No. 93428-2

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL AMES,

Appellant/Cross-Respondent,

v.

PIERCE COUNTY, By and Through, PIERCE COUNTY PROSECUTING ATTORNEY MARK LINDQUIST,

Respondent/Cross-Appellant.

PIERCE COUNTY'S ANSWER TO PETITION FOR REVIEW

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent Pierce County

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A. INTRODUCTION

Petitioner Ames filed a baseless lawsuit against Pierce County ("County") seeking either a writ of prohibition or declaratory relief under the Uniform Declaratory Judgment Act, RCW 7.24 ("UDJA"). The Pierce County Prosecutor's Office ("Office") acted well within its discretion to disclose potential impeachment evidence ("PIE") pertaining to Ames in a criminal case. Indeed, the Office's decision, consistent with model *Brady*[1] standards promulgated by the Washington Association of Prosecuting Attorneys ("WAPA"), was constitutionally-mandated.

The form of relief sought by Ames was simply not available to him under this Court's well-developed UDJA standing principles and its decisions on writs of prohibition. The trial court ably documented why it dismissed Ames' baseless action in its extensive memorandum opinion granting the County's CR 12(b)(6) motion, and the Court of Appeals correctly affirmed that decision. Simply put, Ames could not state a claim for relief by writ of prohibition and lacked standing to assert UDJA claims under the facts here. The Court of Appeals opinion is entirely consistent with decisions of this Court on the UDJA. Review should be denied. RAP 13.4(b).

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

B. STATEMENT OF THE CASE

The Court of Appeals correctly articulated the facts here. *See* Appendix. In contrast, Ames' statement of the case, pet. at 2-11, is argumentative and replete with reference to materials not of record. Ames deliberately omits critical facts in this case.[2]

The County believes that two facts referenced in the Court of Appeals opinion bear emphasis – Ames received a hearing in the only instance that PIE pertaining to him was disclosed, and despite *repeated* opportunities to disclose a legal basis for his theories of recovery, Ames' counsel could not do so.

As a Sheriff's Department detective, CP 1-2, 768,[3] Ames was a witness for the State in certain criminal prosecutions. CP 1198. The Office was constitutionally obligated to provide criminal defendants with any PIE relating to his testimony in such cases; the Office determined that the State

[2] Ames failed to reference or provide this Court the Order Amending Opinion entered by the Court of Appeals on July 26, 2016 as required by RAP 13.4(c)(4). *See* Appendix. Moreover, Ames *deliberately* tries to interject extra record facts. *See, e.g.*, pet. at 3 nn.4, 6, 4 n.8, 7 n.20, 11 n.34. Ames' counsel engaged in the very same conduct before in this case that resulted in this Court striking Ames' brief in Cause No. 89884-7 (*See* Court's November 21, 2014 ruling granting the County's motion to strike under RAP 10.7). Ames' counsel provides this Court Appendix F to the Ames' petition with "media coverage," materials clearly not of record. RAP 10.3(a)(8); RAP 13.4(c)(4). Finally, long passages of Ames' statement of the case are merely argument of counsel for which Ames does not even bother to cite to the record as required by RAP 13.4(c)(6). This Court should simply disregard all such improper materials.

[3] Ames has retired from the Department. CP 1110-11.

was required to disclose two separate instances of Ames-related PIE to the defense in *State v. George*, a case in which the defendant was on trial for murder, and Ames was a prosecution witness.

The first instance related to a civil case in which the Office determined Ames made statements in a sworn declaration which were directly contradicted by a sworn declaration of the attorney of record in that case. *See generally*, CP 769,[4] 1594-1640 (declarations of DPAs Lewis and Kooiman who prosecuted Dalsing). The *material* factual dispute between Ames and DPA Richmond in *Dalsing* was whether Richmond told Ames that an email would "exonerate" him in the *Dalsing* case and whether Richmond promised Ames that it would be turned over in discovery in *Dalsing*. Richmond adamantly denied any such promise to Ames, as Richmond's July 17, 2013 declaration in *Dalsing* explained. CP 826-56, 1588-89.

The second PIE issue related to the report of Jeffrey Coopersmith, an attorney retained by Pierce County's Human Relations Department to independently assess Ames' contentions that the Sheriff's Department and Office had retaliated against him after he submitted a written complaint to the Under Sheriff asking for a state or federal law enforcement investigation

[4] The trial court mischaracterized DPA Richmond's actual testimony. DPA Richmond averred that he did not receive the email at a particular meeting. CP 826-56, 1587-89.

of alleged misdeeds by the Sheriff's Department and Office. CP 770, 975-1012 ("Coopersmith Report").[5] The County handled Ames' request for an investigation as a whistleblower complaint. CP 977. Coopersmith found in May, 2013 that the County did not retaliate against Ames and that the County properly conducted its investigation, describing his allegations of "corruption" as a "very slender reed" and "in fact…not a reed at all." CP 1002. The Office concluded this Report might be PIE, not because the Report found Ames dishonest, but because the Report described a detective who reached conclusions and made accusations without evidence. *See* n.24 *infra*.

On September 18, 2013, the Office's Assistant Chief Criminal DPA Stephen Penner sent a letter to Ames informing him that the Office had recently finalized a policy for disclosure of PIE, based on a model policy recently adopted by the Washington Association of Prosecuting Attorneys ("WAPA"). CP 43-44, 858-59, 1592. Penner further informed Ames that the Office was in possession of documents that it was constitutionally required to disclose to criminal defendants as PIE in cases where Ames was

[5] Ames tries to discredit the report by implying that the Prosecutor selected a political friend for the task. Pet. at 7 n.20. This baseless argument is belied by the fact that Coopersmith was retained not by the Prosecutor or the Office, but by the County's Human Resources Department. CP 975.

expected to testify. CP 43.[6] The letter identified the documents to be disclosed as:

> declarations dated May 14, 2013, June 13, 2013, July 2, 2013, and July 19, 2013, signed by you and filed in the matter of *Dalsing v. Pierce County*, King County Superior Court Cause No. 12-2-08659-1 KNT, which contain assertions which are disputed in signed declarations filed by the civil DPAs assigned to that case and a report of investigation of allegations by you against numerous employees of the Pierce County Sheriff's Department and the Pierce County Prosecutor's Office, wherein it was found that there was "no evidence" to support your allegations of misconduct, and your allegations had "no merit."

CP 43-44. The letter also informed Ames:

> If you would like to provide our office with additional information which you believe is relevant before disclosure, please do so by 4:30 p.m. on September 23, 2013, in writing, and delivered to my attention at the Prosecutor's Office, room 946 of the County-City Building. Please be aware that such materials may also be disclosed to defense attorneys.

CP 44.[7] In response, Ames submitted additional materials and the Office then delivered the declarations referenced in the September 18, 2013 letter,

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[6] DPA Penner specifically advised Ames that the Office was fulfilling its constitutional obligation under *Brady* and it did not concede the materials were admissible. CP 1592-93. Faced with the developments in *Dalsing* and the findings of the independent investigator, the Office had no choice under *Brady* but to disclose what it did. To conceal such PIE would have constituted a constitutional violation under *Brady*.

[7] The WAPA model PIE policy does not include provisions for notification of officers like Ames, nor an opportunity to provide additional information. CP 46-52. Ames was actually afforded a *greater* opportunity by the Office to provide additional information than WAPA *Brady* standards require and Ames actually appeared in *George*.

plus the additional materials provided by Ames, to defense counsel in *George*. CP 1592.

DPA Penner scheduled an *in camera* court hearing before the Pierce County Criminal Presiding Judge, Bryan Chushcoff, to determine whether the Coopersmith Report would be provided to the defense in *George* as PIE. At that hearing, George's defense counsel argued that the materials should be disclosed to the defense. CP 223-27. Ames and his attorney, Joan Mell, were also present. CP 219, 221-22. Judge Chushcoff permitted Mell to speak on Ames' behalf regarding the proposed disclosure of the PIE to Corey. CP 229.[8] The clerk's minutes for the hearing indicated that Ames acquiesced in the provision of the Coopersmith Report to defense counsel. "Ms. Mell ha[d] no objection for The [sic] State giving defense counsel the possible impeachment information." CP 41. *See also*, CP 241-42.

Ames neglects to precisely describe the actual lawsuit he filed anywhere in his petition.[9] In effect, Ames sought a declaratory ruling for

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[8] Judge Chushcoff questioned Ames' standing to complain about the Office's disclosure of PIE in criminal proceedings, noting that Ames' rights were not violated by any PIE disclosure: "Potential impeachment evidence is not the same thing as it is impeachment." CP 234. *See also*, CP 233. When Mell raised the idea of a writ of prohibition, Judge Chushcoff stated: "I'm not sure what the Writ of Prohibition will prohibit." CP 235. After hearing from Mell, Judge Chushcoff bluntly stated, "I don't think that you are right about the legal implications of any of this, Ms. Mell." CP 240.

[9] In his petition, he sought a writ of prohibition to bar prosecutors from disclosing PIE material regarding him. (Some of this PIE material had already been disclosed in *George*). CP 8-9. Ames asked the court to order the County to desist from proceedings that characterized or suggested that he was "untruthful," and to issue an order prohibiting

all future cases in which he was a witness that he was "truthful." Moreover, in the numerous hearings below, Ames could cite no authority to support his requested relief.[10]

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

The trial court dismissed Ames' petition under CR 12(b)(6) because Ames failed to establish a basis for a writ of prohibition or standing to claim declaratory relief. *See* Appendix.[11] The trial court was entirely correct in its ruling, as the Court of Appeals determined.

Rather than carefully discussing the *specific forms of relief* he pleaded in any detail, Ames continues to try to obscure his specific theories

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the Office from claiming that the materials at issue constituted PIE. CP 8. Ames also sought an order prohibiting the Office from seeking an order from any other court that the subject materials constituted PIE. CP 9. He further sought to prohibit the Office from any further communications that the material DPA Penner identified in the September 18, 2013 letter constituted PIE. CP 10. In his second cause of action, Ames sought "an order declaring his statements to be truthful and not properly characterized under 'Brady' or any other doctrine as evidence that Det. Ames has been dishonest." CP 10.

[10] Ames' counsel was *repeatedly* unable to cite applicable supporting authority when questioned by the court. RP (12/16/13):18, 19, 20, 25-26. Specifically, she *conceded* she had no authority regarding the PIE disclosure, *id*. at 24, and similarly had no authority for a writ of prohibition or declaratory relief on the facts here. *Id*. Counsel's mantra was: "There's name-clearing case law out there." RP (12/16/13):20. When the trial court indicated that it saw no legal authority for Ames' petition, Mell asserted that "this is not a case where there's no legal authority whatsoever. There's an abundance of legal authority." RP (3/19/14):37. Such "authority" was never identified.

[11] In specific, the court noted that the Office was not making a determination that Ames was untruthful in disclosing PIE to defense counsel; rather, it was fulfilling its constitutional obligation to provide PIE, an action exclusively within the Office's responsibility. CP 772-73. The court further concluded that Ames presented no justiciable controversy entitling him to seek declaratory relief. CP 774-75.

for relief by launching into a policy argument for a "name clearing hearing," claiming he had no other viable remedies. Pet. at 3-4. That assertion is false.[12] Simply put, *nowhere* in his petition does Ames articulate a basis upon which he can obtain either a writ of prohibition or declaratory relief, the specific claims he pleaded here.

