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FEBRUARY 18, 2015

Court of Appeals  
Division III  
State of Washington

No. 32769-8

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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WASHINGTON COUNTIES RISK POOL, a public entity,

Respondent,

v.

TAMARA MARIE CORTER, a married individual, STEVE  
GROSECLOSE, an individual,

Appellants,

and

DOUGLAS COUNTY, a municipal corporation,

Respondent.

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**RESPONDENT'S BRIEF BY DOUGLAS COUNTY**

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I. COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Steve Groseclose performing or in good faith purporting to perform his official duties as a detective in the Douglas County Sheriff's Office at the time he accessed the Spillman system, a regional records management system used by the Douglas County Sheriff's Office, to obtain constitutionally protected confidential information regarding his ex-wife, Tamara Marie Corter, contained in the record of a Chelan County Sheriff's Office incident , for his personal use in proceedings relating to the guardianship of their adult son?

II. COUNTER-STATEMENT OF THE CASE

Statement of Procedure

On July 17, 2014, the Washington Counties Risk Pool (the Risk Pool) filed suit against Tamara Marie Corter, Steve Groseclose and Douglas County seeking declaratory relief that 1) the Risk Pool has no duty to indemnify Groseclose for the Judgment entered against him in *Corter v. Douglas County, et al.*, USDC EDW, No. CV-12-0173-EFS; and 2) the Risk Pool had not breached any duty owed to Corter and/or Groseclose. CP 93.

The County filed a Cross Claim against Corter and Groseclose requesting declaratory relief that Douglas County does not owe a duty to indemnify Groseclose for any Judgment entered against him in *Corter v. Douglas County, et al.*, USDC EDW, No. CV-12-0173-EFS. CP 53.

Corter and Groseclose filed a Cross Claim against the County seeking declaratory relief requiring the County to indemnify Groseclose from the Judgment entered against him. CP 58.

The Superior Court heard the County's Motions for Summary Judgment and entered an Order on August 22, 2014, granting Summary Judgment to the County declaring the County had no duty to indemnify Groseclose for the Judgment entered against him in *Corter v. Douglas County, et al.*, USDC EDW, No. CV-12-0173-EFS, and had no duty to pay Corter in connection with the Assignment of Claims by Groseclose. CP 380.

Corter and Groseclose filed a timely Notice of Appeal to the Court of Appeals, Division III. CP 386.

#### Statement of Facts

Steve Groseclose is employed by the Douglas County Sheriff's Office as a commissioned law enforcement officer,



previously assigned as a detective. Tamara Marie Corter is the ex-wife of Groseclose. CP 94-95, CP 101-102.

In April 2009, Groseclose accessed the Spillman system, a regional records management system used by the Douglas County Sheriff's Office to obtain constitutionally protected confidential information regarding Corter. The information was contained in the record of a Chelan County Sheriff's Office incident. Groseclose used Corter's confidential information against her in court proceedings relating to guardianship of their adult son. CP 95, 102

On March 23, 2012, Corter filed suit against Douglas County and Steve Groseclose in the United States District Court for the Eastern District of Washington, Civil Action No. CV-12-173-EFS. CP 93. Corter's Complaint for Damages alleged that Groseclose was an agent of Douglas County and acted or purported to act in the performance of his duties as a law enforcement officer when he accessed Corter's information. CP 94, 96. Corter further alleged that 1) Douglas County and Groseclose deprived her of her constitutional rights under color of state law under 42 USC. §1983; 2) Douglas County and Groseclose violated Corter's rights under the First, Fourth and Fourteenth Amendments to the United States Constitution; and 3) Douglas County was liable for the actions of Groseclose based

upon Douglas County's official policy, longstanding practice or custom, ratification and policy of inaction. CP 97.

Douglas County is a member of the Washington Counties Risk Pool (the Risk Pool) and has obtained liability coverage through the Joint Self-Insured Liability Policy issued by the Risk Pool. CP 162. Douglas County's membership was subject to a \$25,000 deductible under the Joint Self-Insurance Liability Policy. CP 162.

