IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BHISHAM SAINI and NEENA SAINI, Husband and Wife, and the Marital Community Comprised Thereof; PNS PROPERTIES, INC., a Washington corporation,	)	**No. 29150-2-III**
Appellants,	)	**Division Three**
v.	)	
PARMINDER SINGH GILLON and BHUPINDER GILLON, As Individuals together with the Marital Community Composed Thereof,	)	
Respondents.	)	**UNPUBLISHED OPINION**

Korsmo, J. — The primary issues in this appeal involve the dismissal of the appellants' individual claims against the respondents and whether the trial judge should have recused himself. Finding no error, we affirm.

FACTS

In 2006, Neena Saini and Parminder Gillon formed a corporation, PNS Properties,

Inc. (PNS), for the purpose of running a gas station, convenience store, and bulk fuel sales operation in Cle Elum. Mr. Gillon and Ms. Saini were the sole officers and intended shareholders of PNS. However, no shares of stock were ever issued. Prior to forming PNS, the parties entered into an oral agreement that Mr. Gillon would manage the day-to-day operations of PNS.[1] PNS generated a profit during 2007, but in August 2007, Ms. Saini and her husband filed suit against Mr. Gillon and his wife claiming misconduct by Mr. Gillon in his role as director and president of PNS.

After PNS's financial status began to decline in 2008, Ms. Saini hired a forensic accountant, Tiffany Couch, to investigate the corporate funds and financial assets of PNS. After receiving Ms. Couch's report, which concluded that Mr. Gillon was self-dealing, Ms. Saini assumed sole control and ownership of PNS on August 12, 2008 pursuant to a memorandum of agreement (MOA) with the Gillons. On March 20, 2009, the Sainis filed a second amended complaint in which both the Sainis and PNS brought concurrent claims against the Gillons. On April 24, 2009, the trial court granted the Gillons' motion for partial summary judgment as to the Sainis' five individual causes of action.[2]

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[1] The parties dispute several material terms of the oral agreement.

[2] The Sainis' five individual causes of action which were dismissed on summary judgment were: breach of contract, breach of fiduciary duty between shareholders, breach of director's and officer's duty of good faith and loyalty, wrongful diversion of corporate assets, and conversion. In the Order Granting Defendant Gillons' Motion for Partial Summary Judgment, the trial court listed all the files and materials it considered in making its determination, including the Gillons' motion for summary judgment, the

The case proceeded to trial on PNS's claims for breach of fiduciary duty and wrongful diversion/conversion of corporate assets as well as the Gillons' counterclaims for specific performance of contract, constructive trust, and request for injunctive relief. The trial took place in two parts. It began with three days of trial on August 20, 21, and 25, 2009, and resumed after a continuance on March 9-12, and 16-17, 2010. At trial, both parties relied heavily on the testimony of accountants, with Genine Pratt serving as the Gillons' expert and Ms. Couch serving as the expert for the Sainis.

Ms. Couch was a certified public accountant who had 13 years experience, but testified that she had no prior experience doing any accounting for a convenience store or fuel station. Ms. Pratt served as PNS's accountant during the time that Mr. Gillon was the director, and she also had experience working as an accountant for several other gas station operations. On March 11, just before Ms. Pratt testified for the defense, the trial judge disclosed to the parties that the accountant he used for his personal taxes worked at the same accounting firm as Ms. Pratt. Neither party objected or requested that the judge recuse himself and the trial continued.

The trial court found for the Gillons. On May 24, 2010, the court entered findings of fact and conclusions of law, and entered judgment for the Gillons. The Sainis timely

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Sainis' response to the motion for summary judgment, and declarations of Noah Davis, Tiffany Couch, and Douglas W. Nicholson. Clerk's Papers (CP) at 189-191.

appealed to this court.

ANALYSIS

This appeal raises four issues, which we will address in the order they were presented. The Sainis initially attack the trial court's summary judgment dismissal of their individual claims against the Gillons. They also allege that the trial judge should have recused himself and that he improperly discounted their claims in the factual findings. Additionally, both parties request attorney fees.

Summary Judgment. The Sainis contend that the trial court erred in dismissing their individual claims against the Gillons on summary judgment.[3] The Sainis argue that the claims were wrongfully dismissed because there were genuine issues of material fact relating to each claim. They also contend that as minority shareholders they had the right to bring a claim of breach of shareholder's fiduciary duty against Mr. Gillon, and that the breach of contract claim was not a derivative claim because the parties entered into the agreement before the formation of PNS.