(1) A Prosecutor's Duty to Provide PIE to Defense Counsel

Nowhere in his petition does Ames deny the Office's long-standing constitutional duty to disclose PIE to a criminal defendant. *Brady, supra* at 87. Nor could he.[13]

Moreover, again uncontested by Ames, the Court of Appeals correctly noted at 13-14 that the United States Supreme Court has mandated that *prosecutors* have the responsibility of gauging what must be disclosed and they must resolve any doubtful questions in favor of disclosure. *Kyles,*

[12] Ames and his counsel made a *tactical decision* to seek a writ of prohibition and for declaratory relief under RCW 7.24. Ames understood he had a potential avenue under 42 U.S.C. § 1983 for a "name clearing proceeding." CP 1310-42, 1344. Although not of record, Ames filed an action to "clear his name," as he noted in his petition at 3 nn.4, 6. The United States District Court for the Western District of Washington at Tacoma initially dismissed his various claims as *baseless*. (Dkt. 21 – No. C16-5090-BNS). *See* Appendix.

[13] The *Brady* court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either as to the defendant's guilt or punishment, irrespective of good or bad faith of the prosecution. 373 U.S. at 87. In *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), this principle was extended to evidence that has the potential to impeach a witness' credibility. The government is obligated to provide such information whether or not a defendant requests it. *Kyles v. Whitley*, 514 U.S. 419, 433, 15 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

514 U.S. at 437-40.[14] The prosecutor's duty is non-delegable and the courts are not entitled to "second guess" such a decision.[15] A prosecutor's duty is not confined to disclosure of *actually* impeaching or exculpatory evidence, she/he must disclose any *potentially* impeaching or exculpatory evidence. *Sehad v. Ryan*, 671 F.3d 708, 715 (9th Cir. 2011).

Thus, as the Court of Appeals noted, op. at 13-14, the Office here was under a constitutional imperative to disclose PIE. Ames' sworn statements in his *Dalsing* declarations were reviewed by the Office and were found to be directly contradicted by DPA Richmond's declaration in that case. Ames' complaints against the Sheriff's Department and the Office were reviewed by attorney Coopersmith and also found to be entirely meritless. CP 975-1012. Because a trial court might conclude that such material could be used to impeach Ames' testimony if he were called as a witness for the State, the Office had a constitutional duty to disclose the

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[14] *See, e.g., United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013), *cert. den.*, 134 S. Ct. 2711 (2014) (Prosecutors should not limit the disclosure of PIE based upon their predictions of materiality "because it is just too difficult to analyze before trial whether particular evidence will ultimately prove to be 'material' after trial."). Further, the determination of whether PIE exists and must be disclosed falls within the *absolute discretion of the prosecutor*. *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003). Indeed, evaluating and determining whether to disclose such information is clearly part of the presentation of the State's case, entitling the prosecutor to absolute immunity for its decision whether to turn over such evidence. *Id.* This is so because the presentation of such information is so related to the prosecutor's preparation to prosecute. *Id.*

[15] *In re Brown*, 17 Cal.4th 873, 881, 952 P.2d 715, *cert. denied*, 525 U.S. 978 (1998); *United States v. Bland*, 517 F.3d 930, 935 (7th Cir. 2008) (a court is under no general independent duty to review government files to determine PIE material).

materials as PIE. To have failed to provide such materials in *George* would have violated George's due process rights, or those of any other criminal defendants in whose cases Ames might testify.

(2) Ames Was Not Entitled to a Writ of Prohibition

The Court of Appeals, like the trial court, CP 771-73, determined that Ames was not entitled to a writ of prohibition because he could not establish that the Office acted outside its jurisdiction with regard to either the *Dalsing* declarations or the Coopersmith Report. Op. at 14-18.[16] Although he references the issue, pet. at 2, Ames neglects to offer *any argument* on this question as required by RAP 13.4(c)(5). He has waived the issue.[17]

The Court of Appeals' writ decision was amply supported in any event. A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."

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[16] The Court of Appeals unanimously agreed on this point.

[17] By failing to comply with RAP 13.4(c)(7), Ames waived this issue because he did not "raise" it within the meaning of RAP 13.7(b) on this Court's scope of review. Clearly, the failure to set out an issue in the statement of issues, required by RAP 13.4(c)(5), means a party has not "raised" an issue, and the issue may not be raised for the first time in subsequent supplemental briefing. *State v. Korum*, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006) (The petitioner there also failed to present argument on the issue in its petition as required by RAP 13.4(c)(7). 157 Wn.2d at 624). It is no different if a party mentions an issue but then fails to address as is required by RAP 13.4(c)(7); it must be disregarded. *In re Detention of A.S.*, 138 Wn.2d 898, 922 n.10, 982 P.2d 1156 (1999) (in the absence of argument on an issue in a petition for review, Court will not consider the argument).

RCW 7.16.290. In cases not cited by Ames in his petition, but addressed by the Court of Appeals, op. at 9, this Court has characterized the writ as a "drastic measure," which is to be issued *only* when two conditions are met: (1) the absence or excess of jurisdiction, and (2) absence of a plain, speedy, and adequate remedy in the course of legal procedure. *Skagit County Public Hospital Dist. No. 304 v. Skagit County Public Hospital Dist. No. 1,* 177 Wn.2d 718, 722, 305 P.3d 1079 (2013). "The absence of either one precludes the issuance of the writ." *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989).

The law on writs of prohibition is clear and supports the conclusion of the Court of Appeals, op. at 8-15, that Ames cannot prove the Office acted in excess of its jurisdiction in disclosing the PIE materials in *George*, given the Office's broad constitutional obligation to disclose PIE to criminal defendants. Review is not merited on this issue. RAP 13.4(b).

(3) Ames Had No Right to Declaratory Relief[18]

RCW 7.24 affords parties the opportunity to secure declaratory relief in appropriate controversies, but parties must still comply with the

[18] Should this Court grant review (which it should not), the County reserves the right to raise the procedural defects in Ames' request for declaratory relief as another basis for dismissing his action. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725, 845 P.2d 987 (1993). Ames failed to join necessary parties under CR 19 and sued the incorrect party, the County, when criminal actions are brought in the State's name. Br. of Resp't at 25-26.

procedural requirements of the statute and they must demonstrate standing to claim declaratory relief. Ames did neither below, as the trial court correctly observed, CP 773-75, and the Court of Appeals agreed. Op. at 18-21.

(a) Ames Lacked Standing to Obtain Declaratory Relief for a Non-Justiciable Controversy

The Court of Appeals,[19] like the trial court, faithfully applied this Court's principles to determine that Ames is not entitled to declaratory relief. His request for a declaration that his statements are "truthful" and that they are "not properly characterized" is precisely the type of amorphous relief that is not justiciable in a declaratory judgment action.

Ames does not squarely address any of the authority cited in the Court of Appeals opinion on standing (op. at 18-19) *anywhere* in his petition, thereby waiving the issue.[20] Again, the Court of Appeals decision is amply supported. This Court has repeatedly noted that a justiciable controversy under RCW 7.24 requires:

> (1)… an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interest, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and

[19] The Court of Appeals unanimously agreed on this point.

[20] *See* n.17, *supra*.

> (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *League of Education Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013); *Lewis County v. State*, 178 Wn. App. 431, 437, 315 P.3d 550 (2013), *review denied*, 180 Wn.2d 1010 (2014). Ames cannot meet these standing requirements.

The Court of Appeals correctly observed, op. at 19-21, that no *present* controversy exists and any decision would not be final or conclusive.[21] Apart from *George*, where Ames' counsel did not object to disclosure and effectively *conceded* the PIE disclosure by the State there was proper, Ames' concerns essentially only pertain to *future* cases and do not involve a *present* controversy. *Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) (controversy over effect of initiative that was not yet in effect not justiciable). As Ames has retired, he will not likely be a future witness for the State. Moreover, the issue here is not one upon which a judgment could effectively operate because Ames seeks to dictate to other courts and juries – present and future – that some unidentified "statements"

[21] The proceedings at issue are also not genuinely adversarial in character. In fact, it is plainly in the State's interest to *uphold* Ames' testimony in its criminal prosecutions, and the Office would vigorously seek to do so. Because disclosure of PIE does not reflect a conclusion that Ames committed misconduct or that he is not credible as witness, no real controversy is at issue here; only a theoretical right or interest, at most, is present.

by him are truthful; he apparently seeks to bar prosecutors from ever treating the materials at issue here as PIE and barring their use by criminal defendants for impeachment, and stating that he must be deemed truthful whenever he testifies in criminal matters for the State. Neither RCW 7.24.010 nor any other law provides such extraordinary and unconstitutional relief. No authority supports a declaratory action stating for all time and in all cases that Ames is truthful. RCW 7.24.060 (refusal of declaration where judgment would not terminate controversy).[22]

Review on the issue of Ames' UDJA standing is not merited. RAP 13.4(b).[23]

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[22] As the trial court noted, any one-time determination in a particular case by a particular court that Ames was or was not truthful does not bind another court in a criminal case in which Ames is called as a witness for the State. CP 774. The courts lacked the ability to provide Ames the relief he sought. Op. at 20-21.

[23] Ames' assertion that a declaratory judgment action could rule invariably that he was "truthful" particularly misses the point with respect to the Coopersmith Report. This Report was PIE because it described a detective who reached conclusions and made accusations without evidence. In his complaint that initiated Coopersmith's investigation, Ames asserted that a specific criminal investigation into child abuse was sabotaged in order to aid a high school friend of a detective; he alleged "officers at the executive command level" of the Sheriff's Department along with executive level officers of the Office "conspired to discredit the legitimacy of the criminal complaint filed by" the victim's parents. CP 976-77. After an extensive, thorough independent investigation, CP 977-78, Coopersmith found "there is no merit to Det. Ames' current allegations," rejecting any basis for claims of corruption or retaliation against Ames. CP 1011. Critically, Coopersmith noted the very weak basis for Ames' allegation of "corruption." CP 1002. Ames was a detective in the Sheriff's Department, and had the authority to arrest individuals and forward cases to the Office for charging; the Coopersmith Report documented that he could jump to baseless conclusions and therefore constituted PIE because it called into serious question Ames' skills and judgment as a detective. The Report also documented contradictory statements by Ames in his interview with Coopersmith. *See* op. at 15-17.

(b) The Present Case Is Not One of Public Importance

The Court of Appeals majority rejected Ames' argument that notwithstanding his inability to meet the test established by this Court for UDJA standing, he was nonetheless entitled to declaratory relief because this case is one of "public importance." Op. at 21-25.[24] But review is not merited in this case, despite the Court of Appeals dissent, op. at 29-35,[25] because the Court of Appeals majority correctly applied this Court's decisions on the public question exception to UDJA standing requirements and the issues in this case, unique to Ames, do not qualify as issues of "public importance" merely because public officials are involved. RAP 13.4(b).

This Court has excused its strict standing rules for declaratory relief in certain critically important public controversies, but this exception is to be *rarely* applied and only if the public's interest is "overwhelming." *To-*

[24] Ames only raised this issue below in passing in response to the County's CR 12(b)(6) motion. CP 694. He actually made the argument in his pleadings on reconsideration of the trial court's CR 11 order, as attested to by his citation to the tardy declarations he adduced on reconsideration. Br. of Appellant at 34. Moreover, as has been typical of Ames' conduct in this case, his counsel cited what is now his principal authority for his public importance argument for standing belatedly so that the County could not read the case, nor properly respond to it. RP (7/10/14):9-11, 15.

[25] The dissent's opinion falls prey to Ames' contention that merely because public officials are involved, the issue is one of "public interest." Op. at 33. This Court has rejected such an argument as a too simplistic basis upon which to excuse a party from meeting UDJA standing and ripeness imperatives. Such a circumvention of this Court's UDJA standing jurisprudence will invite courts to entangle themselves in any public controversy without appropriate restraint.

