



under the contribution prong and the expenditure prong through its support for Dino Rossi's 2008 gubernatorial campaign. Therefore, Utter and Ireland claimed, BIAW violated the FCPA by failing to register and report as a political committee. On summary judgment, the trial court found there was no genuine issue of material fact in dispute and dismissed Utter and Ireland's lawsuit with prejudice. It denied BIAW's request for attorney's fees under RCW 42.17A.765(4)(b). Utter and Ireland appeal from summary judgment and BIAW cross-appeals the denial of attorney's fees. Concluding the evidence showed a genuine issue of material fact as to whether BIAW was a political committee under the expenditure prong, we reverse and remand. We affirm the trial court's denial of attorney's fees to BIAW and do not award fees on appeal.

### FACTS

BIAW is a non-profit affiliate of the National Association of Home Builders (NAHB) whose mission is to promote the common interests of Washington's building industry. It has approximately 13,500 members, primarily home builders. Members first join and pay dues to one of BIAW's fifteen local associations throughout the state, then automatically become members of BIAW and NAHB. Among other activities, BIAW does advocacy work in all branches of government, helps local associations recruit new members, runs an educational program, and organizes conferences. BIAW's sources of revenue include membership dues, income from interest and investments, health insurance fees, and fees from educational programs.

In 1993, BIAW created a wholly owned, for-profit subsidiary, BIAW Member Services Corporation (BIAW-MS), to provide certain services to BIAW members. BIAW-MS's primary function is to administer a worker's compensation insurance retrospective rating program ("retro program") pursuant to Department of Labor and Industries' rules.<sup>2</sup> BIAW-MS generates revenue from the retro program from an up-front enrollment fee and from a back-end, incentive fee of 10 per cent of any refund earned by the program in a given year, referred to as a Marketing Assistance Fee (MAF). BIAW-MS also runs other programs such as health insurance, life insurance, and educational seminars. It contributes a portion of its revenues to independent expenditures and to political action committees (PACs), such as ChangePAC. BIAW and BIAW-MS share the same leadership and staff, with staff salaries allocated between the entities based on the type of work performed. BIAW-MS itself does not have any members.

By spring 2007, one of BIAW's main efforts was supporting Rossi's 2008 gubernatorial campaign. As part of this effort, BIAW senior officers requested the local associations to pledge excess MAF funds from their retro programs to support the campaign. Senior officers drafted a "Rossi-lution" that stated:

WHEREAS BIAW is committing 100% of excess retro dollars to the 2008 gubernatorial election,

WHEREAS, participation of local associations is necessary

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<sup>2</sup> MS was created to "reduce the risk of tax liability for BIAW . . . for administering a for-profit retro program." Retro programs allow members to pool their worker's compensation risks and provide a chance for the pool to earn a refund of a portion of its premiums, when the group's combined claims are less than its premiums. See Washington Administrative Code (WAC) 296-17-90455.

for success,

NOW THEREFORE BE IT RESOLVED THAT

The following local associations pledge that all Retro Marketing Assistance funds received in 2007, beyond the amount budgeted for the year, will be sent to the BIAW and placed in the BIAW 2008 gubernatorial election account, to be used for efforts in the 2008 gubernatorial race.

Eleven of the fifteen local associations agreed to participate in this effort, which ultimately raised \$584,527.53.

On July 25, 2008 and September 9, 2008, in accordance with RCW 42.17A.765(4), Utter and Ireland sent a notice of intent to the Washington State Attorney General (AG), stating that they would file a lawsuit against BIAW for violations of the FCPA if the State did not. They claimed BIAW was legally responsible for violations of the FCPA, even though the independent expenditures in question were handled through the accounts of BIAW-MSA.

The AG referred Utter and Ireland's allegations to the Public Disclosure Commission (PDC), which completed an investigation and issued a report. The PDC determined that BIAW-MSA requested permission from the local associations to withhold a portion of the MAF funds and handled those portions of the withheld funds. On August 20, 2008, BIAW-MSA contributed from its general treasury fund \$584,527.53—the amount raised from the MAF funds—to ChangePAC and provided ChangePAC a list of the 11 local associations and the amount contributed by each association. The next day, ChangePAC reported the receipt of the contributions as coming from the local associations.

