NO. 101167-9
COA NO. 56900-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP COUNTY, a political subdivision of the State of Washington,

Respondent,

vs.

DOMINIC CAMPESE, an individual,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY
Superior Court No. 20-2-08648-2

KITSAP COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

If the issue presented in this Public Records Act (PRA) case is as novel or important as Campese asserts, why did he abandon it before the trial court? Campese failed to pursue his claims that the County wrongfully withheld records and Campese was a prevailing party, and he waived them.

Campese is not a prevailing party because he received records in accordance with his voluntarily agreement to modify the scope of his records request. And, although two trial court orders effectively reserved for Campese the opportunity to pursue his claims that the County violated the PRA and he was a prevailing party, Campese moved for voluntary dismissal without a request for fees, costs, or penalties, and he did not oppose the County's request that dismissal be without an award of fees, costs, or penalties to either party.

Campese's claim that the County violated the PRA has not been decided on the merits. Thus, the trial court correctly reserved and then denied as premature Campese's demand for

fees, costs, and penalties. The Court of Appeals' correctly concluded that the trial court did not err in denying Campese's motion for fees, costs and penalties. Campese's request for review should be rejected.

II. ISSUE

Did the superior court err in reserving and then denying as premature Campese's requests for fees, costs, and penalties under RCW 42.56.550(4) of the PRA when Campese never sought a determination whether County violated the PRA and Campese was a prevailing party?

Short Answer: The superior court did not err in reserving and then denying Campese's requests for fees, costs, and penalties because Campese never sought a ruling whether the County violated the PRA and Campese was a prevailing party.

III. STANDARDS OF REVIEW

A. Whether review should be accepted by the Court because there are conflicting decisions or because this case

involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination?

Short Answer: Campese has identified no conflicting decisions or fundamental and urgent issue warranting review by this Court.

B. If review is accepted, the standard for review will be whether the superior court erred in not awarding costs under RCW 42.56.550(4), a legal issue which is reviewed de novo.[1]

Short Answer: The superior court did not err in ruling costs were premature because Campese never sought a ruling whether records were wrongfully withheld.

IV. FACTS

On March 12, 2020, the Prosecutor's Office received a public records request from Campese for "Kitsap County

[1] *Sanders v. State*, 169 Wn.2d 827, 866, 240 P.3d 120 (2010) (*citing Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103–04 and n. 10, 117 P.3d 1117 (2005)).

Prosecuting Attorney's Office's current Brady List and Brady material." CP 40 and 44.

"Brady material" are records collected, reviewed, and maintained by the Prosecutor's office to fulfill legal obligations established under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny. Brady records are gathered as pretrial discovery for criminal cases, and many records compiled as Brady material are attorney work product

and exempt from inspection and copying. CP 32-37, CP 153-156.[2]

Three business days after receiving Campese's request, the Prosecutor's Office responded acknowledging receipt of the request and advising that records would be available for release on or before October 16, 2020. CP 40 and 47.

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[2] See RCW 42.56.290 (Records relevant to a controversy not available to another party under rules of pretrial discovery exempt from disclosure); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611–12, 963 P.2d 869 (1998), *as amended on denial of reconsideration* (Nov. 16, 1998) (attorney work product in prosecutor's criminal litigation files exempt from inspection and copying); *Sanders v. State*, 169 Wn.2d 827, 857, 240 P.3d 120 (2010) ("[D]ocuments can be exempt as work product even if created some time before the anticipated controversy"); *Soter v. Cowles Pub. Co*., 162 Wn.2d 716, 732–33, 174 P.3d 60 (2007) (Work product protection exists both before reasonably anticipated litigation and after resolution of a controversy); *Limstrom v. Ladenburg*, 110 Wn. App. 133, 144 and 147, 39 P.3d 351 (2002), *as corrected* (Feb. 15, 2002) (work product privilege is not waived by disclosing records to defense counsel under CrR 4.7); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985) ("there is no distinction between attorney and non-attorney work product"); *Koenig v. Pierce County*, 151 Wn. App. 221, 226 and 230, 211 P.3d 423 (2009), *as amended* (July 20, 2009), *as amended on denial of reconsideration* (Oct. 26, 2009) (documents prepared by another agency collected by the prosecutor may be withheld as work product).