Ro Trade Shows, 144 Wn.2d at 413. For example, this Court in *Wash. Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County*, 77 Wn.2d. 94, 96, 459 P.2d 633 (1969) and *Vovos v. Grant*, 87 Wn.2d 697, 555 P.2d 1343 (1976), both extraordinary writ cases, indicated that standing requirements could be relaxed "where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally…." *Id*. at 701. As the Court of Appeals majority noted, op. at 22, major public issues must be at stake to justify this exception to UDJA standing.[26] Ames did not meet this test, and *he fails to even address* the test or this Court's decisions anywhere in his petition. Ames' request is one that necessarily pertains *to him* and not the criminal justice system generally, particularly given the *Brady* principles at issue here. Op. at 22-25.[27]

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[26] This exception is not a justification to routinely circumvent the requirements of personal or representational standing. This Court has rejected this exception to general standing requirements in numerous instances even where significant public issues are present. *E.g.*, *Walker*, 124 Wn.2d at 414-26 (rejecting application of exception to allow challenge to initiative's constitutionality); *League of Education Voters*, 176 Wn.2d at 820 (same, noting that exception was also inapplicable where dispute was not ripe). *See also*, *Bercier v. Kiga*, 127 Wn. App. 809, 822, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005) (dispute over tobacco taxation by tribe as to member of another tribe not an issue of major public importance). *Lewis County*, 178 Wn. App. at 439-41 (County's dispute with State over funding of civil liability for acts of judicial branch officers was not one of major public importance; the financial dispute between the County and State did not implicate the public's interest). Ames neglects to address *any* of these cases in his petition.

[27] Ultimately, the real public importance of the case has little to do with Ames and more to do with the public policy of *Brady*, as the trial court concluded: "Ames alleges

The principal thrust of Ames' argument seems to be that he had a "constitutional" right to a hearing, a position that is ultimately negated here by the facts. Pet. at 13-19.[28] But again, this assertion is far too simplistic. This Court has rejected similar constitutionally-driven arguments in cases like *Walker* and *League of Education Voters* where the issue is not ripe and the claim is hypothetical, as here.[29]

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that the conduct of the Prosecutor is of major public concern. The major public concern does not have to do with Ames however. The public concern regarding PIE is a fair trial for criminal defendants, not the person whose credibility is being questioned." CP 775.

[28] In fact, as noted *supra*, the Office provided Ames advance notice of the PIE disclosure in the September 18, 2013 Penner letter, and he had an opportunity to provide additional materials; he submitted additional information which the Office included in the production to the defense in that case; he and his counsel appeared at the October 1, 2013 hearing in *George*; his counsel offered argument to the court and ultimately acquiesced in turning over the Coopersmith Report to defense counsel. Ames cannot now be heard to claim he was deprived of due process where he patently had notice and an opportunity to be heard. He is not entitled to more.

[29] Ames' citation to New Hampshire authority, pet. at 19 n.50, does not help him, as he omits a real analysis of the decisions of the New Hampshire Supreme Court. That court did not discern a general constitutional right to a "name clearing" process. It addressed the peculiar circumstances of New Hampshire law. Under New Hampshire's Constitution, its Supreme Court recognized a broader duty on the part of prosecutors to disclose PIE than that articulated in *Brady*. *State v. Laurie*, 653 A.2d 549 (N.H. 1995). Local prosecutors came to maintain actual lists of police officers who had questionable behaviors in their personnel files – "*Laurie* lists." *Duchesne v. Hillsborough County Attorney*, 119 A.3d 188, 193-94 (N.H. 2015). The New Hampshire Legislature enacted legislation to address officers' personnel files. *Id*. at 194-95. In *Duchesne*, officers accused of using unnecessary force successfully challenged discipline imposed upon them for such conduct and then sued to have their names removed from the *Laurie* lists, and the New Hampshire court agreed. But in *Gantert v. City of Rochester*, 135 A.3d 112 (N.H. 2016), the New Hampshire court held that the procedures for addressing placement on a *Laurie* list, a list required by the State's Attorney General, satisfied due process standards.

Washington does not have anything resembling "*Laurie* lists" in place, and, as the New Hampshire court noted in its opinions, the critical point of *Laurie* was the very powerful obligation of prosecutors to disclose PIE to accuseds and their counsel.

Ames seemingly hopes to support his baseless theories by contending public officials are involved or that there is media "interest" in the case[30] so that he therefore met the stringent test set out by this Court's "public importance" decisions. Pet. at 10-11. Ames does not meet that test, as those cases attest.

Finally, Ames asserts that this is an important issue to the criminal defense bar, citing declarations of defense counsel. Pet. at 10. But this effort is fundamentally *misleading*. The declarations at issue were supplied in connection with the issue of CR 11 sanctions below, not the *Brady*-related issues or UDJA standing.

Here, Ames' activities do not meet the public importance test articulated by this Court in *WNG* or *Vovos* because his is a personal issue. The only public issue – PIE – suggests that court should not excuse Ames from meeting the test for UDJA standing, standing requirements he clearly cannot meet, as the Court of Appeals unanimously determined. Review is not merited. RAP 13.4(b).

D. CONCLUSION

Ames' complaint regarding the Office's decision to provide PIE materials to defense counsel in *George* and other cases is ultimately baseless

[30] This is the apparent reason for Ames' improper inclusion of news stories in the appendix to his petition. He did the same thing below, trying to submit news stories that are inadmissible hearsay as evidence. CP 2024-47, 2236-43.

in light of the broad constitutional obligation of the Office to provide such materials to criminal defendants and their counsel. The trial court correctly determined that Ames failed to state a claim against the County on the theories he pleaded, dismissing his petition under CR 12(b)(6), and the Court of Appeals correctly affirmed the trial court under the UDJA. Review is not merited. RAP 13.4(b).

DATED this 24th day of August, 2016.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent Pierce County

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

July 26, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL AMES, Appellant and Cross-Respondent, v. PIERCE COUNTY, Respondent and Cross-Appellant.	No. 45880-2-II ORDER GRANTING MOTION TO RECONSIDER AND AMENDING OPINION

The respondent and cross-appellant has moved for clarification and reconsideration of the court's published opinion filed May 17, 2016. Amicas curiae Timothy Lewis filed a motion to file a brief in support of the respondent and cross-appellant's motion for clarification and reconsideration.

The court rules as follows:

(1) The first paragraph on page 3 following subtitle A is amended to read as follows:

> In December 2010, Lynn Dalsing was arrested and charged with first degree child molestation and sexual exploitation of a minor. CP at 1594-95; 1599-1609. Dalsing's attorney sought photographic and computer evidence that allegedly were the bases of the charges against Dalsing. CP at 539. Ames was the PCSD's forensic computer examiner. CP at 538. On June 9, 2011, Ames e-mailed the lead detective on the *Dalsing* case opining that the photographic and computer evidence did not link Dalsing to the crimes. CP at 118-119. That same day, the lead detective forwarded Ames's opinion to Deputy Prosecuting Attorney Lori Kooiman, who then forwarded it to Deputy Prosecuting Attorney Timothy Lewis. CP at 118-119. Deputy Prosecutor Kooiman stated that she told Dalsing's attorney about Ames's

> evaluation by phone and in person after the e-mail exchange. CP at 1619. But Dalsing's attorney stated that Kooiman never told him about Ames's evaluation nor did he receive the e-mail chain until April 2013. CP at 128-129. The 2010 charges against Dalsing were dropped in July 2011. CP at 1619.

(2) In the dissent, the carryover paragraph beginning on page 26 and ending on page 27 of the slip opinion is amended to read as follows:

> Even without reaching into the hypothetical, the record before us is unmistakably an overture of interests more profound than those of the individual players. After Ames e-mailed the lead detective on the Lynn Dalsing case that there was no evidence on any of the computers linking Dalsing to the crimes the prosecutor had charged, the detective forwarded Ames's opinion to a deputy prosecuting attorney the same day. The prosecutor's office and Dalsing's defense counsel dispute when and if Dalsing's counsel was notified of Ames's conclusion that the evidence did not link Dalsing to her alleged crimes. Dalsing's attorney stated he did not receive the e-mail chain in which Ames expressed this opinion until April 2013, long after the 2010 charges against Dalsing were dismissed in July 2011.
>
> The following year, Ames filed a number of declarations in Dalsing's subsequent suit against Pierce County. In those declarations, Ames stated, among other matters, that the prosecutor told him not to answer Dalsing's deposition questions about the e-mails he had sent to the detective and that only at that time did Ames know those e-mails had not been disclosed. In response, the County filed a declaration by Pierce County Deputy Prosecutor James Richmond, declaring that Ames's declarations contained "false assertions made under oath" and setting out supporting details. Clerk's Papers at 576-82. Also, in a separate matter Ames filed a complaint with the County dated December 20, 2012, alleging retaliation and misconduct for its actions relating to the Coopersmith Report.

(3) The motion by amicus curiae Timothy Lewis to file a brief in support of the respondent and cross-appellant's motion for clarification and reconsideration is denied.

(4) In all other respects, the motion for clarification and reconsideration is denied.

IT IS SO ORDERED

DATED this 26th day of July, 2016.

JOHANSON, J.

We concur:

MELNICK, J.

BJORGEN, C.J.

Filed
Washington State
Court of Appeals
Division Two

May 17, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL AMES, Appellant and Cross-Respondent, v. PIERCE COUNTY, Respondent and Cross-Appellant.	No. 45880-2-II PUBLISHED OPINION

JOHANSON, J. — Michael Ames appeals the trial court's CR 12(b)(6) dismissal of his claims for a writ of prohibition and declaratory judgment. Ames argues that he is entitled to (1) a writ of prohibition because the Pierce County Prosecuting Attorney's Office (PCPAO) acted outside its jurisdiction and (2) a declaratory judgment because a justiciable controversy exists and, in the alternative, this case presents an issue of major public importance. Pierce County cross appeals, arguing that the trial court abused its discretion when it granted Ames's motion for reconsideration, reversing its CR 11 sanctions order against Ames.

We hold that Ames failed to state claims for (1) a writ of prohibition because he does not allege facts that demonstrate the PCPAO acted outside or in excess of its jurisdiction and (2) a declaratory judgment because this controversy is not justiciable nor is this an issue of major public importance. Regarding the County's cross appeal, we hold that the trial court did not abuse its discretion when it concluded that Ames's claims are not baseless because he argued for a good

faith extension of the law and supported it with a reasonable inquiry into relevant precedent. We affirm.

FACTS

I. SUMMARY OF BACKGROUND FACTS

Michael Ames was a detective with the Pierce County Sheriff's Department (PCSD). He was a recurring government witness for the State in criminal prosecutions. The instant case arose when the PCPAO sent Ames a letter dated September 18, 2013 stating that several of Ames's "*Dalsing*" declarations and the "Coopersmith" report would be disclosed to defense counsel as potential impeachment evidence in the prosecution of *State v. George* and in any other case where Ames was expected to testify.[1] Ames disagreed that the *Dalsing* declarations and the Coopersmith report should be disclosed to defense counsel as potential impeachment evidence.

Ames filed this lawsuit, requesting a writ of prohibition to generally prohibit the PCPAO from disclosing these materials as potential impeachment evidence and an order declaring that his *Dalsing* declarations were truthful and not properly characterized as potential impeachment evidence under *Brady*.[2] Specifically, Ames requested the following relief:

> 5.1 A trial by jury of any factual disputes pursuant to RCW 7.24.090;
> 5.2 A writ of prohibition ordering defendant to cease and desist with any further communications that the materials identified in [the PCPAO's] letter of September 18th are impeachment evidence or potential impeachment evidence;
> 5.3 An order declaring the materials identified in [the PCPAO's] letter of September 18th are not impeachment evidence or potential impeachment evidence;
> 5.4 An award of attorney's fees and costs to Det. Ames under equitable theories to include good faith and fair dealing, or any other applicable statute or doctrine;

[1] *Dalsing v. Pierce County*, cause no. 12-2-08659-1, the Coopersmith report, and *State v George*, cause no. 05-1-00143-9, are discussed in detail below.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

5.5 For such other and further relief as the court deems just and equitable.

Clerk's Papers (CP) at 10-11.

The trial court denied Ames's request for the writ of prohibition and for a declaratory judgment on a CR 12(b)(6) motion. Ames appeals.