The PDC report concluded:

While [PDC] staff maintains the entire BIAW-MSA general fund

would not be considered a political committee, the solicitation, receipt, and retention of local association Retro program refunds by BIAW-MSA in the amount of \$584,527.53 qualifies that discrete portion of BIAW-MSA funds as a political committee pursuant to [RCW 42.17A.005(37)].

Based on the report, the PDC advised the AG that BIAW-MSA committed “multiple apparent violations of [RCW 42.17A] by failing to register as a political committee and report the contributions it solicited, received and retained from its local associations in 2007, and by failing to report expenditures to ChangePAC in 2008 with the contributions received.” The report concluded that BIAW was not a political committee under RCW 42.17A.005(37). It found that during 2006 to June 2008, BIAW did not solicit or receive contributions to support or oppose candidates or ballot propositions, contribute to candidates or political committees, or use its general treasury for other campaign-related expenditures. Accordingly, the report did not recommend action against BIAW.

On September 19, 2008, the AG filed a lawsuit against BIAW-MSA in superior court, alleging that BIAW-MSA was required to register as a political committee with respect to the MAF funds and to file PDC reports. The AG alleged that BIAW-MSA conducted an illegal fundraising campaign and violated RCW 42.17A.435 by concealing its solicitation and receipt of \$584,527.53 in campaign contributions toward 2008 electoral activities. BIAW-MSA and the AG settled the lawsuit. As part of the settlement, BIAW-MSA agreed to file a political committee registration form and campaign finance disclosure reports with the PDC.

The AG did not file a lawsuit against BIAW. Utter and Ireland filed a lawsuit against BIAW on October 6, 2008 and filed an amended complaint on October 13. They claimed BIAW itself qualified as a political committee and was therefore required to register and report.<sup>3</sup> They asserted that although the transfers and expenditures at issue were processed through BIAW-MSA accounts, the evidence showed that BIAW “orchestrated the entire violation, made all decisions, and the parties making the illegal donations believed they were donating to the BIAW.” They argued that the funds belonged to BIAW and/or its members and that BIAW-MSA was a “mere conduit” for them.

The BIAW filed a motion for summary judgment. The trial court granted BIAW’s motion for summary judgment, finding there was no genuine issue of material fact in dispute and BIAW was entitled to judgment as a matter of law. This appeal followed.

### DISCUSSION

Utter and Ireland argue that the evidence creates a genuine issue of material fact that BIAW was a political committee under the contribution prong and the expenditure prong. BIAW responds that the entire activity forming the basis of Utter and Ireland’s claims was conducted by BIAW-MSA.<sup>4</sup> We agree with

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<sup>3</sup> Utter and Ireland also claimed that BIAW exceeded the campaign contribution limits under RCW 42.17A.405 and improperly coordinated with Dino Rossi. They voluntarily dismissed that claim and it is not at issue on appeal.

<sup>4</sup> Alternatively, BIAW argues that this court should affirm on the ground that, under RCW 42.17.400(4), the AG’s lawsuit precludes Utter’s and Ireland’s claims. That statute provides generally that a citizen’s action may be brought only where a party has provided proper notice of the intention to bring suit to the AG and the county prosecutor’s office and where, after the statutorily required waiting period, the AG and county prosecutor have “failed to commence an action[.]” When BIAW raised this issue below, Utter and Ireland responded that the issue had

Utter and Ireland that the evidence creates an issue of fact under the expenditure prong. Specifically, we conclude there are triable issues of fact whether: (1) BIAW made expenditures in support of electoral goals or, alternatively, controlled BIAW-MSC's contributions under RCW 42.17A.455(2) and (2) electoral activity was one of BIAW's primary purposes during the 2008 election cycle. Accordingly, we reverse and remand. We deny BIAW's cross-appeal regarding attorney's fees.

### Summary Judgment

We review summary judgment decisions de novo, engaging in the same inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party." Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000) (citing Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994)).

Under RCW 42.17A.005(37), "political committee" includes any organization that has "the expectation of receiving contributions or making

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already been resolved against the BIAW in earlier motions and the trial court did not address the issue in its order on summary judgment. On appeal, BIAW again raises the issue briefly and Utter and Ireland do not respond. Given this posture, the issue is inadequately briefed and we decline to reach it. We likewise decline to address BIAW's constitutional claims. The parties may raise these issues on remand.

expenditures in support of, or opposition to, any candidate or any ballot proposition.” This definition contains two alternative prongs under which an entity is considered a political committee: (1) the contribution prong and (2) the expenditure prong. EFF, 111 Wn. App. at 599. We consider each in turn.