This court reviews summary judgments de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to

[3] The Sainis' initial claim is that the trial court improperly relied on unsupported conclusory statements in a brief filed by the Gillons when it decided to dismiss the Sainis' individual claims on summary judgment. However, the order on summary judgment listed all the materials the court considered, and therefore the record establishes that the trial court did not rely solely on unsupported conclusory statements.

judgment as a matter of law." CR 56(c). "A material fact is one that affects the outcome of litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Once a moving party has made a showing that no material facts are in dispute, the party opposing summary judgment must come forward with specific facts in dispute; it cannot rely on conclusory statements or speculation to defeat summary judgment. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

A fundamental rule of corporate law is that when a third party harms a corporation, if the corporation does not bring an action for compensation, a shareholder may not proceed by way of a direct action to seek recovery. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276-277, 734 P.2d 949 (1987). Instead, the shareholder must bring a derivative action, acting on behalf of the corporation. *Id.* A shareholder may only bring a derivative action if he can show that he has exhausted his means to obtain corporate action and the officers and directors have failed to assert the corporation's rights or have done so improperly. *In re F5 Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 236, 207 P.3d 433 (2009). Although 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, he may do so "only when that special duty had its origin in circumstances *independent* of the stockholder's status as a stockholder." *Hunter v. Knight, Vail & Gregory*, 18 Wn. App. 640, 646, 571 P.2d 212 (1977), *review denied*, 89 Wn.2d 1021 (1978)). "As a general rule, a plaintiff cannot join in the same suit a claim on behalf of the corporation and an individual, personal claim against the defendants." 3A Karl B. Tegland, Washington Practice: Rules Practice CR 23.1 author's cmts., at 518 (5th ed. 2006) (citing *Hames v. Spokane-Benton County Nat. Gas Co.*, 118 Wash. 156, 203 P. 18 (1922)).

We initially consider the Sainis' claims for breach of director's and officer's duty of good faith and loyalty, wrongful diversion of corporate assets, and conversion, which are all claims that arise from alleged harms to PNS. None of these claims arise from any special duty that Mr. Gillon owed the Sainis apart from their status as shareholders of PNS. Therefore, the Sainis could only bring these claims as derivative actions on behalf of PNS. However, a shareholder may only bring a derivative suit when he establishes that he made efforts to compel the corporation to file suit, and the corporation failed to take action. Here, PNS was already bringing claims of breach of fiduciary duty, conversion, and wrongful diversion against Mr. Gillon. Therefore, the trial court

properly dismissed these three individual claims.

The Sainis also contend that they could bring an individual claim against the Gillons for breach of fiduciary duty between shareholders because they are minority shareholders in a closely-held corporation, citing *Interlake Porsche + Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 728 P.2d 597 (1986), *review denied*, 107 Wn.2d 1022 (1987). In *Interlake*, the court allowed a minority shareholder of a closely-held corporation to bring an individual action against the majority shareholder for injunctive and declaratory relief as well as a shareholder's derivative action on behalf of the corporation for breach of fiduciary duty. *Id.* at 504-506. The Sainis argue that *Interlake* establishes that shareholders in closely-held corporations owe each other fiduciary duties, that it allows them to bring a claim of breach of fiduciary duty individually rather than derivatively on behalf of the corporation, and that the court should have allowed this claim.

In Washington, a minority shareholder of a closely-held corporation may bring a direct action against the majority shareholder for breach of fiduciary duty and also bring a derivative suit on behalf of the corporation. *Id.* at 504-506, 519-520. Washington courts have allowed direct recovery for minority shareholders against the corporation's officers when a derivative claim would result in the majority shareholders receiving an award to which they were not entitled. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 496 P.2d

343, *review denied*, 81 Wn.2d 1003 (1972). For purposes of a stockholder derivative suit, a person may be considered a stockholder if he holds a mere equitable interest in the stock, even if the stock was never issued. *Id.* at 776.

The Sainis maintain that Mr. Gillon acted as the majority shareholder from the time of PNS's incorporation until August 12, 2008, and that they were minority shareholders during that time. However, no shares of PNS stock were ever issued. The record shows that the Sainis invested $320,000 in exchange for shareholder status and an equity interest in PNS. The Sainis allege that Mr. Gillon agreed to match their investment, but that he never actually did so. The record also shows that when Mr. Gillon was the president and manager of PNS, Ms. Saini was a director and officer. In light of these facts, the Sainis have failed to establish that Mr. Gillon was the majority and controlling shareholder of PNS and that the Sainis were minority shareholders. Since the Sainis have failed to show that they were minority shareholders, they may not bring individual claims under *Interlake*. The trial court properly dismissed their individual claim for breach of fiduciary duty.