A. THE *DALSING* CASE

In December 2010, Lynn Dalsing was arrested and charged with several child pornography-related offenses. Dalsing's attorney sought photographic and computer evidence that allegedly were the bases of the charges against Dalsing. Ames was the PCSD's forensic computer examiner. In June 2011, Ames e-mailed the lead detective on the *Dalsing* case that there was no evidence on any of the computers to link Dalsing to the crimes. That same day, the lead detective forwarded Ames's opinion to Deputy Prosecuting Attorney Timothy Lewis, but the PCPAO did not disclose this exculpatory information until over a month later when the PCPAO dropped the charges and released Dalsing.

In March 2012, Dalsing filed a civil complaint against the County, claiming that the PCPAO's and the PCSD's actions amounted to false arrest and malicious prosecution. In Dalsing's civil case, Ames filed four declarations to support his various motions for costs and attorney fees he incurred. Ames had hired his own attorney during the Dalsing civil case because he believed that his interests, i.e., disclosing his involvement with the Dalsing criminal investigation and sending e-mails to the lead detective, conflicted with the County's interests in the civil case, such as denying misconduct from the PCPAO and avoiding liability. In his declarations, Ames stated that (1) prior to his deposition in Dalsing's civil case, he did not know the PCPAO had never disclosed his e-mails to the lead detective to Dalsing, (2) he wanted to tell

the truth about the e-mails because the PCPAO's decision not to disclose them was "not in [Ames's] best interest," and (3) the deputy prosecutor told him not to answer Dalsing's deposition questions about the e-mails. CP at 546.

In response to Ames's motions for attorney fees and costs, Deputy Prosecutor James Richmond[3] declared that Ames's declarations contained "false assertions." CP at 577. Specifically, Richmond declared that contrary to Ames's declaration, at their October 2012 meeting, Ames did not give the e-mails at issue to Richmond; they did not discuss whether there were "supposedly 'exculpatory' e-mails or that Mr. Ames was aware of information that would be considered exculpatory"; and Richmond did not say that there was an "e-mail [that] would 'clear [Ames] of any wrong doing in the case'" or that Richmond would see that such e-mails were "'turned over as part of discovery.'" CP at 577. Richmond stated that Ames was not a party to the "numerous communications [exchanged] about plaintiff's discovery requests and Pierce County's objections and responses" and that when he met with Ames again in February 2013, contrary to Ames's declaration, they did not discuss or review county e-mails. CP at 577.

Regarding Ames's deposition, Richmond denied that Ames asked him (Richmond) about whether what happened in the deposition would have any repercussions for Ames or expressed concern about Richmond's advice not to answer questions. Richmond also denied that Ames ever expressed that he thought the County's assertion of work product protection of e-mails was erroneous or having been concerned that he was being prevented from clearing his name, the name

[3] Originally, Richmond was counsel for the County when Dalsing sued the County and advised Ames in that capacity. Later, Ames asserted that there was a conflict of interest and he retained independent counsel in the matter.

of the PCSD, or from testifying truthfully. Richmond also stated that contrary to Ames's declaration, Ames sought the advice of independent counsel two months before the deposition, not after the deposition.

B. THE COOPERSMITH REPORT

Also in 2012, a student alleged that he had been bullied at a local school and that a teacher had participated in the bullying. The attorney who represented the student's parents had also represented Ames in a recent dispute with the PCSD. The attorney tried to contact the head of the PCSD's special assault unit but eventually contacted Ames, who went to the attorney's office to take a report from the parents. The head of the special assault unit investigated the bullying allegations and forwarded the results of her investigation to the PCPAO, who declined to prosecute.

The PCPAO released a long, detailed statement to the media explaining its decision and mentioning Ames's personal relationship with the attorney who "initiated" the investigation, though not naming Ames directly. Around the same time, the PCSD reviewed Ames's e-mails to see if he had any contact with the parents' attorney to determine whether Ames's involvement with the investigation presented a conflict. The PCSD found no suspicious e-mails.

Based on the PCPAO's "handling of the [school] Case," the PCPAO's press release, and the PCSD's search of his e-mails, Ames filed a complaint alleging retaliation and misconduct. CP at 450. That complaint was forwarded to the County's human resources department, who hired Jeffrey Coopersmith, an outside civil attorney, to conduct an independent investigation. Coopersmith's report found that there was "no merit" to Ames's retaliation allegations, that the

PCSD and the PCPAO handled the school bullying case properly, and that there is "no evidence that Det. Ames acted in anything other than good faith." CP at 485, 469.

C. THE *GEORGE* CASE

In September 2013, the PCPAO sent Ames a letter explaining that it planned to disclose "potential impeachment evidence" regarding Ames in the *George* case. CP at 858. Specifically, the letter said that the PCPAO had four signed declarations from Ames regarding Dalsing that contained assertions that were disputed by Richmond, the deputy prosecuting attorney in that case in another signed declaration. The letter also said that the PCPAO had the Coopersmith report. The letter concluded by stating that the PCPAO intended to release Ames's and the prosecuting attorneys' declarations and the Coopersmith report to defense counsel as potential impeachment evidence in its prosecution of Dmarcus George.

The declarations, which included a signed statement by Richmond, were disclosed to George's attorney. The trial court had a hearing to discuss whether the PCPAO must disclose the Coopersmith report. The deputy prosecutor argued for an in camera review of the Coopersmith report to determine whether it was potential impeachment evidence, and Ames argued that a determination whether the report was potential impeachment evidence should be made by writ of prohibition and declaratory relief, but ultimately conceded that the report was likely discoverable as a public record.

II. PROCEDURAL FACTS

In October 2013, Ames petitioned for a writ of prohibition seeking to prohibit the PCPAO from disclosing the *Dalsing* declarations and the Coopersmith report as potential impeachment evidence in future cases and a declaratory judgment that the declarations and report are not

potential impeachment evidence. The County moved to dismiss Ames's claims under CR 12(b)(6), arguing that (1) a writ of prohibition is improper where the PCPAO did not act outside or in excess of its jurisdiction, and (2) a declaratory judgment is improper because this dispute is not justiciable and a declaratory judgment would affect the interests of nonparties. The County also moved to strike under RCW 4.24.525 (the anti-strategic lawsuits against public participation (SLAPP) statute), which the trial court denied.

Ames argued that although the PCPAO has mandatory obligations to disclose potential impeachment evidence, it acts outside its role when it "generat[es] so called '*Brady*' material for the purposes of discrediting a witness." CP at 686. Ames also argued that based on case law from other jurisdictions and legal treatises, a declaratory judgment action is a proper proceeding for clearing his name; that such a claim is justiciable; and that, even if it were not justiciable, it presents an issue of major public importance.

The trial court granted the County's CR 12(b)(6) motion, concluding that (1) the PCPAO had jurisdiction to create the declarations in *Dalsing* and to disclose those declarations and the Coopersmith report as potential impeachment evidence, and (2) Ames's claim for a declaratory judgment is neither justiciable nor an issue of major public importance. The trial court also initially granted the County's motion for attorney fees and sanctions under CR 11, finding that Ames's claims were "baseless and frivolous" and not supported by a reasonable inquiry, which would have shown the absence of any controlling law. CP at 1203. After Ames moved for reconsideration, the trial court reversed its CR 11 sanctions order finding that Ames provided enough argument, case law from foreign jurisdictions, and law review articles to make a good faith argument for an extension of the law.

Ames appealed the trial court's CR 12(b)(6) dismissal and the County cross appealed the trial court's decision not to order CR 11 sanctions.

ANALYSIS

I. CR 12(B)(6) DISMISSAL ORDER

A. STANDARD OF REVIEW

We review a dismissal under CR 12(b)(6) de novo. *Worthington v. Westnet*, 182 Wn.2d 500, 506, 341 P.3d 995 (2015). CR 12(b)(6) motions should be granted only "'sparingly and with care'" and only when it is "beyond doubt" that the plaintiff can prove "no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (quoting *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). We accept all facts in the plaintiff's complaint as true. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). When reviewing the trial court's CR 12(b)(6) dismissal, we ask whether "there is not only an absence of facts set out in the complaint to support a claim of relief," but also whether there is any "hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Worthington*, 182 Wn.2d at 505.

B. WRIT OF PROHIBITION

Ames argues that a writ of prohibition is appropriate because the PCPAO does not have jurisdiction to knowingly disclose false information that it created in separate proceedings as *Brady*

evidence.[4] The PCPAO has both jurisdiction and an ethical obligation to decide what potential impeachment evidence is and to make *Brady* disclosures. Thus, we hold that even if we assume the content of those disclosures is false, the PCPAO has jurisdiction to make *Brady* disclosures and a writ of prohibition is not appropriate. Accordingly, CR 12(b)(6) dismissal was proper.

1. RULES OF LAW

A "writ of prohibition . . . arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." RCW 7.16.290. A writ of prohibition is a "drastic measure" that may be granted only if the official is acting in the "'(1) [a]bsence or excess of jurisdiction, and [there is an] (2) absence of a plain, speedy, and adequate remedy in the course of legal procedure. The absence of either [condition] precludes the issuance of the writ.'" *Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 722-23, 305 P.3d 1079 (2013) (first alteration in original) (quoting *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989)). The statutory writ of prohibition may be issued to "arrest" the improper exercise of judicial, quasi-judicial, executive, and administrative power. *Skagit County Pub. Hosp. Dist. No.*

[4] Ames argues repeatedly that he is entitled to a "name-clearing" hearing. Br. of Appellant at 1. A name-clearing hearing is part of the remedy he requests as part of his claims both for a writ of prohibition and a declaratory judgment and is based on the case law from other jurisdictions that have, in certain instances, given public employees the right to a "name-clearing hearing." *See, e.g.*, *Cotton v. Jackson*, 216 F.3d 1328, 1333 (11th Cir. 2000) ("If Plaintiff were without another legal remedy and proved in a state mandamus proceeding that Defendants had deprived Plaintiff of his federal liberty interest in his reputation without a hearing, then Plaintiff would have shown that he had a clear legal right to a name-clearing hearing."). A "name-clearing hearing" is not a proceeding explicitly recognized in Washington law. Because Ames does not demonstrate that he is entitled to either a writ of prohibition or a declaratory judgment, we need not determine what the proper remedy or proceeding on remand would be.

304, 177 Wn.2d at 722. It is not a proper remedy where the only allegation is that the actor is exercising jurisdiction in an erroneous manner. *See Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996).

In *County of Spokane v. Local No. 1553, American Federation of State, County & Municipal Employees, AFL-CIO*, Division Three of this court considered whether employees of the county prosecutor's office acted outside their "jurisdiction" when going on strike because a public employee strike is contrary to Washington law. 76 Wn. App. 765, 769, 888 P.2d 735 (1995). The court held that a strike was not necessarily outside the employees' jurisdiction just because it was unlawful. *Local No. 1553*, 76 Wn. App. at 769. Instead, historically, writs of prohibition apply where the officials' actions would encroach on the jurisdiction of others and "enlarge the powers of their positions." *Local No. 1553*, 76 Wn. App. at 769.

In *Brady v. Maryland*, the United States Supreme Court explained a prosecutor's disclosure obligations prior to a criminal trial. 373 U.S. 83, 86-87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Court held that a prosecutor's decision not to disclose material "evidence favorable to an accused" violates that defendant's due process rights. *Brady*, 373 U.S. at 87. In the years after *Brady*, several cases expanded and clarified *Brady*'s reach. *See State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). The Supreme Court extended the *Brady* rule to require the State to disclose impeachment evidence probative of witness credibility if that evidence is favorable to the accused. *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *United States v. Bagley*, 473 U.S. 667, 676-78, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The prosecutor is also obligated to disclose evidence in his or her possession and evidence in law enforcement's possession. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed.