#### Contribution prong

Under the contribution prong, an organization is considered a political committee if it expects to receive or receives contributions toward electoral goals. EFF, 111 Wn. App. at 599. Utter and Ireland contend contemporaneous documents show that BIAW solicited and received pledges, in the form of MAF funds, from the local associations. For example, the “Rossi-lution” signed by heads of the local associations refers to “BIAW” throughout. Documents from the local associations refer to “BIAW” in discussing the local associations’ participation in the MAF fundraising effort and their decisions to pledge funds. Other documents show that throughout the fundraising effort, senior officers represented themselves as “BIAW senior officers” and BIAW president Daimon Doyle signed correspondence seeking pledges as “BIAW President.” Utter and Ireland contend that BIAW was required to register within two weeks of having the expectation of receiving the pledges for MAF funds from the local associations and was required to report the pledges when received.

BIAW does not dispute that pledges are treated as contributions under the FCPA; rather, it disputes that it was the entity that expected to receive the contributions at issue. It contends that BIAW-MSA received the withheld MAF



funds from the local associations and BIAW-MSA donated to ChangePAC. It points out that the MAF funds are generated from a BIAW-MSA program and are revenue to BIAW-MSA, not BIAW. As for the use of “BIAW” in the contemporaneous documents, BIAW contends that while BIAW and BIAW-MSA are legally separate entities with different functions, both are referred to internally as “BIAW.” It explains that when its board of directors or any officers direct actions by “BIAW,” BIAW and/or BIAW-MSA staff ensures that the appropriate entity—whether BIAW or BIAW-MSA—actually carries them out to comply with regulatory and tax obligations.

We conclude the evidence does not create a genuine issue of material fact as to the contribution prong. The issue is whether BIAW or BIAW-MSA expected to receive and ultimately did receive the MAF funds from the local associations. The evidence shows that BIAW-MSA administered the retro program from which the funds were generated and was formed in part to run the program; BIAW-MSA actually received the fees from the local associations and then contributed them to ChangePAC; and these transactions were made through BIAW-MSA’s accounts. BIAW submitted evidence that “BIAW” was used generically to refer to BIAW-MSA, BIAW, or both. The documents to which Utter and Ireland point fail to create an issue of fact.

#### Expenditure prong

Next, we consider whether the evidence created a genuine issue of material fact that the expenditure prong was met. Under this prong, an

organization is considered a political committee by expecting to make or making expenditures to further electoral political goals. EFF, 111 Wn. App. at 599. An additional requirement under this prong is that an organization must have as its primary purpose, or one of its primary purposes, to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions. State v. (1972) Dan J. Evans Campaign Comm., 86 Wn.2d 503, 509, 546 P.2d 75 (1976).

Utter and Ireland contend the evidence shows that BIAW expected to make or made electoral expenditures. Alternatively, even if those expenditures are attributed to BIAW-MSA, Utter and Ireland argue that BIAW “financed” or “controlled” BIAW-MSA’s expenditures and that BIAW-MSA’s expenditures should therefore be considered made by BIAW under RCW 42.17A.455(2). Finally, they contend electoral activity was one of BIAW’s primary purposes during the 2008 election cycle. We consider these issues in turn.

a. Whether BIAW made electoral expenditures

First, Utter and Ireland contend the following evidence shows that BIAW made \$233,648.89 in independent expenditures and over \$6.4 million in electoral expenditures to other political committees during the 2008 election cycle:

- PDC “Cash Receipts Monetary Contributions” report dated October 13, 2008 stating that “Building Industry Association o” [sic] made an aggregate total contribution of \$6,169,175 to ChangePAC.
- PDC reporting form for “Electioneering Communications” dated October 14, 2008 stating that “Building Industry Assn of WA” made “total C-6 expenses” of \$233,648.99 in relation to Rossi.
- BIAW reported making in-kind contributions of staff time to

ChangePAC and It's Time for a Change.