The Risk Pool's Claims Manager, Susan Looker, issued a letter to Groseclose on April 18, 2012. CP 174. The letter explained the coverage and exclusions under the Risk Pool's Joint Self-Insurance Liability Policy issued to Douglas County. CP 175-177. The letter informed Groseclose the Risk Pool would, based upon the allegations in the Complaint, provide a defense to the lawsuit under a reservation of rights. CP 177. The letter advised Groseclose the Risk Pool reserved the right to decline to pay any judgment or settlement if, at the time of the alleged acts, Groseclose was not acting in good faith on behalf of Douglas County or if Corter's alleged damages were intentionally caused by Groseclose. CP 177. The Risk Pool also reserved the right to refuse to pay any punitive damage awarded against Groseclose. CP 177.

The Risk Pool retained separate attorneys for Douglas County and Groseclose. Douglas County was represented by attorney Stanley Bastian. Groseclose was represented by attorney Heather Yakely, at the expense of the Risk Pool. CP 200.

On September 20, 2013, The Honorable Edward F. Shea, Senior Judge of the United States District Court, entered an Order Granting Douglas County's Motion for Summary Judgment. CP 100. Judge Shea dismissed Douglas County as a party defendant, finding Groseclose accessed the Spillman system in contravention of Douglas County policy,<sup>1</sup> that Groseclose had no legitimate law enforcement purpose to access the Spillman system and obtain information regarding Corter,<sup>2</sup> that there was no evidence of an affirmative, conscious or deliberate choice by Douglas County to ratify Groseclose's improper access of Spillman for personal gain,<sup>3</sup> and that Groseclose's conduct "was not indicative of a deliberately-indifferent training/supervision program by the County, but rather

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<sup>1</sup> CP 102; Order Granting Douglas County's Motion for Summary Judgment, II. 11-13

<sup>2</sup> CP 106; Order Granting Douglas County's Motion for Summary Judgment, II. 15-17

<sup>3</sup> CP 108, Order Granting Douglas County's Motion for Summary Judgment, II. 19-22

'rogue conduct' by a County detective."<sup>4</sup> Judgment was entered that same day and Douglas County was dismissed as a party. CP 112.

Corter did not appeal the Order Granting Douglas County's Motion for Summary Judgment.

The case remaining between Corter and Groseclose proceeded. A jury trial was commenced on October 28, 2013, approximately five weeks after the dismissal of Douglas County. The jury was instructed:

Plaintiff claims . . . Defendant deprived her of her constitutional rights . . . by using his law enforcement status and credentials to access her private, personal medical information **for his own personal, and non-law enforcement related purposes**. CP 115<sup>5</sup>.

A person acts "under color of law" when the person acts **or purports to act** 1) in the performance of official duties under any state, county, or municipal law, ordinance, or regulation; 2) in some meaningful way either to his governmental status or to the performance of his duties; or 3) **under pretense of his governmental status**. CP 137.<sup>6</sup>

[T]he Plaintiff must establish by the preponderance of the evidence that: 1) the Defendant, **while acting under color of law**, accessed the March 30, 2009 law enforcement incident report pertaining to Plaintiff via Spillman; 2) the Defendant **had no legitimate law**

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<sup>4</sup> CP 110-111, Order Granting Douglas County's Motion for Summary Judgment, l. 25 – l. 2

<sup>5</sup> Preliminary Instruction No. 2.

<sup>6</sup> Final Jury Instruction No. 8.

**enforcement purpose to access this incident report**  
pertaining to the Plaintiff . . . . CP 138.<sup>7</sup>

(Emphasis added)

A jury verdict was entered on October 30, 2013, in favor of Corter. The jury found Groseclose acted “under color of law” and awarded Corter damages in the amount of \$60,000. CP 149-150. On February 18, 2014, Corter’s attorney was awarded \$61,025.50 in attorney’s fees and \$1,568.43 in taxable costs. CP 152-161.