2d 490 (1995). If the prosecutor is unsure about whether certain evidence should be disclosed, he or she should err in favor of disclosure. *Kyles*, 514 U.S. at 439-40; *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure"). The prosecutor is the only person who knows of undisclosed evidence and therefore is charged with the responsibility to gauge which evidence should be disclosed. *Kyles*, 514 U.S. at 437.

2. THE PROSECUTOR HAS JURISDICTION TO DISCLOSE POTENTIAL IMPEACHMENT EVIDENCE

Here, the PCPAO has jurisdiction to disclose potential impeachment evidence. Ames contends, however, that the PCPAO exceeded or acted outside of its jurisdiction when it disclosed the *Dalsing* declarations and the Coopersmith report because Ames's statements in those materials were truthful and Richmond's declaration was untruthful and created to discredit Ames. We disagree that the PCPAO exceeded or acted outside its jurisdiction when it determined the *Dalsing* declarations and the Coopersmith report constituted potential impeachment evidence.

(a) THE *DALSING* DECLARATIONS

Regarding the *Dalsing* declarations, Ames confuses the PCPAO's authority to file or make declarations to defend itself in a civil case with its separate and constitutional *Brady* obligation to disclose evidence to criminal defendants that might impeach potential witnesses. *Giglio*, 405 U.S. at 153-54. The PCPAO had jurisdiction to create declarations in *Dalsing* to defend against the allegations made by Ames in his motion for attorney fees. Therefore, the prosecuting attorney acts within his or her duties as an advocate for the State by creating an opposing declaration. The truth or falsity of that declaration was up to the trier of fact in *Dalsing*, and the truth or falsity of that declaration does not affect the prosecuting attorney's jurisdiction.

And even assuming, as we must when reviewing the trial court's CR 12(b)(6) dismissal, that Ames correctly alleges that Richmond's declaration was untruthful and was filed to discredit Ames, the PCPAO's *Brady* obligation to disclose potential impeachment evidence to future criminal defendants remains. *FutureSelect*, 180 Wn.2d at 962; *see also Kyles*, 514 U.S. at 439-40. The PCPAO's decision to disclose evidence under *Brady* is not a determination of credibility or truthfulness of a witness. Disclosure is only precautionary, with a final determination of credibility left to the specific fact finder in the case where the evidence may be considered.

Regardless of the truth of Ames's and Richmond's *Dalsing* declarations, the PCPAO's duty is to determine whether the defendant might consider those declarations to be probative of Ames's credibility as a witness. *Bagley*, 473 U.S. at 676. In fulfilling this duty, prosecutors must err on the side of disclosure. *Kyles*, 514 U.S. at 439-40. Therefore, Richmond's proper or improper intentions when filing his *Dalsing* declaration, and the truthfulness of Ames's and Richmond's declarations, are irrelevant. The issue here instead is whether a future defendant *might* use Ames's dispute with Richmond's and Ames's conduct during the *Dalsing* investigation to impeach Ames. The PCPAO has jurisdiction to decide whether to disclose Ames's and Richmond's *Dalsing* declarations to future defendants. Ames fails to show that the PCPAO has exceeded its jurisdiction and thus the drastic measure of a writ of prohibition is precluded.

(b) THE COOPERSMITH REPORT

The County's human resources department commissioned the Coopersmith report in response to Ames's allegations against top officials in the PCSD and the PCPAO. Although the Coopersmith report found no misconduct or bad faith from Ames, it also found that his claims had "no merit" and that it was not proper for Ames to take a police report in his official capacity from

his personal attorney. If the findings in the Coopersmith report call Ames's judgment into question, it is within the PCPAO's *jurisdiction*, as discussed above, to determine whether to disclose this report to future defendants as potential impeachment evidence.

Ames relies on whistleblower protections against retaliation for county employees to support his argument that the PCPAO acted outside or in excess of its jurisdiction. But whistleblower protections apply only when a retaliatory action is taken against the whistleblower. RCW 42.41.020(3); PCC 3.14.010(B).[5] A "retaliatory action" is

> (a) [a]ny adverse change in a local government employee's employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action; or (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official.

RCW 42.41.020(3).

Here, Ames's argument fails for three reasons. First, the possible disclosure to future defendants of the Coopersmith report as potential impeachment evidence is not a "retaliatory action" as defined under RCW 42.41.020(3) or PCC 3.14.010(B). Second, it is not clear that, in the Coopersmith report, Ames is even a whistleblower. And third, even if the disclosure of potential impeachment evidence to criminal defendants is a "retaliatory action," Ames offers no argument about whether that affects the PCPAO's jurisdiction. Again, that an official's act was unlawful does not inherently establish that the act was outside the official's jurisdiction. *Local*

[5] Local government whistleblower protection act. Ch. 42.41 RCW; Pierce County Code, ch 3.14, Whistleblower Protection.

No. 1553, 76 Wn. App. at 769. Future disclosure of the Coopersmith report as potentially impeaching evidence is, therefore, not outside or in excess of the PCPAO's jurisdiction.[6]

In conclusion, Ames points to no authority, and we know of none, for the proposition that a prosecutor acts in excess of or outside his or her jurisdiction when he or she discloses potential impeachment evidence even if known to be false, when created by the prosecutor to defend himself or herself in a separate civil suit. When witnesses change their stories or recant previous accounts, prosecutors must regularly disclose information, statements, or declarations to defendants under *Brady* that they know or believe to be false. Even if Richmond's declaration is false and an individual prosecutor lacks authority to create false declarations, it does not mean that the prosecutor acts without jurisdiction when he or she discloses those declarations to future defendants as potential impeachment evidence. *See Local No. 1553*, 76 Wn. App. at 769. Regardless of the truth of the *Dalsing* declarations, the PCPAO did not seek to "enlarge the powers of [its] position" because, according to *Brady* and its progeny, it is the PCPAO's exclusive duty to disclose *potential* impeachment evidence. *Local No. 1553*, 76 Wn. App. at 769; *Brady*, 373 U.S. at 86-87; *Giglio*, 405 U.S. at 153-54.

[6] The County argues repeatedly that Ames agreed to turn over the Coopersmith report to George. This argument is misleading. Ames agreed that the Coopersmith report was a public record and was likely available to George for that reason. But Ames also repeatedly and emphatically stressed that he did not want the trial court to rule on whether the Coopersmith report was potential impeachment evidence outside the context of Ames's petition for a writ of prohibition and declaratory judgment. Therefore, the County's contention that Ames somehow waived his argument that the Coopersmith report is potential impeachment evidence or agreed to characterize it as such is inaccurate.

Because Ames cannot demonstrate that the PCPAO acted outside or in excess of its jurisdiction when it determined whether to disclose the *Dalsing* declarations and the Coopersmith report, the dismissal of Ames's claim for a writ of prohibition was proper.[7]

C. DECLARATORY JUDGMENT

Ames next argues that his claim is justiciable because he "presents an actual, immediate dispute in which [he] has a direct and substantial interest." Br. of Appellant at 24. We hold that Ames's claim is not justiciable because this dispute does not meet at least two of the four elements required to raise a justiciable controversy.

1. RULES OF LAW

The Uniform Declaratory Judgments Act (UDJA)[8] gives "[c]ourts of record" the authority "to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. However, a claim for relief under the UDJA exists only if there is a "'justiciable controversy'" or if the dispute pertains to "'issues of major public importance.'" *League of Educ. Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (quoting *Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990)).

A justiciable controversy requires proof of four elements:

[7] As to the second element to establish a claim of a writ of prohibition, Ames argues that the "[PCPAO] has not offered him any relief in any other forum." Br. of Appellant at 47. The County argues that Ames had an adequate legal remedy to prohibit the PCPAO from disclosing potential impeachment evidence because there was a hearing in the *George* case to determine whether the Coopersmith report should be disclosed. But neither party cites any relevant law in support of their arguments. Since Ames's claim for a writ of prohibition fails with the first element, we need not address this argument.

[8] Ch. 7.24 RCW.

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

League of Educ. Voters, 176 Wn.2d at 816 (alteration in original) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). If any one of these four elements is lacking, the court's opinion in this case would be merely advisory, and Ames will have failed to raise a justiciable controversy. *Lewis County v. State*, 178 Wn. App. 431, 437, 315 P.3d 550 (2013), *review denied*, 180 Wn.2d 1010 (2014).

2. AMES'S CASE IS NOT JUSTICIABLE

(a) NO ACTUAL, PRESENT DISPUTE EXISTS

Ames argues that the record here "indisputably evidences adversarial proceedings." Br. of Appellant at 31. We disagree.

In *Diversified Industries Development Corp. v. Ripley*, the trial court granted a declaratory judgment to a lessor against his tenants and their insurers. 82 Wn.2d 811, 812, 514 P.2d 137 (1973). The lessor sought to determine who would be liable for injuries to the tenants' social guests on the premises. *Diversified Indus.*, 82 Wn.2d at 812. Our Supreme Court held that this dispute was not justiciable because a claim for financial responsibility was not yet "more discernible than an unpredictable contingency." *Diversified Indus.*, 82 Wn.2d at 815.

In *Walker v. Munro*, the court rejected a claim of justiciability where the dispute was over the impact of a statute not yet in effect. 124 Wn.2d 402, 412, 879 P.2d 920 (1994). There, citizen action groups sought a declaratory judgment that provisions of an initiative limiting expenditures, taxation, and fees were unconstitutional. *Walker*, 124 Wn.2d at 405. The Supreme Court held that

because most provisions of the initiative were not yet in effect and could still be amended, no actual harm was shown, and the dispute was "speculative" and "essentially political" such that it could only result in an improper advisory opinion. *Walker*, 124 Wn.2d at 412-13.

Here, Ames does not allege that the County has any current or future plans to call him as a witness and to disclose the potential impeachment evidence. Although he might be called to testify again, he has no current dispute with the County and the possibility that potential impeachment evidence may be disclosed in the future is merely an "unpredictable contingency." *Diversified Indus.*, 82 Wn.2d at 815. Importantly, Ames seeks to bind future and unidentified defendants by the declaratory judgment he seeks here. But there is no current dispute regarding the disclosure of the *Dalsing* declarations and the Coopersmith report that involves Ames and the County, much less the future defendants he hopes to bind. A claim for declaratory judgment that seeks to bind defendants that are not a party here must be rejected as merely advisory. Therefore, we conclude that there is no actual present or existing dispute.

(b) A JUDICIAL DETERMINATION WOULD NOT BE FINAL OR CONCLUSIVE

Ames appears to argue that a judicial determination could be a final judgment that the declarations and Coopersmith report are not potential impeachment evidence and should not be disclosed in future cases. Here, Ames's argument fails because he takes an overly narrow view of the PCPAO's *Brady* obligation.

Ames claims that if he secures a declaratory judgment that his declarations and the Coopersmith report were truthful, those materials will not be *Brady* evidence. But the PCPAO must disclose any potential impeachment evidence about witnesses whose testimony will be probative of the defendant's guilt or innocence. *Giglio*, 405 U.S. at 153-54. Whether Ames's

statements were truthful, therefore, is not the relevant question. Whether the evidence is actual impeachment evidence is also irrelevant. The deputy prosecutor and defense counsel in future cases must decide whether, assuming the deputy prosecutor should err on the side of disclosure, the declarations and Coopersmith report "*might* [be] used to impeach" Ames. *Bagley*, 473 U.S. at 676 (emphasis added). A declaratory judgment would not be final or conclusive because the future deputy prosecutor, defense counsel, and trial court will still have to determine whether the evidence at issue is potential impeachment evidence under the particular circumstances of that future case. *Kyles*, 514 U.S. at 437. Attempting to make that determination here would invade the rights of the parties in future ligation.