BIAW responds that the expenditures reflected in these PDC documents are BIAW-MSA expenditures. It contends there was not enough room on the forms for the full name "Building Industry Association of Washington Member Services Corporation" and that the PDC discouraged the use of acronyms. BIAW contends the PDC recognized this issue in its investigation when it wrote, regarding BIAW-MSA's expenditures from 2006 to 2008:

BIAW-MSA pays for staff members who provide support for reportable independent expenditures, electioneering communications, and contributions to political committees. In these instances, PDC reports show BIAW as the entity providing the support. PDC reports should identify BIAW-MSA as providing the support.

BIAW points to its income statements and BIAW-MSA's income statements to show that BIAW-MSA made the expenditures. It also points to the statement by its executive vice president, Tom McCabe, in a declaration that "BIAW does not contribute to any political candidates or political action committees. Nor does it make political expenditures." It notes that, as a non-profit entity, it must report to the IRS both revenue and expenses on its Form 990, and contends there are no electoral expenditures noted on the 2008 form.

We agree with BIAW that the evidence fails to create an issue of material fact that BIAW-MSA made the expenditures shown in the PDC reports. This issue involves the identity of the entity—BIAW or BIAW-MSA—that made the expenditures in question. Along with the other evidence to which BIAW points, the contents of its 2008 Form 990 are inconsistent with BIAW having been the

entity that made the expenditures reflected in PDC reports.

However, we conclude that BIAW's 2008 Form 990 itself creates an issue of fact that BIAW made electoral expenditures. Part IV, Line 3 of the form asks, "Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If "Yes," complete Schedule C, Part 1." BIAW answered "Yes" and attached Schedule C. On form Schedule C, which contains the heading "Political Campaign and Lobbying Activities," next to the entry for "Political expenditures," BIAW responded, "\$165,214." While political expenditures do not necessarily equate to electoral expenditures, BIAW, as the moving party, fails to show that none of the \$165,214 noted on Form 990 was spent on electoral activity.

b. Whether BIAW "controlled" BIAW-MSA's expenditures

Alternatively, Utter and Ireland contend, the evidence creates an issue of material fact that BIAW "controlled" BIAW-MSA's expenditures as defined in RCW 42.17A.455(2).<sup>5</sup> We agree. The statute provides, in pertinent part, "All contributions made by a person or political committee whose contribution or expenditure activity is financed, maintained, or controlled by a trade association . . . are considered made by the trade association . . ." RCW 42.17A.455(2).<sup>6</sup>

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<sup>5</sup> In addition, Utter and Ireland contend that RCW 42.17A.460 makes BIAW responsible even if it carried out the contribution through BIAW-MSA. We decline to consider this argument because Utter and Ireland make only a passing reference to the statute and do not explain why the evidence showed the statute was met.

<sup>6</sup> The full text of the statute provides:

For purposes of this chapter:

- (1) A contribution by a political committee with funds that have all been contributed by one person who exercises exclusive control over the distribution of the funds of the political committee is a contribution by the controlling person.

The preliminary issue we must decide is whether RCW 42.17A.455(2) applies in this context so that any electoral expenditures made by BIAW-MSA are considered made by BIAW, for the purpose of determining whether BIAW is a political committee, if BIAW “financed, maintained, or controlled” BIAW-MSA’s contribution or expenditure activity. BIAW contends the statute means only that campaign contributions from a corporation and its controlled entities are aggregated in determining whether a campaign contribution cap has been reached. Resp. Brief 31-32. It cites Edelman v. State ex rel. Pub. Disclosure Comm’n, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) in support, pointing to the Edelman court’s statement that “[RCW 42.17A.455(2)] specifies a relationship between entities in which those entities are considered a single entity for purposes of campaign contribution limits.” BIAW contends that if Utter and Ireland’s interpretation were correct, every entity that controls a political committee would be required to report as a political committee.

Based on the statute’s plain language, we disagree and conclude that it applies to the situation before us. RCW 42.17A.455(2) begins “[f]or purposes of

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(2) Two or more entities are treated as a single entity if one of the two or more entities is a subsidiary, branch, or department of a corporation that is participating in an election campaign or making contributions, or a local unit or branch of a trade association, labor union, or collective bargaining association that is participating in an election campaign or making contributions. All contributions made by a person or political committee whose contribution or expenditure activity is financed, maintained, or controlled by a trade association, labor union, collective bargaining organization, or the local unit of a trade association, labor union, or collective bargaining organization are considered made by the trade association, labor union, collective bargaining organization, or local unit of a trade association, labor union, or collective bargaining organization.