On August 28, 2020, two months prior to the due date, a first installment of records was produced. In the letter accompanying them, Campese was informed that 809 records were responsive to his request and 72 pages of records were produced. The remaining 737 pages were not produced on the grounds that they are "investigative records, notes, drafts and legal research which the Prosecutor's Office collected or prepared in anticipation of, or in preparation for, litigation and are exempt from public inspection and copying under the Public Records Act as protected attorney work product." Campese was informed that a second installment of records would be produced on or before February 12, 2021. CP 40-41 and 49-50.

On November 16, 2020, a second installment of records was produced – the "Brady List" that Campese had requested. He was informed that a third installment of records responsive to his request for "Brady materials" would be available on or before February 12, 2021. CP 41 and 56-57.

On December 3, 2020, the County filed a declaratory judgment proceeding naming Campese as Respondent seeking a judicial decision whether the Brady materials sought by Campese are attorney work product and exempt from public inspection and copying. CP 1-4.

On January 25, 2021, Campese answered the Petition asserting counterclaims, including claims that records were being wrongfully withheld and for attorney fees, costs, and penalties under RCW 42.56.550(4). CP 5-13

On January 29, 2021, the County filed a motion for summary judgment seeking a determination whether the Brady materials requested by Campese were work product and exempt from inspection and copying. CP 14-78.

A few days after the summary judgment motion was filed, the Prosecuting Attorney and Campese engaged in discussions about Campese's records request. CP 86-87 and CP 94. Campese was informed that as a matter of policy the Prosecuting Attorney would be willing to waive attorney work

product for a subset of Brady materials consisting of potential impeachment disclosures made to defense counsel in criminal cases. Campese agreed to modify his public records request to limit the scope of his request to this same subset of records (hereinafter "modified request"). CP 90-93.

On February 11, 2021, a third installment of records consisting of the subset of records (1,193 pages) responsive to Campese's modified request was produced and the request was closed. The records produced to Campese contained no redactions for attorney work product and all records were produced within the due dates identified for installments. CP 87 and 97-100. [3]

[3] Campese alleges the Prosecutor agreed to "fulfill[]" Campese's original request, "admitted" that records responsive to Campese's original request should be disclosed, acquiesced to Campese's original request, and "relented" and "tendered" all records responsive to his original request. These allegations are untrue, as the record shows. After the first installment of Brady material, 6,426 pages of records remained for review and redaction. CP 156. Then, Campese modified his request, and 1,193 pages were produced, leaving 5,233 pages of Brady materials unproduced. CP 86-100, 155-156.

After Campese modified his public records request, the County no longer needed a ruling from the trial court whether the remaining Brady materials were exempt from public inspection as attorney work product, and the County moved for voluntary dismissal of its Petition without prejudice. CP 79-82. The County's motion expressly stated that its motion for voluntary dismissal was "not intended to seek dismissal of those claims in Respondent's counterclaims, which are not rendered moot by settlement." CP 79.

Campese objected to the County's motion for voluntary dismissal without prejudice and requested fees, costs, and penalties. CP 101-112. The County filed a reply. CP 146-173. On March 26, 2021, the superior court granted the County's motion for dismissal without prejudice. CP 174-175. The order expressly stated that those elements of Campese's counterclaims not rendered moot by the parties' settlement remained pending and a ruling on Campese's request for "[a]ttorney [f]ees and costs are reserved." CP 174. Thus,

Campese could have pursued claims that the County violated the PRA and he was a prevailing party under RCW 42.56.550(4).

On April 2, 2021, the County filed a motion to dismiss Campese's counterclaims, asserting that Campese could not establish that records were wrongfully withheld and thus Campese was not a prevailing party and not entitled to fees, costs, and penalties. CP 176-202.