Because the absence of any of the justiciability elements defeats Ames's claim and here his claim does not meet at least two of the required elements, we hold that Ames's claim does not present a justiciable controversy.[9]

D. THIS DISPUTE IS NOT AN ISSUE OF MAJOR PUBLIC IMPORTANCE

Alternatively, Ames argues that even if his claims do not present a justiciable dispute, he may invoke the UDJA because this dispute raises an issue of major public importance because the issues here "concern the integrity of the criminal justice system." Br. of Appellant at 33.[10]

[9] The County also argues that Ames's claim for declaratory judgment is procedurally defective because he failed to join all necessary parties who have an interest that would be affected by a declaratory judgment as required under RCW 7.24.110. Ames disagrees, arguing that future criminal defendants' rights are not implicated unless the declarations and the Coopersmith report are actually potential impeachment evidence. But since Ames and the County focus their arguments on whether this controversy is justiciable and the lack of justiciability defeats Ames's claims, we do not address the potential procedural defect.

[10] The dissent diverges from the majority opinion at this point in the analysis. The dissent agrees with Ames that this case presents an issue of major public importance and that the public interest would be enhanced by review of this case.

"'The presence of issues of broad overriding import may persuade a court to exercise its discretion in favor of reaching an issue which is otherwise not justiciable.'" *Kitsap County v. Smith*, 143 Wn. App. 893, 908, 180 P.3d 834 (2008) (internal quotation marks omitted) (quoting *Snohomish County v. Anderson*, 124 Wn.2d 834, 840-41, 881 P.2d 240 (1994)). In deciding whether an issue of major public importance exists, we must identify the public interest that the subject matter of the case presents and examine the "*extent to which* [that] *public interest would be enhanced by reviewing the case*." *Anderson*, 124 Wn.2d at 841. Courts should find that an issue of major public importance exists only rarely and where the public's interest is "overwhelming." *Lewis County*, 178 Wn. App. at 440 (citing *To-Ro Trade Shows*, 144 Wn.2d at 416). Washington courts have applied the major public importance exception in cases involving, for example, eligibility to stand for public office, freedom of choice in elections, the constitutionality of increasing excise taxes, and the statutory duty of the State to provide child welfare services. *Wash. State Coal. for the Homeless v. Dep't. of Soc. & Health Servs.*, 133 Wn.2d 894, 917-918, 949 P.2d 1291 (1997).

Ames asserts and the dissent agrees that the public interest implicated here is the integrity of the criminal justice system. We disagree and reject the notion that this case has the potential to impact the integrity of the criminal justice system such that the public's interest is overwhelming. This case does not reach the level of overwhelming public interest that is involved in elections, public office, the constitutionality of excise taxes, and maintaining statutorily mandated child welfare services as established in other cases that have granted review under this exception.

The public interest here will not be enhanced by review of this case for several reasons: (1) the PCPAO's actions here were within its jurisdiction,[11] (2) we cannot and should not anticipate future defendants' use of the potentially impeaching evidence, and (3) Ames seeks to repair only his own credibility. Thus, Ames's claim that his dispute raises issues of major public importance is unpersuasive.

First, although the integrity of the criminal justice system in the County would be impacted if the PCPAO acted outside its jurisdiction here, as discussed above, the PCPAO's decision to release potentially impeaching evidence was within its jurisdiction. It is well settled that where a prosecutor is unsure whether evidence amounts to potential impeachment evidence or is exculpatory, the prosecutor should err on the side of disclosure. *Kyles*, 514 U.S. at 439-40; *Agurs*, 427 U.S. at 108.

Second, neither we nor the trial court can adequately anticipate all possible uses that future defendants might make of the potential impeachment evidence at issue here. And we are concerned that future defendants, those arguably most affected by a declaratory judgment here that the evidence is not potentially impeaching, are not party to this lawsuit and therefore are prevented from challenging the declaratory judgment ruling that might prevent disclosure of this evidence under *Brady* to future defendants. In our view, a declaratory judgment today regarding whether certain evidence is potentially impeaching evidence in future cases would damage rather than enhance the criminal justice system.

[11] The dissent takes issue with only the majority's decision regarding the declaratory judgment claim and does not dispute that the PCPAO acted within its jurisdiction.

Third, Ames primarily seeks to repair his own credibility. His prayer for relief requested (1) a jury trial to determine whether his or the deputy prosecutor's declarations were truthful, (2) a writ of prohibition ordering the PCPAO to cease and desist with any further communications that the materials at issue are impeachment evidence or potential impeachment evidence, (3) an order saying the materials are, in fact, not potential impeachment evidence, (4) attorney fees, and (5) any other just and equitable relief as determined by the court. Thus, Ames primarily seeks to clear his own name and to establish his declarations as truthful.

The public's interest in his declarations' truthfulness is certainly not overwhelming and will have little positive impact on the integrity of the criminal justice system as a whole. Even if we assume as the dissent asserts that the PCPAO here misused his powers to create the potentially impeaching evidence, such misuse in this case does not reach the level of broad public import as described in *Coalition for the Homeless*, 133 Wn.2d at 917. The issues presented in this appeal, in our view, simply do not rise to the level of broad public and overwhelming importance that would trigger the application of the exception to the general rule that courts do not review issues that are not justiciable.

Accordingly, because the integrity of the criminal justice system will not be enhanced by a review of the issues presented in this case, we hold that there is no issue of major public concern and the trial court properly dismissed Ames's declaratory judgment claim.[12] The integrity of the

[12] Ames also argues several other claims that he did not raise in his initial petition: that (1) he, as a public sector employee, is entitled to a "name-clearing" hearing as due process because he has a "constitutionally-based liberty interest" in his reputation, and (2) his free speech rights are implicated by the disclosure of his declarations and the Coopersmith report as potential impeachment evidence. Br. of Appellant at 34-35. However, because he did not raise these arguments as separate claims in his petition for review and does not argue them sufficiently here, we do not address them. RAP 10.3(a)(6).

criminal justice system is best served when the prosecutor fulfills its duties and obligations under *Brady* to disclose potentially impeaching evidence to defendants and their counsel. This tried and true approach allows the prosecution and the defense, on a case-by-case basis, to advocate to the trial court whether to admit the evidence as impeachment evidence.

II. THE COUNTY'S CROSS APPEAL: CR 11 SANCTION

In its cross appeal, the County argues that the trial court abused its discretion when it granted Ames's motion for reconsideration of its CR 11 award of sanctions to the County because Ames's claims are frivolous.[13] We disagree.

A. STANDARD OF REVIEW AND RULES OF LAW

We review a trial court's decision to award or deny sanctions under CR 11 for an abuse of discretion. *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 135, 252 P.3d 406 (2011); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *West*, 162 Wn. App. at 135.

CR 11 requires attorneys to make certain guarantees when they sign pleadings, motions, briefs, and legal memoranda. *Biggs v. Vail*, 124 Wn.2d 193, 196, 876 P.2d 448 (1994). Specifically, an attorney's signature is his or her certification that the pleading, brief, or motion is "(1) . . . well grounded in fact; [and] (2) . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR

[13] The County also argues that (1) the trial court erred when it denied the County's special motion to strike under the anti-SLAPP statute, RCW 4.24.525(4), and (2) Ames failed to preserve his claim for fees and penalties under the anti-SLAPP statute. Both the County's and Ames's claims under the anti-SLAPP statute fail because our Supreme Court recently held that the anti-SLAPP statute is unconstitutional. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015).

11(a). The rule is not meant to be a "fee shifting mechanism" or to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," but to curb abuses of the judicial system and to deter baseless filings. *Biggs*, 124 Wn.2d at 197; *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

A filing is "'baseless'" when it is "'(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.'" *West*, 162 Wn. App. at 135 (internal quotation marks omitted) (quoting *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996)). A trial court may not impose CR 11 sanctions for a baseless filing unless it determines both that (1) the claim was without a factual or legal basis and (2) the attorney who signed the filing failed to perform a reasonable investigation into the claim's factual and legal basis. *West*, 162 Wn. App. at 135.

B. AMES'S FILINGS NOT BASELESS

Ames's response to the County's CR 12(b)(6) motion demonstrates that his claims for a writ of prohibition and for a declaratory judgment were both made in good faith and after a consideration of and inquiry into relevant precedent. First, Ames began his response to the County's CR 12(b)(6) motion with citations to case law, arguing that a judgment on the pleadings is not appropriate because the decision to grant a writ of prohibition is a fact-specific inquiry. He continued with a lengthy explanation of the PCPAO's common law *Brady* obligation to disclose exculpatory evidence, including potential impeachment evidence. He argued that although the PCPAO may determine what constitutes potential impeachment evidence and whether the evidence should be disclosed under *Brady*, the PCPAO's "discretionary authority . . . does not equate to a jurisdictional power to create [potential impeachment evidence]." CP at 685. Ames

distinguished the cases the County cited, arguing instead that there is something fundamentally different about this case because the PCPAO created the potential impeachment evidence declarations to discredit Ames in *Dalsing* where the PCPAO's own misconduct was at issue.

The argument in Ames's CR 12(b)(6) response demonstrates that he considered case law relevant to writs of prohibition and the PCPAO's duty to make *Brady* disclosures specifically and made a good faith argument that his situation differed. Therefore, the trial court did not abuse its discretion when it concluded that Ames's legal research demonstrates that he performed a reasonable investigation into his claim for a writ of prohibition and that his claim was made in good faith.

Second, regarding Ames's claim for a name clearing by declaratory judgment, Ames argued in his response to the County's CR 12(b)(6) motion that "Washington does not have any specific case law on the use of a declaratory judgment action for purposes of name clearing; however, the theory is not novel." CP at 692. He then cited to the *Restatement (Second) of Torts Five* 27 Spec. Note (1977), one law review article, and two out-of-state cases that discuss "the propriety of a declaratory action for purposes of name clearing." CP at 693. The trial court found that "[t]he[se] articles and cases do not necessarily place the potential remedy into the context of Ames' [sic] case, but the fact that there are discussions in law review articles and case law makes the argument for the extension of such a remedy to this situation plausible." CP at 2069. The trial court also found that Ames's legal research suggests that his attorney made a reasonable investigation. This demonstrates that the trial court applied proper reasoning to the CR 11 sanctions question and that Ames's claim for a name clearing by declaratory judgment was not

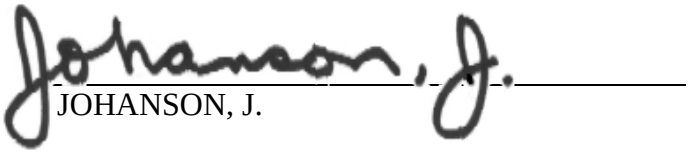
baseless because he supported his good faith argument for an extension of existing law with a reasonable investigation into that argument's legal basis by providing legal research and analysis.

We hold that the trial court did not abuse its discretion when it granted Ames's motion for reconsideration and decided not to impose CR 11 sanctions because Ames's claims were made in good faith and after a reasonable inquiry into relevant case law.

III. ATTORNEY FEES

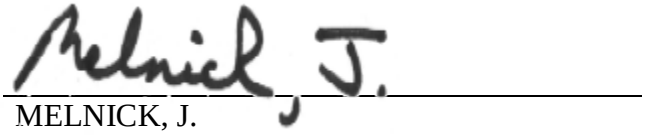
The County requests attorney fees on appeal under RCW 4.24.525(6)(a) if it prevails on its anti-SLAPP issue and under RAP 18.9 because Ames's appeal is frivolous. We hold that the County is not entitled to attorney fees because the anti-SLAPP statute is unconstitutional and Ames's claims are not frivolous.

Affirmed.



JOHANSON, J.

I concur:



MELNICK, J.

BJORGEN, C.J. (dissenting) — Assuming that Michael Ames's declaratory judgment claims are not justiciable, those claims still raise issues of major public importance which demand resolution. Therefore, I would reverse the trial court's dismissal of Ames's petition for a declaratory judgment and remand for trial of that petition.