(3) The commission shall adopt rules to carry out this section and is not subject to the time restrictions of RCW 42.17A.110(1).

this chapter” (emphasis added). The provision at issue is found in chapter 42A.17 RCW, as is RCW 42.17A.005(37), which defines “political committee.” When interpreting a statute, we first look to its plain language. State v. Gonzalez, 168 Wn.2d 256, 271, 226 P.3d 131 (cert. denied, 131 S. Ct. 318, 178 L.Ed.2d 207(2010)) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). If the plain language is subject to one interpretation only, our inquiry ends. Id. Here, the meaning of the language “[f]or purposes of this chapter” is clear and subject to one interpretation only. Had the legislature intended the statute to apply only for the purposes of determining whether campaign contribution limitations are reached, it could have easily said so. Furthermore, while Edelman addresses the statute’s application to contribution limits, it does not limit the statute’s application to that context, nor does it contravene the statute’s plain language. Finally, BIAW is incorrect in arguing that every entity that controls a political committee would be required to report if we interpret RCW 42.17A.455(2) to apply in determining whether an entity is a political committee. Such entities must still be shown to have electoral activity as a primary purpose. Dan J. Evans Campaign Comm., 86 Wn.2d at 509. We conclude that RCW 42.17A.455(2) applies here so that if BIAW-MS’s contribution or expenditure activity was financed, maintained, or controlled by BIAW, those contributions are considered made by BIAW.

The next inquiry, therefore, is whether the evidence created an issue of fact that BIAW financed, controlled, or maintained BIAW-MS’s expenditure

activity. We conclude that it did. Numerous meeting minutes for BIAW's executive committee and BIAW's board of directors show that those leadership bodies discussed and made decisions regarding how to support Rossi's campaign, including decisions relating to expenditure activity that was formally carried out by BIAW-MSA.<sup>7</sup>

c. Whether electoral activities were one of BIAW's primary purposes

Finally, we must determine whether there was a genuine issue of material fact that electoral activities were one of BIAW's primary purposes. The following non-exclusive factors are considered: (1) the organization's stated goals and mission; (2) whether the organization's conduct furthers its stated goals and missions; (3) whether the stated goals and mission would be substantially achieved by a favorable outcome in the election; and (4) whether the organization uses non-electoral means to achieve its stated goals. EFF, 111 Wn. App. at 600. "[I]f the organization has merely restated its primary political purpose in broad nonpolitical terms, the organization's purpose will likely be achieved in an upcoming election. But if electoral political activity is merely one means the organization uses to achieve its legitimate broad nonpolitical goals, electoral political activity cannot be said to be one of the organization's primary purposes." EFF, 111 Wn. App. at 600.

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<sup>7</sup> For example, June 16, 2006 meeting minutes for BIAW's executive committee show that BIAW treasurer Brad Spears reported that "BIAW's ten percent ROII [Return on Industrial Insurance] return is going to be approximately \$925,000 in excess of what was budgeted." He reported that BIAW's budget committee recommended using part of those excess funds toward the expenditure of a "[s]hort-term investment account for use in the 08' Governor's race." Minutes from a meeting that same day of BIAW's board of directors show that the board, by motion, accepted this recommendation.

We conclude that while BIAW's mission statement<sup>8</sup> does not support a finding that electoral activity is one of BIAW's primary purposes as a general matter, the evidence in the record, viewed in the light most favorable to Utter and Ireland, nonetheless creates an issue of fact as to whether BIAW's conduct during the 2008 election cycle furthered its stated goals and missions, whether BIAW's stated goals and mission would be substantially achieved by Rossi winning the election, and whether BIAW used non-electoral means to achieve its stated goals during that time. There is evidence from which it may be inferred that supporting Rossi's campaign was a top priority for BIAW leading up to the 2008 election and that BIAW made significant efforts toward that end. This evidence includes the following:

- June 29, 2007 meeting minutes for BIAW's Board of Directors show that BIAW president Daimon Doyle announced that he was encouraged by the support from the local associations to contribute to BIAW's 2008 governor fund and that so far over \$550,000 had been raised. Rossi was a guest speaker at this meeting and thanked BIAW members for their support.
- In a letter to BIAW members asking them to contribute at least 10 percent of their refunds from the retro program to the 2008 gubernatorial race, Doyle wrote:

The next Governor will, in my opinion, make the most significant impact on the long-term success of our industry and our

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<sup>8</sup> BIAW's mission statement reads:

The Building Industry Association of Washington is the voice of the housing industry in the state of Washington. The association is dedicated to ensuring and enhancing the vitality of the building industry for the benefit of its members and the housing needs of its citizens.