The final argument the Sainis present regarding the summary judgment is that their breach of contract claim should not have been dismissed because it is an individual personal claim rather than a derivative claim. They contend that Mr. Gillon breached the

oral agreement when he took a salary, failed to pay the Sainis the return they were owed, and failed to divide the profits.

A corporation is an entity that is separate and distinct from the personality of its shareholders. RCW 23.01.050; *State v. Nw. Magnesite Co.*, 28 Wn.2d 1, 41, 182 P.2d 643 (1947). As a distinct entity, a corporation acts through its directors and officers. *Lycette v. Green River Gorge, Inc.*, 21 Wn.2d 859, 862, 153 P.2d 873 (1944); RCW 23B.08.010. "This statutory entity, so long as it exists, is the owner of all the property which the corporation possesses." *State of Cal. v. State Tax Comm.*, 55 Wn.2d 155, 157, 346 P.2d 1006 (1959). An individual shareholder has no property rights in the corporation's physical assets. *Id.*

The parties agree that they entered into an oral agreement prior to the creation of PNS, under which they agreed to form PNS and to invest money for the purpose of acquiring the gas station operation.[4] The Sainis claim that Mr. Gillon breached that agreement by taking a salary, failing to pay the Sainis their return, and failing to divide the profits. However, the actions that the Sainis seek to recover from were actually the actions of PNS, acting through Mr. Gillon as the managing director of the corporation. It was PNS that paid Mr. Gillon's salary and failed to pay the Sainis' return. The Sainis

[4] CP at 441-442; Ex. 2; Report of Proceedings (RP) (March 9, 2010) at 124-125; RP (March 16, 2010) at 14-15.

may have invested their money pursuant to the oral agreement, but once the money was invested it became the property of PNS. Therefore, the Sainis cannot successfully maintain an individual breach of contract claim against Mr. Gillon for actions he took in his capacity as a director of PNS.

The general rule is that a plaintiff cannot join a claim on behalf of the corporation and an individual, personal claim against a defendant. 3A Tegland, *supra*, CR 23.1 author's cmts., at 518. Thus, even if the breach of contract claim were viewed as an individual, personal claim against Mr. Gillon rather than as a derivative claim, the Sainis could not properly bring this claim in the same suit as the claims brought by PNS. The trial court correctly dismissed the Sainis' individual claims on summary judgment.

Recusal. The Sainis also challenge the trial judge's decision to wait to disclose that his accountant worked at the same firm as the Gillons' expert witness until the middle of trial, March 11. They claim that they did not waive their right to complain about the judge's impartiality because they were never given a meaningful opportunity to object. They also argue that the record establishes both potential and actual bias on the part of the judge.

Under former CJC 3(D)(1)(a) (2002), "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." This includes

"instances in which: . . . (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." "A trial court is presumed to perform its functions regularly and properly without bias or prejudice." *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, 159 Wn. App. 591, 600, 245 P.3d 257 (2011). The party challenging the impartiality of a judge bears the burden of presenting evidence of actual or potential bias. *State v. Dominguez*, 81 Wn. App. 325, 328-329, 914 P.2d 141 (1996).

When a claimant presents sufficient evidence of potential bias, the reviewing court considers whether the appearance of fairness doctrine was violated. *In re Marriage of Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003). The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial." *Dominguez*, 81 Wn. App. at 330. Decisions on recusal are reviewed for an abuse of discretion. *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022 (2007). A party who claims that a trial judge is biased may waive his right to complain by not timely raising the objection and proceeding with trial as if the judge were not disqualified. *Brauhn v. Brauhn*, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974).

On March 11, the following exchange occurred after Mr. Gillon's counsel called

Ms. Pratt to the stand:

> THE COURT: I need to disclose to everybody Bill Wilson is my accountant in that firm so everybody I think I don't know if that's — inaudible — how many choices do you have in Ellensburg, right? So he has been my accountant for a long time. We don't talk about anything except my taxes. He doesn't have time to talk to me. So I don't know anything about this case. He never mentioned — it's not come up.
>
> Q. (By Mr. Nicholson) I want to clarify you don't know — personally you have no personal association or social relationship of any kind with Your Honor Judge Sparks?
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> A. (By Ms. Pratt) No.
>
> THE COURT: I would second that. I know where she lives because she lives on the same road as I do but everybody knows everybody where I live.
>
> MR. NICHOLSON: I live kind of close to you also.
>
> THE COURT: Yeah, small town stuff.