On April 7, while the County's motion was pending, Campese filed a motion for fees, costs, and penalties pursuant to RCW 42.56.550(4). CP 203-215. The County responded that no decision had been made whether the County violated the PRA and whether Campese was a prevailing party, thus his request for fees, costs, and penalties was premature. CP 216-228. The superior court agreed and on April 16 issued an order denying Campese's motion for fees, costs, and penalties as "premature and therefore denied." CP 378-379. Thus, again

the opportunity to pursue claims that the County violated the PRA and Campese was a prevailing party was preserved.[4]

Campese never filed a response to the County's motion for summary judgment dismissal of Campese's counterclaims. Instead, on April 21 Campese moved for voluntary dismissal of his counterclaims. In his motion, Campese did not request fees, costs, or penalties. CP 240-241.

The County responded to Campese's motion for voluntary dismissal. The response informed the court that the

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[4] In its Opinion, the Court of Appeals stated its belief that the parties "appear to believe that in denying Campese's motion the trial court actually ruled on the merits of Campese's argument that the County's voluntary dismissal of its declaratory judgment suit rendered Campese the prevailing party in a PRA action for purposes of RCW 42.56.550(4)." The County has no such belief. As discussed more fully in the Argument and Analysis below, the County has always asserted that under the facts of this case, the County's voluntary dismissal of its Petition for Declaratory Judgment did not make Campese a prevailing party under RCW 42.56.550(4). Campese's agreement to modify his PRA request caused the dismissal of the Petition. The trial court merely deferred the question of fees, costs, and penalties until the question whether the County violated the PRA was presented, and Campese never did so.

County did not object to entry of an order dismissing Campese's counterclaims without prejudice but requested that dismissal be without an award of fees, costs, and penalties assessed against either party. CP 242-244. The County filed a proposed order for dismissal without prejudice and without an award of fees, costs, and penalties to either party. CP 245-246.

Campese never filed a response to either the County's motion for summary judgment dismissal of his counterclaims or to the County's proposed order for dismissal without an award of fees, costs, and penalties to either party. The superior court accepted the County's proposed order, and it was entered on May 7, 2021. CP 247-248.

On May 26, 2021, Campese appealed for direct review to this Court, identifying the trial court's March 26 and April 16 orders as the basis of his appeal. CP 249-253.

On December 1, 2021, this Court issued an order transferring the case to Division II of the Court of Appeals. The Court of Appeals issued its decision on July 12, 2022,

concluding that the trial court did not err when it denied Campese's motion for PRA fees, costs, and penalties.

Throughout his Petition, Campese obfuscates the facts. He repeatedly alleges that the County tendered the records he requested. It did not. Campese's original request was for "Kitsap County Prosecuting Attorney's Office's current Brady List and Brady material." CP 40 and 44. After the first installment of records on August 28, 2020, 6,426 pages of Brady material remained for review and possible redaction. CP 155-156. Pursuant to Campese's modified request, 1,193 pages of the remaining 6,426 pages of Brady material were produced. Thus, the County produced records responsive to Campese's *modified* request, not his original request.

V. ARGUMENT AND ANALYSIS

A. That the County Filed and then Dismissed its Declaratory Judgment Action Does Not Make Campese a Prevailing Party.

Campese frames the issue for direct review as whether a requester is entitled to fees when an agency initiates a

declaratory judgment action and then voluntarily dismisses it. First, several courts have recognized that public agencies may seek declaratory judgment to have their obligations under the PRA declared and delineated, even as recently as last month. *Cantu v. Yakima Sch. Dist. No. 7*, __ Wn. App. __, 514 P.3d 661 (Filed August 2, 2022) ("An agency seeking adjudication that it is in compliance with the PRA can file a complaint for declaratory judgment.") (*citing Benton County v. Zink*, 191 Wn. App. 269, 277-78, 361 P.3d 801 (2015) (county had standing to bring declaratory judgment action to determine its compliance with the PRA)). *See also Yakima Sch. Dist. No. 7 v. Magee*, *unpublished*, 16 Wn. App. 2d 1079 (2021) ("We conclude the trial court correctly determined that YSD had standing to pursue its declaratory judgment action.")