The majority opinion ably sets out the factual background of this appeal and the legal standards governing its resolution. Among those standards, threaded throughout the analysis are the rules governing dismissal under CR 12(b)(6). Dismissal under that rule should be granted only "'sparingly and with care'" and only when it is "beyond doubt" that the plaintiff can prove "no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (quoting *Tenore v. A T & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). To this end, we review dismissals under CR 12(b)(6) by asking whether there is any "hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Worthington v. Westnet*, 182 Wn.2d 500, 505, 341 P.3d 995 (2015).

Even without reaching into the hypothetical, the record before us is unmistakably an overture of interests more profound than those of the individual players. After Ames e-mailed the lead detective on the Lynn Dalsing case that there was no evidence on any of the computers linking Dalsing to the crimes the prosecutor had charged, the detective forwarded Ames's opinion to a deputy prosecuting attorney the same day. The prosecutor, however, did not disclose this exculpatory information until over a month later when the charges were dropped. The following year, Ames filed a number of declarations in Dalsing's subsequent suit against Pierce County. In those declarations, Ames stated, among other matters, that the prosecutor told

him not to answer Dalsing's deposition questions about the e-mails he had sent to the detective and that only at that time did Ames know those e-mails had not been disclosed. In response, the County filed a declaration by Pierce County Deputy Prosecutor James Richmond, declaring that Ames's declarations contained "false assertions made under oath" and setting out supporting details. Clerk's Papers (CP) at 576-82. Also, in a separate matter Ames filed a complaint with the County dated December 20, 2012, alleging retaliation and misconduct for its actions relating to the Coopersmith Report.

Then, in September 2013, the prosecutor notified Ames by letter that he planned to disclose four declarations by Ames in the Dalsing case, the Richmond declaration accusing Ames of making false accusations under oath, and the Coopersmith Report to defense counsel as evidence potentially impeaching Ames's credibility as a witness called by the State. The prosecutor's letter stated that he would make this disclosure in cases where Ames is expected to be called as a witness by the State. The next such case, the prosecutor stated, is its prosecution in *State v. George*.

Ames's petition for writ of prohibition and declaratory relief claims that these materials are not potential impeachment evidence that must be disclosed. Because the declaratory judgment action was dismissed under CR 12(b)(6), no judicial determination of the facts necessary to resolve this claim has occurred. The evidence we have before us, summarized here and in the majority opinion, would be consistent with a determination that the prosecutor acted entirely in good faith in keeping with his duty under *Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), to disclose potential impeachment evidence. The evidence

could also be consistent with the view that the disclosures were a misuse of the prosecutor's duties and authority in an attempt to retaliate against Ames for his actions in the Dalsing case.

Proof, though, is not the question before us. Instead, as shown, we must ask whether it is beyond doubt that Ames can prove no set of facts, consistent with the complaint, which would justify recovery. *San Juan County*, 160 Wn.2d at 164. We must ask whether there is any hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim. *Worthington*, 182 Wn.2d at 505.

Given the context and timing of Ames's e-mails about the absence of evidence against Dalsing, his declarations in Dalsing's civil suit, Richmond's declaration accusing him of making false accusations under oath, and Ames's complaint for retaliation against the County, one cannot reasonably conclude that Ames can prove no set of facts, consistent with his petition, which would justify a conclusion that these disclosures did not include legitimate potential impeachment evidence. Especially where, as here, the documents that would be truly impeaching were prepared by the prosecutor's office, one may reasonably conceive of hypothetical circumstances under which these disclosures might not be compelled by the case law.

It must be stressed, and stressed again, that hypothesizing is a far distant exercise from determining the truth. In law, as in science, many hypotheses poorly correlate to the actual facts. A dismissal under CR 12(b)(6), though, prevents a party from developing the facts that may prove its case. A dismissal with that severe a consequence is allowed only when we can say, consistently with *San Juan County* and *Worthington*, that there is no reasonably conceivable set

of facts Ames could have proved that would entitle him to relief. Under the circumstances of this case, one may hypothesize such an array of facts.

That, though, does not end the inquiry. To conclude that dismissal of the claim for declaratory relief was improper under CR 12(b)(6), the hypothetical facts must either show that the claim was justiciable or that it falls within the exception for issues of major public importance. Assuming the majority is correct that the claim is not justiciable, one must ask whether a hypothetical set of facts, consistent with the petition, would show this to be an issue of major public importance.

As the majority points out, in deciding whether an issue is of major public importance, "courts examine not only the public interest which is represented by the subject matter of the challenged statute, but the *extent to which public interest would be enhanced by reviewing the case*." *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (emphasis in original). The Uniform Declaratory Judgments Act, chapter 7.24 RCW, is designed "'to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'" *Osborn v. Grant County By & Through Grant County Comm'rs*, 130 Wn.2d 615, 631, 926 P.2d 911 (1996) (quoting RCW 7.24.120; *Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Comm'rs*, 92 Wn.2d 844, 848, 601 P.2d 943 (1979)). This rule of liberal construction will apply to determinations of major public importance.

The majority contends that the issues raised in this appeal are not of major public importance because, among other reasons, they only touch on Ames's attempt to clear his own name and to establish his credibility. Ames, without doubt, is attempting to clear his name and

repair his credibility. His petition for declaratory judgment, though, also raises claims that reach far beyond any narrow, individual interest. For example, the petition claims that

> Defendant is motivated to wrongfully discredit Det. Ames because he has spoken out truthfully on matters that discredit Mark Lindquist and expose his office to liability.

CP at 7.

> Defendant is abusing its power and the judicial process to benefit itself and its officials and to mitigate against liability against the Prosecuting Attorney's Office.

CP at 7.

> Mark Lindquist has an apparent bias and prejudice against Det. Ames because he has spoken out against Mark Lindquist and his office and because he refuses to remain silent on matters of public concern that negatively impact the prosecutor's office even though he has been directed to do so by Mark Lindquist and his deputies.

CP at 7-8.

> Mark Lindquist is abusing the power of his office to retaliate against Detective Ames.

The Petition also characterizes the issue on declaratory judgment as

> whether Det. Ames has been truthful or whether the prosecuting attorney's office has been dishonest in characterizing the evidence and in its declarations and representations to the court.

CP at 9.

None of these claims have been proven. As shown above, however, that is not the standard before us when reviewing dismissal under CR 12(b)(6). Instead, we ask whether it is "beyond doubt" that the plaintiff can prove "no set of facts, consistent with the complaint, which would justify recovery." *San Juan County*, 160 Wn.2d at 164. With the evidence before us, it is certainly conceivable that Ames could prove additional facts consistent with his allegations of

governmental abuse. Those allegations, if true, would directly contest the integrity of the criminal justice system and of an agency that administers it. Such issues rank high in any measure of public importance. More to the point, the relief Ames requests is a declaration that the materials at issue are not potential impeachment evidence. If he is able to prove his allegations, this relief would remove any misuse of the duty to disclose in this case and would discourage similar tactics in the future. As such, the "*public interest would be enhanced by reviewing the case*," which is the heart of the standard set by *Snohomish County*, 124 Wn.2d at 841, for determining whether an issue is of major public importance. (Emphasis in original.)

The majority also makes the critical points that the prosecutor is under a duty to disclose potential impeachment evidence, that the prosecutor should err on the side of disclosure if in doubt, and that no one can adequately anticipate all possible uses that future defendants might make of the potential impeachment evidence at issue here. Before us, though, is a case where the principal evidence impeaching Ames was created by the prosecutor's office, where the sequence of events could suggest some adversity between Ames and the prosecutor's office, and where Ames's petition alleges various flaws in the prosecutor's development of the potential impeachment evidence. These allegations call into question whether the information created and released by the prosecutor in fact is legitimate potential impeachment evidence. If it is not, then the duty to disclose would likely not apply and future prosecutions would not be affected.

Against the backdrop of the evidence presented and the petition's allegations, there are reasonably conceivable sets of facts Ames could have proved that would have raised issues of

major public importance. With that, the petition for declaratory judgment should not have been dismissed under CR 12(b)(6). For that reason, I dissent.

BJORGEN, C.J.

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

MICHAEL AMES,

Plaintiff,

v.

PIERCE COUNTY

Defendant.

No. 13-2-13551-1

OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant Pierce County's Motion to Dismiss pursuant to CR 12(b)(1) and CR 12(b)(6). Plaintiff Michael Ames responded in opposition to Pierce County's motion. On January 17, 2014, Ames and Pierce County both appeared through counsel for oral argument.

FACTUAL HISTORY

Plaintiff Michael Ames is a detective with the Pierce County Sheriff's Office. He is often called as a witness for the prosecution in criminal matters. The Pierce County Prosecutor's Office has a written procedure for providing potential impeachment evidence ("PIE") to defense counsel in criminal cases. The prosecutor's office provided notice to Ames that it was going to provide defense attorneys PIE regarding Ames in cases in which Ames was scheduled to testify. Ames objects to this evidence being disclosed as PIE. He

Pierce County Superior Court
930 Tacoma Avenue South, Room 334
Tacoma, Washington 98402

has filed a petition for a writ of prohibition and declaratory relief. Specifically, Ames' primary objections are to evidence stemming from the following:

Dalsing declarations

Ames was an investigator in a criminal matter against Lynn Dalsing. Dalsing was arrested and charged with child molestation in the first degree and sexual exploitation of a minor. After the criminal charges were dismissed on the eve of trial, Dalsing sued Pierce County alleging the Prosecutor's Office delayed disclosing an exculpatory photograph to defense counsel and continued the prosecution despite knowledge of this exculpatory evidence. Ames states he had in his possession emails exculpating Dalsing, indicating there was no probable cause that she was involved or had possessed any child pornography. Civil deputy prosecuting attorney Jim Richmond, Ames' counsel at the time, instructed Ames to not answer certain questions at a deposition and claimed the emails were attorney work product. Ames later asserted there was a conflict of interest and retained independent counsel in the matter.

Ames alleges he provided the emails to the prosecutor in the criminal matter prior to the trial. Ames alleges he was told in an email from the criminal prosecutor on June 9, 2011 that she would disclose the emails to defense counsel.

Likewise, Ames states he provided the emails to civil deputy prosecutor Richmond on October 18, 2012 during the discovery process for the civil matter. Ames alleges Richmond told him that the emails would be disclosed. When the emails were not disclosed, Ames provided copies to the judge. Ames made a motion for attorney's fees and in his supporting declaration alleged that he provided the emails to Richmond and was told the emails would be disclosed. Richmond disputes this in his own declaration, claiming he never received the emails and never told Ames the emails would be disclosed. Attorney's fees were awarded to Ames. The Prosecutor's Office was found to be "not justified" in its instructions to Ames. Pierce County has appealed the award of attorney's fees.

Ames alleges the declarations countering his statements were made in retaliation for bringing forward the exculpatory emails. He claims these were created intentionally so that

there would be PIE to discredit him as a State witness and undermine his employment and ability to do his job.

Coopersmith report

The other piece of evidence Ames takes exception to being labeled PIE is known as "The Coopersmith Report." According to Ames, in July 2012 he took a mandatory child abuse report regarding a bullying and child neglect case in Gig Harbor. In October 2012, Ames was told there was a potential misconduct investigation against him regarding his conduct in that case. A lieutenant advised him there would be no investigation because the lieutenant found no problem with Ames' actions in that case, which according to Ames, were limited to creating the report.

In November 2012, Pierce County Prosecutor Mark Lindquist issued a press release indicating that the case would not be prosecuted because of a detective's improper relationship with the attorney representing the victim's family. Ames took this as an implication that the detective was in an attorney-client relationship in another civil case and that somehow it was improper for him to take the report. Ames believes the press release was referring to him and denies being in an attorney-client relationship with any attorney at the time he took the report.

In December 2012, Ames says he discovered a misconduct investigation did take place against him, despite the assurances by the lieutenant. Ames believes he should have been afforded due process and made aware of the investigation. Ames then requested an outside investigation be conducted into the handling of that case.