RP (March 11, 2010) at 40. After this disclosure, the Sainis did not raise any objection. They also did not ask the judge to recuse himself.

On the record, it appears that the trial judge may have had notice of his accounting firm's involvement in the trial prior to March 11 because several documents showed Bivens and Wilson as the accountants for Mr. Gillon. These documents included an order on a motion in limine regarding Mr. Gillon's witness list with references to Bivens and Wilson and an order referencing Bivens and Wilson as Mr. Gillon's accounting firm.[5] However, the Sainis did not object after the trial judge disclosed his relationship with Bivens and Wilson and instead proceeded with the trial. Under *Brauhn*, the Sainis

[5] CP at 44, 588, 622-628, 932.

waived their right to complain that the trial judge was biased or violated the appearance of fairness doctrine.

However, even if the Sainis did not waive their claims, they also have failed to establish sufficient evidence of bias or potential bias. Although another member of the Bivens and Wilson accounting firm has prepared the trial judge's taxes for years, there is no evidence that the trial judge ever had a personal or professional relationship with Ms. Pratt. The Sainis' bare assertion that a person would not use an accountant he did not trust, and therefore the trial judge would automatically give more credibility to the expert from Bivens and Wilson is not sufficient to establish potential bias. In *Dominguez*, this court held that "unless there is a specific showing of bias, a judge is not disqualified merely because he or she worked as a lawyer for or against a party in a previous, unrelated case." 81 Wn. App. at 329. Arguably, a past professional relationship like the one at issue in *Dominguez* presents a greater appearance of potential bias than the situation here. Although the testimony of the two accountants was relied upon heavily in the case, the mere fact that the trial judge used the same accounting firm as Mr. Gillon is not enough to establish potential bias.

The Sainis also contend that the trial judge was actually biased because he gave great deference to Ms. Pratt and gave no credibility to their expert, Ms. Couch. They

claim that the trial judge's bias is evident in the record because the findings of fact do not track the testimony presented at trial.[6] However, in order to prove bias here, the test is not whether the findings disagree with the testimony of the Sainis' expert, but instead whether no reasonable person would have taken the view adopted by the trial court in light of the record. A party claiming judicial bias must provide evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618-619, 826 P.2d 172, 837 P.2d 599 (1992). This court applies an objective test, viewing the evidence as would a reasonable person familiar with all of the facts, to determine if there is the appearance of bias. *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002).

The record shows that the findings for the most part do track the evidence presented by Ms. Pratt rather than Ms. Couch.[7] It also shows that the trial judge did not unconditionally believe the testimony of Ms. Pratt, as alleged by the Sainis, because he reduced Ms. Pratt's MOA accounting by $43,000 based on the evidence, including Ms. Pratt's admission that she did not deduct several bounced checks from Mr. Gillon's

[6] Specifically, the Sainis contend that findings of fact 20-22, 29-31, 37-38, and 56-57 all establish the trial judge's bias because the findings disagree with the testimony presented by Ms. Couch. They also claim that the findings launched unnecessary personal attacks on Ms. Couch by stating that Ms. Couch "relied on whatever information suited her purposes." CP at 492.

[7] *See* RP (March 9, 2010) at 76-82, 110-211; RP (March 10, 2010) at 37-38, 60-92, 178-183; RP (March 11, 2010) at 7-10, 69-71 102-105; RP (March 12, 2010) at 10-42, 45-50, 76, 105-109, 125-127, 149-152; Exs. 8, 234, 244.

equity share.[8] The Sainis have also failed to establish that Ms. Couch was somehow more qualified than Ms. Pratt and that therefore the trial judge's reliance on Ms. Pratt's testimony reveals his bias. Although Ms. Pratt admitted that she did not renew her CPA license from 1999 to 2009, she also testified that she had been an accountant since 1989 and that she had extensive prior accounting experience with convenience store and fuel sales.[9] Ms. Couch testified that she had 13 years of experience as a certified public accountant and was trained in forensic accounting, but admitted she had no prior experience accounting for a gas station operation and that she called a colleague to get an explanation for how the accounting for a gas station normally works.[10] Based on each of the experts' relevant credentials, it does not appear that Ms. Couch was more qualified than Ms. Pratt, and certainly not to the extent that reliance on Ms. Pratt's testimony establishes bias.