In *Soter v. Cowles Pub. Co.*, the Court of Appeals concluded, and the Supreme Court affirmed, that it was not improper for the school district to seek a declaratory judgment to determine its obligations with respect to a request for

records. *Soter v. Cowles Pub. Co*., 131 Wn. App. 882, 907, 130 P.3d 840, 851 (2006), *aff'd*, 162 Wn. 2d 716, 752-755, 174 P.3d 60 (2007). In *Soter*, a newspaper made an argument like Campese's here: "Agencies with unlimited public funds should not be able to haul individual people who file a request under the public disclosure act into court." *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 907, 130 P.3d 840, 851 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007). But the Court of Appeals concluded that an agency may seek a judicial ruling on the merits, stating:

> [S]par[ing] the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding. It does not prejudice the requester. It is immaterial who hauls whom into court, because the requester who prevails in any court action over the release of public records is entitled to attorney fees.

Id. at 907.

On appeal, the Supreme Court in *Soter* rejected arguments that agencies should not be permitted to initiate review of a PRA request by a superior court, stating:

> [A] public records requester who does not wish to engage in a court battle could simply withdraw the public records request, making the agency's action moot. In addition, the requester could move for voluntary dismissal of the action if he or she no longer seeks access to the public record. CR 41(a). Withdrawing the record request is not significantly different from deciding to no longer pursue access to the record.

Soter v. Cowles Pub. Co., 162 Wn. 2d 716, 753 n. 16, 174 P.3d 60, 80 (2007). *See also City of Fife v. Hicks*, 186 Wn. App. 122, 145, 345 P.3d 1 (2015) (Concluding that public agency may use RCW 42.56.540 or file a declaratory judgment action to bring actions to enjoin the disclosure of requested documents).

As suggested in *Soter*, after the County filed its declaratory judgment action Campese could have withdrawn his request. Or, after receiving his first installment of records which released only 72 of 809 pages and identifying 737 pages as exempt attorney work product he could have reached out to the County about modifying his request. Or, he could have

pursued to the trial court the contention he makes here that Brady material, including Brady material produced as discovery to criminal defense counsel under CrR 4.7, are not exempt. He did none of these things.

Second, Campese's argument that a requester is a prevailing party if an agency initiates suit and then voluntarily dismisses it is without merit. In *Walji v. Candyco, Inc*. cited by Campese, the court rejected the definition of "prevailing party" in RCW 4.84.220 concluding that the parties intended a different meaning in an attorney fee provision in their lease. *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 287-288, 787 P.2d 946 (1990). *Walji* is not applicable here.

Campese cites *Anderson v. Goal Seal Vineyards, Inc*., but the case there concerned allowance of costs under RCW 4.28.185, the "long arm statute," enacted to facilitate service upon out-of-state defendants who prevail in an action. *Andersen v. Gold Seal Vineyards, Inc*., 81 Wn.2d 863, 868, 505 P.2d 790 (1973).

In *Soper v. Clibborn*, the court interpreted an attorney fee provision in a landlord/tenant statute, RCW 59.18.290. *Soper v. Clibborn*, 31 Wn. App. 767, 769, 644 P.2d 738 (1982).

The *Walji*, *Anderson*, and *Soper* cases are not applicable here. "Washington follows the American rule that neither party can recover attorney's fees unless authorized by statute, contract or recognized ground of equity." *Soper v. Clibborn*, 31 Wn. App. 767, 768, 644 P.2d 738 (1982) (*citing Public Utility Dist. 1 v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976)); *see also Burt v. Washington State Department of Corrections*, 191 Wn. App. 194, 361 P.3d 283 (2015) (*citing Kottsick*, the court of appeals concluded that equitable exceptions to the American rule for "misconduct or bad faith by a party" and "the dissolution of temporary restraining orders or injunctions when wrongfully issued" did not apply in action for attorney fees pursued by the estate of a PRA requester).

Here, the statute applicable to Campese's request for fees, costs, and penalties is RCW 42.56.550. The decisions

discussed above and in the next section support the conclusion that an agency may bring a declaratory judgment action to determine its obligations with respect to a request for records, and the requester is not entitled to fees, costs, or penalties unless records were wrongfully withheld. Campese's argument otherwise should be rejected.