On November 6, 2013, one week after the jury’s verdict, Ms. Looker issued a letter to Groseclose informing him the Risk Pool was enforcing its reservation of rights and declined to pay the Judgment entered against Groseclose because Groseclose was not acting in good faith on behalf of Douglas County when he accessed the Spillman system to obtain Corter’s constitutionally protected confidential information. CP 178. The letter also advised Groseclose of his right and the process to appeal the Risk Pool’s determination. Groseclose did not appeal the Risk Pool’s determination. CP 178.

On December 4, 2013, Corter and Groseclose entered into a written Assignment of Claims. CP 180. Corter agreed not to execute her Judgment against Groseclose in consideration of

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<sup>7</sup> Final Jury Instruction No. 9A.

Groseclose assigning to Corter all his "rights, privileges, claims and causes of action that he may have against Douglas County and/or the Risk Pool/Insurers affiliated with Douglas County and its agents." The assignment included "claims or actions for insurance protection, indemnification, breach of contract, negligence, fiduciary breach, Consumer Protection Act, bad faith, punitive damages and/or the insurer's acting as a lawyer."

On February 24, 2014, the Corter's attorney wrote to the Douglas County Prosecuting Attorney demanding Corter's Judgment against Groseclose be paid by Douglas County. CP 185.

### III. ARGUMENT

#### A. Summary of Argument

Groseclose never made a request to Douglas County for a defense to the §1983 lawsuit filed by Corter. Douglas County did not provide a defense to Groseclose. Groseclose was provided a defense by the Risk Pool. Groseclose was not acting or purporting to act in the performance of his duties as a law enforcement officer when he accessed Corter's constitutionally protected confidential information. Under the doctrine of issue preclusion, the United States District Court granting of Summary Judgment to Douglas County bars Corter and Groseclose from relitigating whether

Groseclose was acting or purporting to act in the performance of his duties as a law enforcement officer.

Douglas County has no duty under RCW 4.96.041 and/or DCC Chapter 2.90 to indemnify Groseclose with respect to the Judgment entered against him.

B. Burden of Proof and Standard for Review

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). A party seeking to avoid summary judgment must set out specific facts sufficiently rebutting the moving party's contentions and cannot rest upon the allegations in pleadings, speculation, argumentative assertions or having unsupported assertions accepted at face value. CR 56(e)

The review of a trial court's order granting summary judgment is de novo and the appellate court engages in the same inquiry as the trial court, viewing all evidence in the light most favorable to the nonmoving party. *Columbia Community Bank v. Newman Park, LLC*, 177 Wn.2d 566, 573, 304 P.3d 472 (2013); *Rafel Law Group PLLC v. Defoor*, 176 Wn.App. 210, 219-220, 308 P.3d 767 (2013), *review denied* 179 Wn.2d 1011, 316 P.3d 495.

C. The Requirements of RCW 4.96.041 and DCC Chapter 2.90

Under RCW 4.96.041, a county employee *may request* the County provide a defense to a lawsuit that is based upon the employee's performance of official duties. The County must provide the defense *if the County finds* "the acts or omissions . . . were, or in good faith purported to be, within the scope of his or her official duties."

(1) Whenever an action or proceeding for damages is brought against any past or present officer, employee, or volunteer of a local governmental entity of this state, **arising from acts or omissions while performing or in good faith purporting to perform his or her official duties**, such officer, employee, or volunteer **may request** the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

(2) If the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, **finds that the acts or omissions of the officer, employee, or volunteer were, or in good faith purported to be, within the scope of his or her official duties**, the request shall be granted. If the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity. Any monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution.

RCW 4.96.041(1) and (2). (Emphasis added)



Douglas County has implemented RCW 4.96.041 through Chapter 2.90 of the Douglas County Code:

2.90.020 Request for defense of claim.

An officer, employee or volunteer **may request** that Douglas County defend and pay the necessary expenses of defending any claim arising from acts or omissions **while performing or in good faith purporting to perform his or her official duties.** **Such request shall be in writing and signed by the person or his or her attorney, shall be filed with the board of county commissioners,** and shall include a summary of the claim. If the claim is pending, then a copy of the written claim, demand or lawsuit shall be attached to the request.