On March 27, 2013, Ames was informed that Jeff Coopersmith, an outside investigator, would be conducting the investigation of Ames' complaints. On May 24, 2013, Ames was informed that the investigation into his complaint had been completed and it had been determined that there was no merit to his allegations that he had been a victim of retaliation. Coopersmith's investigation also concluded that the misconduct investigation against Ames concerning the bullying and child neglect incident had been conducted properly.

Ames seeks a writ of prohibition to prevent the Prosecutor's Office's dissemination

of the above-referenced material as PIE to criminal defense counsel. He claims the Prosecutor's Office overstepped its jurisdiction by creating PIE and invaded the domain of the sheriff's office to conduct investigations when an officer's integrity was questioned. He is also seeking declaratory relief and a fact-finding hearing so he can cross-examine Richmond and obtain relief declaring Ames as truthful and that the information is not PIE.

STANDARD

Dismissal under CR 12(b)(6) is only appropriate when accepting plaintiff's factual allegations in the complaint as true, it appears that beyond doubt there is no set of facts or hypothetical facts which justify plaintiff's recovery.[1] This should be granted sparingly and only when on the face of the complaint, plaintiff's allegations show an insuperable bar to relief.[2]

ANALYSIS

I. Writ of Prohibition

According to the complaint, Ames seeks a writ of prohibition ordering the Pierce County Prosecutor's Office cease and desist with any further communications that the evidence is impeachment evidence or potential impeachment evidence and with any communications that label him as untruthful. He alleges the prosecutor's office has acted in excess of its jurisdiction by creating and fabricating its own impeachment evidence to discredit Ames.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."[3] "Prohibition is a drastic remedy and may only be issued where (1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does

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[1] *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn.App. 630, 635, 128 P.3d 627 (2006), *rev. denied,* 158 Wn.2d 1029 (2007).
[2] *Id.*
[3] RCW 7.16.290

not have a plain, speedy, and adequate legal remedy."[4] "If either of these factors is absent, the court cannot issue a writ of prohibition."[5] It is not a proper remedy where the only allegation is that the actor is exercising jurisdiction in an erroneous manner.[6]

Ames believes that the lack of statutory authority to disclose PIE means the prosecutor has acted without jurisdiction. He does concede that the prosecutor has a mandatory duty to disclose impeachment evidence under *Brady v. Maryland.*[7] He believes that defendant has stepped beyond this duty by creating and then deciding which evidence to disclose.

Kyles v. Whitley provides that the prosecutor is the only person who knows of undisclosed evidence and therefore is charged with the responsibility to gauge which evidence should be disclosed.[8] The prosecutor is to decide this in favor of disclosure when he is unsure.[9] This means that it is in a prosecutor's sole discretion as to which evidence he discloses as potential impeachment evidence under his mandatory duty. Ames is alleging that by including the "Dalsing Declarations" and the "Coopersmith Report" as PIE, defendant is acting in excess of jurisdiction. This is not correct. At best, plaintiff's contention is that defendant has erroneously exercised jurisdiction by disclosing this evidence as PIE.

Even accepting Ames' idea that a prosecutor would jeopardize his own career and future criminal cases by creating false declarations undermining his own witness, a prosecutor still has jurisdiction to create declarations in civil matters to defend against the allegations made by Ames in his motion for attorney's fees. The hearing was an adversarial proceeding and at that moment, the prosecutor's office was an adversary of Ames. Therefore the prosecuting attorney could act within its duties as an advocate for the State by creating an opposing declaration. Whether the statements in those declarations are true

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[4] *Brower v. Charles*, 82 Wn.App. 53, 57, 914 P.2d 1202 (1996), *rev. denied,* 130 Wn.2d 1028 (1997).
[5] *Id* at 57-58.
[6] *Id* at 59.
[7] 373 U.S. 83 (1983).
[8] 514 U.S. 419, 437 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.")
[9] *Id* at 439 *quoting* U.S. v. Agurs, 427 U.S. 97, 108 (1976).

or not is not within this court's jurisdiction, but rather the court which heard the motion for attorney's fees.

Ames' other contention is that defendant has invaded the jurisdiction of the Sheriff's office by making a ruling on the credibility of Detective Ames without an internal investigation. As noted above, the prosecutor has the discretion to decide what he should disclose to the defense as potential impeachment evidence. This evidence does not determine the credibility of the witness and makes no assertion as to truthfulness of the witness. The disclosure is precautionary as evidence which possibly could impact the credibility of the witness. The ultimate determination on credibility is properly made by the fact-finder at trial.

Ames has requested relief that defendant cease and desist from characterizing and suggesting that Ames is untruthful. Even when accepting plaintiff's facts as true, defendant does not make any assertions that Ames is untruthful when disclosing PIE, only that a defense attorney may consider the "Dalsing Declarations" and "Coopersmith Report" as potential impeachment evidence. Defendant acted within its jurisdiction, both when creating the "Dalsing Declarations" and providing the declarations and "Coopersmith Report" to defense counsel as potential impeachment evidence. Since defendant is acting within its jurisdiction, plaintiff is not entitled to a writ of prohibition and thus this cause of action must be dismissed.

II. Declaratory Relief

Ames seeks declaratory relief in the form of an order stating that he was truthful in his declarations, that the evidence disclosed by the prosecutor is not PIE, and a determination of his rights under the Pierce County Policy on PIE.

Ames argues that he should be afforded a name-clearing hearing as due process. Ames does not provide case law, legal authority or method for how to determine whether he is being truthful in his declarations. He has provided a number of cases from other jurisdictions which recognize the potential use of a declaratory action for the purpose of name clearing, but offer little guidance on how to implement such a procedure. He also

provides commentary from the Restatement of Torts and a law review article discussing the theory.

A declaratory judgment is only available when there is a justiciable controversy or an issue of major public importance.[10] A justiciable controversy is "(1) an actual, present, and existing dispute; (2) between parties having genuine and opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive."[11]

While there is a dispute regarding the disclosure of the evidence, it is questionable as to whether the parties have genuine opposing interests. This is potential impeachment evidence of a prosecution witness. It is in the State's interest that the witness be credible. The prosecutor's office is disclosing the evidence because of its duty under *Brady*.

As to the third element, the interests here are theoretical. Ames does not provide case law or legal authority in which someone has been definitively determined to be truthful in a declaration. The only assertion made when disclosing potential impeachment evidence is that a criminal defendant could view it as something which questions the credibility of Ames. It is therefore difficult to clarify Ames's rights because even if he is declared truthful, the evidence would still need to be turned over if the prosecutor believes it should be disclosed.

Finally, any judicial determination would not be conclusive. The rights of criminal defendants are central to the matter. The admissibility of such evidence is decided by the trial judge and it is up to the defense on whether to use or seek admission of the PIE in each case. The prosecutor has a duty to turn over evidence that in his discretion could be considered PIE. Making a judgment here would invade the rights of other judges, the prosecutor, and criminal defendants to use their own judgment in determining the admissibility and credibility of Ames in each case.

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[10] *Bercier v. Kiga*, 127 Wn.App. 809, 822, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005).
[11] *Id.*

Ames alleges that the conduct of the prosecutor is of major public concern. The major concern does not have to do with Ames however. The public concern regarding PIE is a fair trial for criminal defendants, not the person whose credibility is being questioned.

Even when accepting Ames' facts as true, there is no justiciable controversy and no major public concern with regard to the disclosure of potential impeachment evidence and creation of declarations in a civil matter. Additionally, declaratory relief here would do nothing to help Ames as the evidence would still need to be disclosed to defense counsel and a determination made on its admissibility by the individual trial court. This cause of action should be dismissed as well.[12]

CONCLUSION AND ORDERS

Even when accepting the facts in Ames's complaint as true, he has not proven any that justify the relief requested. As such, the complaint should be dismissed.

Based on the foregoing, it is hereby,

ORDERED that defendant's motion to dismiss pursuant to CR 12(b)(6) is **GRANTED** and the case is dismissed with prejudice.

Dated this 3rd day of February 2014.

Visiting Judge Kevin D. Hull
Pierce County Superior Court

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A.M. FEB 06 2014 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY_____DEPUTY

[12] Because both causes of action can be dismissed under 12(b)(6), there is no need to consider defendant's motion pursuant to 12(b)(1).

2/7/2014 161031Z

CERTIFICATE OF SERVICE

I, Chris Jeter, certify 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.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Joan Mell III Branches Law PLLC 1033 Regents Blvd Ste 101 Fircrest, WA 98466-6089	☒ Via U.S. Mail
Michael Patterson Patterson Buchanan Fobes Leitch PS 2112 3rd Ave Ste 500 Seattle, WA 98121-2391	☒ Via U.S. Mail

In addition, I caused the original of the foregoing document to be sent for filing in the manner noted on the following:

Cristina Platt, Judicial Calendar Coordinator Pierce County Superior Court 930 Tacoma Avenue South, Room 334 Tacoma, Washington 98402	☒ Via U.S. Mail

DATED this 5th day of February 2014, at Port Orchard, Washington.

Chris Jeter
Judicial Law Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL AMES,

Plaintiff,

v.

MARK LINDQUIST, et al.,

Defendants.

CASE NO. C16-5090 BHS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFF LEAVE TO AMEND

This matter comes before the Court on Defendants Mark Lindquist, Mark and Chelsea Lindquist, and Pierce County's ("Defendants") motion to dismiss (Dkt. 13). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On February 2, 2016, Plaintiff Michael Ames filed a complaint against Defendants in Pierce County Superior Court for the State of Washington. Dkt. 1, Exh. 1 ("Comp."). Ames asserts causes of action for violations of his constitutional rights, conspiracy to violate his civil rights, abuse of process, invasion of privacy, constructive discharge, outrage, and indemnification. *Id.*

On February 22, 2016, Defendants filed a motion to dismiss. Dkt. 13. On March 14, 2016, Ames responded. Dkt. 15. On March 18, 2016, Defendants replied. Dkt. 16.

II. DISCUSSION

Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed factual allegations but must provide the grounds for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

In this case, Defendants argue that Ames has failed to state valid claims for relief. The Court agrees. For example, Ames claims violations of his civil rights by providing labels of constitutional rights (Free Speech, Due Process, Equal Protection, etc.) and then sets forth conclusory allegations that fail in a coherent manner to correlate specific factual allegations with the elements of each cause of action. *See* Comp. ¶¶ 6.1–6.22. In addition, Ames asserts a breach of contract claim against Defendants, but fails to allege any contract existed between him and Defendant Lindquist in either his official or individual capacity. Therefore, the Court grants Defendants' motion to dismiss.

In the event the court finds that dismissal is warranted, the court should grant the plaintiff leave to amend unless amendment would be futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Ames requests leave to amend (Dkt. 15 at 24) while Defendants oppose the request (Dkt. 16 at 11). Defendants, however, fail to show that they are able to comprehend Ames's claims to the extent that any amendment would be futile. Because the Court is unable to determine what factual allegations form the basis of each claim, the Court is unable to determine that any amendment would be futile. Therefore, the Court grants Ames leave to amend.

III. ORDER

Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 13) is **GRANTED** and Ames is **GRANTED** leave to amend. Ames shall file an amended complaint no later than May 6, 2016.

Dated this 21st day of April, 2016.

BENJAMIN H. SETTLE
United States District Judge

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of Pierce County's Answer to Petition for Review in Supreme Court Cause No. 93428-2 to the following parties:

Joan K. Mell
III Branches Law, PLLC
1033 Regents Blvd., Suite 101
Fircrest, WA 98466

Michael Patterson
Patterson Buchanan Fobes & Leitch PS
2112 3rd Avenue, Suite 500
Seattle, WA 98121

Original E-filed with:
Washington Supreme Court
Clerk's Office

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

DATED: August 24, 2016, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

August 24, 2016 - 12:15 PM

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Pierce County's Answer to Petition for Review

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
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