine.harlan@foster.com
- kcpaciv@kitsap.gov
- kinney@kinneylawgroup.com
- litdocket@foster.com
- mckenna.filler@foster.com
- usellis@kinneylawgroup.com
- wadamhunt@icloud.com

Comments:

Sender Name: Jay Kinney - Email: kinney@kinneylawgroup.com
Address:
200 WINSLOW WAY W UNIT 300
BAINBRIDGE ISLAND, WA, 98110-4931
Phone: 206-623-2300

Note: The Filing Id is 20240926142714D2386393