2.90.030 Authorizing defense of claim.

A. Douglas County shall grant the request to defend a claim and pay the necessary expenses of defense **upon a determination that the claim is based upon an alleged act or omission of the officer, employee or volunteer which was, or in good faith purported to be, within the scope of his or her official duties.** Such determination shall be made as follows:

1. By a majority vote of a quorum of the board of county commissioners consisting of members not named as a party to such claim; or
2. If a quorum of unnamed members of the board is not possible, then by a written opinion of legal counsel, other than the prosecuting attorney, as selected by the board. Such legal counsel shall not be an attorney or member of a law firm who has performed services within the past three years for Douglas County.

B. **Douglas County shall not defend or pay for the expense of defending a claim against an**

**officer, employee or volunteer based upon or which alleges unlawfully obtaining personal benefits while acting in his or her official capacity.**

C. Douglas County shall not pay any expenses of defending a claim which are paid or incurred by an officer, employee or volunteer prior to receipt of a proper written request by the board of county commissioners. Douglas County shall not pay any expenses of defending a claim in advance of services being rendered or costs being incurred.

2.90.050 Payment of nonpunitive monetary judgment.

When Douglas County **has defended a claim** against an officer, employee or volunteer pursuant to this chapter **and the court hearing the action has found that the officer, employee or volunteer was acting within the scope of his or her official duties**, Douglas County shall pay any final nonpunitive monetary judgment entered on such claim, after termination of all appellate review, if any. Pursuant to RCW 4.96.041, a judgment creditor shall seek satisfaction for a nonpunitive monetary judgment only from Douglas County and a judgment for nonpunitive damages shall not become a lien upon any property of the officer, employee or volunteer.

(Emphasis added)

Therefore, under RCW 4.96.041(1) and DCC 2.90.020, an employee must 1) request the County to authorize the defense of a lawsuit at the expense of the County and 2) the County must find the lawsuit is arising from acts or omissions of the employee while performing or in good faith purporting to perform his official duties.

Finally, DCC 2.90.050 provides that, where the County has defended a claim against an employee, the County is authorized to pay a final non-punitive monetary judgment against the employee where the court found the employee was acting within the scope of his official duties.

1. *Groseclose Did Not Request a Defense*

There is no evidence that Groseclose made a request to Douglas County to provide a defense in the *Corter v. Groseclose* litigation, nor did Douglas County otherwise authorize a defense. Groseclose did not comply with RCW 4.96.041(1) and DCC 2.90.020.

2. *Douglas County Did Not Provide a Defense for Groseclose*

Douglas County did not retain Ms. Yakely to represent Groseclose in the *Corter v. Groseclose* litigation, or otherwise authorize the defense of Groseclose. Douglas County made no payments to Ms. Yakely for the legal services she provided to Groseclose. Groseclose was provided a defense paid by the Risk Pool. CP 177.

Douglas County had a \$25,000 deductible under the Joint Self-Insurance Liability Policy issued by the Risk Pool and paid that

deductible. CP 162. Corter and Groseclose argue that payment of a deductible to the Risk Pool constitutes the County's authorization to provide and payment of a defense for Groseclose.<sup>8</sup> Douglas County would have incurred this deductible as a defendant in the *Corter v. Groseclose* litigation, regardless of whether Groseclose was named as a co-defendant.

Contrary to the arguments of Corter and Groseclose, there is no evidence that Douglas County authorized or otherwise provided a defense for Groseclose, or waived the requirements of RCW 4.96.041 and DCC Chapter 2.90.