B. Campese Is Not a Prevailing Party Because He Never Pursued a Determination Whether the County Violated the PRA.

Campese seeks fees, costs, and penalties under RCW 42.56.550(4), but he is not entitled to them unless he establishes that records were wrongfully withheld. The Public Records Act (PRA) provides:

> (4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or

> she was denied the right to inspect or copy said public record.

RCW 42.56.550(4).

By its terms, the statute allows fees, costs, and penalties only to the prevailing party. *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009). "A party prevails under [RCW 42.56.550(4)] if 'the records should have been disclosed on request.'" *Haines-Marchel v. State, Dep't of Corr*., 183 Wn. App. 655, 674, 334 P.3d 99 (2014) (*citing and quoting Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005)).

In *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011), the Supreme Court affirmed that fees and costs may be awarded where it is determined that the requester had "'the right to inspect or copy'" or "'the right to receive a response,'" and "penalties are authorized only for denials of "'the right to inspect or copy.'" *Id*. (*quoting Sanders*

v. State, 169 Wn.2d 827, 860, 240 P.3d 120 (2010) (*quoting* RCW 42.56.550(4)).

In *Burt v. Washington State Dep't of Corr.*, 168 Wn.2d 828, 838, 231 P.3d 191 (2010), the requester of records sought attorney fees pursuant to RCW 42.56.550(4), but the Court denied the request, stating: "Because we remand this case and do not resolve whether Mr. Parmelee is entitled to the records requested, it is premature to award costs and attorney fees." *Burt*, at 838.

In *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 196, 181 P.3d 881 (2008), the Court of Appeals determined that the Animal Care & Control Shelter (TCAC) was subject to the PRA. However, it had not yet been determined whether the requester was entitled to copy or inspect records, thus she was not yet a prevailing party and it was premature to award fees. *Id*. ("Because we have only determined that TCAC is subject to the PDA, Ms. Clarke is not yet the prevailing party in an action to enforce the right to copy

or inspect records, and her request is denied as premature"). *See also Cortland v. Lewis County*, 14 Wn. App. 2d 249, 473 P.3d 272 (2020), *review denied*, 196 Wn.2d 1039, 479 P.3d 710 (2021) (county never denied requestor access to a public record, as a prerequisite for filing an action for judicial review of an agency decision under the PRA; because there was no denial of access, the requester was not a prevailing party on the merits); *White v. Clark County*, 188 Wn. App. 622, 640, 354 P.3d 38 (2015) ("A petitioner prevails in a PRA action when the court determines that the agency wrongfully failed to disclose the requested records or otherwise violated the PRA.") (*citing Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005); *Haines–Marchel v. Dep't of Corr.*, 183 Wn. App. 655, 674, 334 P.3d 99 (2014); *and Citizens For Fair Share v. Dep't of Corr.*, 117 Wn. App. 411, 437, 72 P.3d 206 (2003)).

Campese is not a prevailing party when the Prosecutor produced records responsive to Campese's modified records

request. The Prosecutor's voluntary disclosure of exempt records did not make the initial withholding of them unlawful. *Sanders v. State*, 169 Wn.2d 827, 849–50, 240 P.3d 120 (2010) (An agency that decides, after litigation is filed, to produce records that would otherwise be exempt is not in and of itself wrongful. "If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant").

The County's summary judgment motion contains extensive discussion why Campese was not entitled to the Brady materials he requested in March 2020. CP 61-82 and 32-57. Campese never filed a response to the County's motion for summary judgment. Instead, Campese and the Prosecuting Attorney reached an agreement where the Prosecuting Attorney decided to waive work product as to those Brady materials provided to criminal defense counsel, and those records were produced to Campese. CP 86-100.

As stated in *Sanders v. State*, *supra*, and *Spokane Research & Defense Fund v. City of Spokane*, *supra*, if the trial court had decided that the Brady materials were work product and exempt from inspection and copying, then the fact that the Prosecutor produced a subset of those records after the suit was filed was not wrongful withholding.

No determination has been made whether the Brady materials Campese initially requested were wrongfully withheld. Campese abandoned these claims. *West v. Gregoire*, 184 Wn. App. 164, 172, 336 P.3d 110 (2014), *as amended* (Nov. 4, 2014) (a PRA claimant abandons PRA claims if the claimant does not address those claims in briefing, argument at trial, in summary judgment proceedings, or show cause proceedings).