In essence, the Sainis are asking this court to find substantial evidence of bias by reweighing the trial court's credibility determination regarding the experts. However, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d

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[8] CP at 458.

[9] RP (March 11, 2010) at 38, 44, 52; RP (March 12, 2010) at 45-47, 50-51, 66-74, 151-156.

[10] RP (March 9, 2010) at 25-27.

850 (1990). The Sainis have failed to show that the trial judge was biased on the basis that his findings disagreed with the testimony of Ms. Couch because there is sufficient evidence in the record to support the court's findings.

Findings of Fact. The Sainis also claim that the trial court erred by making findings of fact at trial which were adverse to the Sainis' previously dismissed individual claims. The Sainis contend that findings of fact 7-10[11] improperly discounted their five individual claims against the Gillons.

Under CR 52, in all actions tried upon the facts without a jury or with an advisory jury, the court shall enter written findings of fact and conclusions of law. CR 52(a)(1). The findings must cover all of the material issues that have been developed in the case. *Peterson v. Neal*, 48 Wn.2d 192, 195, 292 P.2d 358 (1956). This court's review of findings and conclusions is limited to whether substantial evidence supports the findings and, if so, whether the findings support the trial court's conclusions of law and judgment. *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002),

[11] Finding of fact 7 relates to the terms of the agreement signed by the parties under which Ms. Saini became the sole officer and director of PNS; finding 8 states that "Ms. Saini, who was now the sole officer and director of PNS, had the opportunity to sell the business for $1.57 million," but chose not to; finding 9 notes that "Ms. Saini caused PNS to join as a plaintiff in the Sainis' lawsuit against the Gillons, and to assert identical corporate claims against Mr. Gillon that the Sainis were bringing individually;" and finding 10 states that "[a]fter taking control of PNS, Ms. Saini . . . engage[d] in the very conduct" which the Sainis accused Mr. Gillon of, including refusing to keep Mr. Gillon informed about PNS and using PNS funds to pay for her daughter's expenses.

aff'd, 149 Wn.2d 873, 73 P.3d 369 (2003). Substantial evidence is evidence that is sufficient to persuade a fair-minded person that the declared premise is true. *Id*. The burden is on the party challenging the findings to show that the record does not support the findings.

The four findings that the Sainis challenge are all material to the claims brought by PNS against the Gillons or the counterclaims brought by the Gillons against the Sainis, and the trial court was required to cover all of the material issues that have developed in the case in the findings. The Sainis have failed to show that the challenged findings are immaterial to the issues of the case, and have also failed to show that the record does not support the challenged findings. In addition, the Sainis failed to allege a harm caused by the trial court's dismissal of their individual claims on the findings of fact and they do not request a remedy for the allegedly improper findings.

Attorney Fees. Both parties also request attorney fees. The Sainis request attorney fees pursuant to RAP 18.1, while the Gillons contend that they should be awarded attorney fees pursuant to RAP 18.9(a) because the Sainis' entire appeal is frivolous. We deny both requests.

RAP 18.1 and 18.9(a) provide that this court may award attorney fees on appeal where authorized by law, court rule, or where the appeal is frivolous. *Harrington v.*

Pailthorp, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992), *review denied*, 121 Wn.2d 1018 (1993). An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and it is so devoid of merit that no reasonable possibility of reversal exists. *Id.* Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007), *review denied*, 162 Wn.2d 1009 (2008). "An appeal that is affirmed merely because the arguments are rejected is not frivolous." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 723, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987).

The Sainis request attorney fees pursuant to RAP 18.1 but do not recite any reasons why they should be awarded fees, other than claiming that Mr. Gillon should have to pay the Sainis' attorney fees due to his mismanagement of PNS. This argument is unconvincing because the Sainis did not effectively establish that Mr. Gillon mismanaged PNS. In addition, the Sainis did not devote a section of their opening brief to the request for attorney fees as required by RAP 18.1(b). Instead, they abruptly requested fees in the last sentence of the opening brief. The Sainis are not entitled to attorney fees.

The Gillons are also not entitled to attorney fees under the theory that the Sainis' appeal was frivolous because the appeal was not so devoid of merit that no reasonable possibility of reversal existed. In particular, the Sainis' argument regarding the trial

judge's duty to disclose his relationship with Bevins and Wilson was not frivolous, even if it was ultimately unconvincing. The Gillons have not established that there were no debatable issues upon which reasonable minds could differ, and any doubts as to whether an appeal is frivolous must be resolved in favor of the Sainis. Thus, neither party is entitled to attorney fees.

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.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.