To accomplish this purpose, the association's primary focus is to educate, influence and affect the legislative, regulatory, judicial and executive agencies of Washington's government. The Building Industry Association of Washington will offer its membership those services which can best be provided on a state wide basis and will disseminate information concerning the building industry to all associated members and the public.



businesses. He or she will be the driving force for a change in our state's business climate—either for better or worse in 2008 and beyond. He or she will appoint the Directors of the Departments of Ecology and Labor & Industries—both agencies that have direct (and potentially very negative) impacts on our industry and our individual businesses. He or she will set the tone in all areas of a government that is pervasive in our lives. No single individual in this state has a greater influence on our future than the Governor. Getting the right person in office is critical.

. . .

If every member were to contribute just 10% of their refund, we would begin the 2008 Governor's race with a war chest in excess of \$3.7 million! Combined with substantial funds that have already been committed by BIAW and its local associations, I believe that we can make a tremendous impact on an election that was so close it took two re-counts to complete last time.

- In a March 9, 2007 email to other BIAW leaders, Doyle wrote, "In light of recent attacks on our entire industry by the legislature, we have never been more in need of a pro-housing Governor than now . . . ."
- In a March 22, 2007 email, Doyle wrote:

Our State government has become very anti-business and in many respects anti-builder. This year is just one example of how our industry can be majorly affected by the legislation passed in Olympia. Add to that, our opponents—those who want tighter environmental restrictions and have pledged to dismantle the Retro program—are huge supporters of the current incumbents. With one vote shy of a 2/3 majority in both the House and Senate, it would take huge sums of money and many years of effort to win back even one of those two bodies. However, the change of just one individual, the Governor, would have a profound effect on this state. Regardless of what the legislature votes out, the Governor has the veto pen. . . . We must get a pro-housing Governor in office and 2008 will be our best opportunity.
- In January 2008, newly elected BIAW president Brad Spears announced, "One of my priority goals as the 2008 President of the Building Industry Association of Washington is to replace anti-small business and anti-affordable housing Governor Gregoire with her pro-small business and affordable housing challenger Dino Rossi."
- February 27, 2008 meeting minutes for BIAW's Board of Directors

show that Spears announced that BIAW's number one priority this campaign season would be to help Rossi get elected. Spears reported that the General Membership luncheon, which was well attended, featured Rossi as the guest speaker and that Rossi had delivered a "great speech." Id. Four recent polls showed that if the election were held today, Rossi would win. Spears had met with leaders across the state and nation who shared their respect for BIAW due to its successes and efforts. Spears also reported that candidates came to BIAW because they knew BIAW had the resources, will, and tools in place to get the job done. Id.

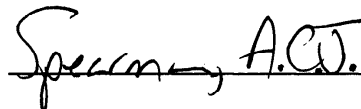
- In promoting the main benefits of BIAW membership, BIAW cited its "Political Program": "BIAW's experienced team of lobbyists and members . . . work to elect 'business friendly' candidates . . . ."

Based on our conclusion that the evidence created a genuine issue of material fact that BIAW was a political committee under the expenditure prong, we reverse and remand.<sup>9</sup>

#### Cross-Appeal of Attorney's Fees

BIAW sought attorney's fees from Utter and BIAW for bringing a citizen's action "without reasonable cause" under RCW 42.17A.765(4)(b). It also sought an award of fees against the State, claiming fees were due under RCW 42.17A.765(5) for the State's failure to intervene in the action. Given our disposition of this appeal, we reject BIAW's cross-appeal concerning fees, and deny its request for attorney fees on appeal under RAP 18.9 and RCW 4.84.185.

Reversed and remanded.



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<sup>9</sup> The point raised by the dissent that the legislature and/or the PDC should revisit the FCPA is well taken. But the issue before this court, as the dissent concedes, is the narrow question of whether there is sufficient evidence to create an issue of fact as to whether BIAW had electoral activity as one of its primary purposes during the 2008 election period. The evidence on this issue, as set out above, is more than sufficient.

WE CONCUR:

Cox, J.

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