Campese mistakenly relies extensively on *Coalition on Government Spying (COGS) v. King County Dept. Of Public Safety*, 59 Wn. App. 856, 801 P.2d 1009 (1990), *modified* (Jan. 18, 1991), *and abrogated by Spokane Rsch. & Def. Fund v. City*

of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005) to support his contention that agencies that produce records after suit is filed are subject to fees, costs, and penalties. But *COGS* was *abrogated by Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) ("prevailing" relates to the legal question of whether the records should have been disclosed on request") (*citing Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990) (PAWS I); *abrogation recognized by Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 726-727, 261 P.3d 119 (2011) ("A violation [] results in a remedy . . . the harm occurs when the record is wrongfully withheld"). *See also City of Fife v. Hicks*, 186 Wn. App. 122, 146, 345 P.3d 1 (2015) (*citing Soter*, 162 Wn.2d at 753 n. 16, 174 P.3d 60 (It is only if the agency prosecutes an unsuccessful declaratory judgment action that the agency becomes liable for the requester's reasonable costs and attorney fees).

Contrary to Campese's contentions, the County's motion for voluntary dismissal of its Petition was not a final judgment and did not entitle Campese to fees, costs, and penalties. The County's motion expressly stated that its motion for voluntary dismissal without prejudice was "not intended to seek dismissal of those claims in Respondent's counterclaims, which are not rendered moot by settlement." *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009):

> [A] "voluntary dismissal" is not a final judgment. A voluntary dismissal leaves the parties as if the action had never been brought. . . No substantive issues are resolved, and the plaintiff may refile the suit. Because a voluntary dismissal is not a final judgment rendered in favor of the defendant, the Court of Appeals correctly concluded that Kraft cannot be considered a prevailing party" for the purpose of awarding fees.

Id. (*citing Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999); *and State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003)).

In granting the County's motion for voluntary dismissal without prejudice, the court reserved the issue of fees, costs, and penalties (CP 174-175). Then later, the trial court effectively preserved the opportunity for Campese to pursue whether the County violated the PRA and whether Campese was a prevailing party for purpose of fees, but Campese abandoned the claim. (CP 378-379)

As was the case in *Kraft*, no substantive issues have been resolved here. No determination was made on question whether the County violated the PRA. Unless and until a court determines that the Prosecutor wrongfully withheld records, Campese is not a prevailing party, and he is not entitled to fees, costs, or penalties.

VI. CONCLUSION

Appellate resources should not be wasted on parties who fail to pursue their claims before the trial court, who distort facts to obtain review, and who assert that an issue is of "great public importance" despite abandoning it below. The County's

declaratory judgment action was not frivolous, faux, or intended to vex Campese. Case law supports the Prosecutor's position that many of the Brady materials covered by Campese's request were attorney work product and exempt from public inspection and copying. That the Prosecutor decided to waive the privilege as to a subset of the exempt records does not make the previously filed declaratory judgment action wrongful.

The trial court correctly reserved and then denied as premature Campese's demand for fees, costs, and penalties. The Court of Appeals correctly concluded that the trial court did not err in denying Campese's motion for fees, costs and penalties. Campese's petition for review should be rejected.

WORD COUNT CERTIFICATION

We hereby that this brief complies with the word limit of RAP 18.17(c)(10). This brief contains 4,615 words, excluding the items exempted by RAP 18.17(c).

Respectfully submitted this 19th day of September, 2022.

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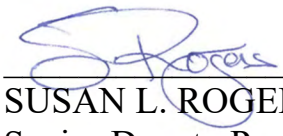

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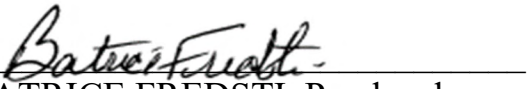
CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

Nicholas Power	[ ]	Via U.S. Mail
540 Guard Street, Suite 150	[X]	Via Email
Friday Harbor, WA 98250	[ ]	Via Hand Delivery

SIGNED in Port Orchard, Washington this 19th day of September, 2022.



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