3. *Groseclose Was Not Acting Within the Scope of His Official Duties*

Even if Groseclose had made a request to the County under RCW 4.96.041(1) and DCC 2.90.020, he was not entitled to a defense. Groseclose was not performing or in good faith purporting to perform his official duties when he accessed the Spillman system

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<sup>8</sup> There is no evidence in the record as the total fees paid by the Risk Pool to Mr. Bastian to represent Douglas County or to Ms. Yakely to represent Groseclose. Corter's attorneys were awarded fees and costs in the *Corter v. Groseclose* litigation which exceeded \$62,000, after the District Court *rejected all fees and costs relating to the Douglas County claims*, rejected other claimed fees and costs, and rejected applying a lodestar factor. CP 152-161. Corter and Groseclose cannot reasonably argue that Douglas County's deductible of \$25,000 was used by the Risk Pool to pay all of Mr. Bastian's fees and costs and all of Ms. Yakely's fees and costs.

to obtain personal information regarding Corter to be used against Corter in their son's guardianship proceeding.

The test for determining when an employee has acted within the scope of employment is clearly settled in Washington and stated as follows:

[W]hether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, *or* by specific direction of his employer; *or*, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer's interest.*

*Rahman v. State*, 170 Wn.2d 810, 815-16, 246 P.3d 182 (2011) (Emphasis original); *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814 (1986); *Greene v. St. Paul–Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958); *McGrail v. Department of Labor and Industries*, 190 Wash. 272, 67 P.2d 851 (1937); See, WPI 50.02.

It is undisputed that Groseclose was pursuing his own personal interests when he accessed the Spillman system to obtain information from the Chelan County Sheriff's Office regarding Corter. Groseclose was not pursuing information related to a Douglas County case or investigation. His actions in no way furthered the interests of Douglas County.

D. The Decision of the United States District Court  
and Issue Preclusion

1. The District Court Determined Groseclose Was Not  
Acting Within the Performance of His Official Duties

The *Corter v. Groseclose* litigation included allegations that Groseclose was acting as an agent of Douglas County and acted or purported to act in the performance of his official duties as a law enforcement officer when he accessed Corter's information. CP 94, 96. The United States District Court determined whether Groseclose was performing or in good faith purporting to perform his official duties as a Douglas County law enforcement officer. The District Court dismissed Douglas County from the *Corter v. Groseclose* litigation finding that Groseclose "accessed the Spillman system in contravention of Douglas County policy,"<sup>9</sup> that Groseclose "had no legitimate law enforcement purpose to access the Spillman system and obtain information regarding Corter",<sup>10</sup> and that Groseclose's conduct "was not indicative of a deliberately-indifferent training/supervision program by the County, but rather 'rogue

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<sup>9</sup> CP 102; Order Granting Douglas County's Motion for Summary Judgment, ll. 11-13

<sup>10</sup> CP 106; Order Granting Douglas County's Motion for Summary Judgment, ll. 15-17

conduct' by a County detective."<sup>11</sup> Judge Shea's instructions to the jury also stated that Groseclose was "acting for his own personal, and non-law enforcement related purposes" and "had no legitimate law enforcement purpose" when he accessed Carter's information contained in the Chelan County Sheriff's Office incident. CP 115, 138.

2. Issue Preclusion is a Bar to the Claims of  
Carter and Groseclose

Groseclose and Carter are both barred from relitigating whether Groseclose was acting or purporting to act within the scope of his official duties under the doctrine of issue preclusion:

Collateral estoppel, modernly referred to as issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. It is distinguished from claim preclusion, or *res judicata*, in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004).

*Ullery v. Fulleton*, 162 Wn.App. 596, 602, 256 P.3d 406, 410 (2011) (Emphasis original).

Issue preclusion requires that four elements be demonstrated: (1) the issue decided in the earlier proceeding was

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<sup>11</sup> CP 110-111, Order Granting Douglas County's Motion for Summary Judgment, I. 25 – I. 2

identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of issue preclusion does not work an injustice on the party against whom it is applied. *Ullery*, at 162 Wn.App. at 602; *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004).

The issue as to whether Groseclose was acting or purporting to act in performance of his official duties as a Douglas County law enforcement officer was presented and decided in the *Corter v. Groseclose* litigation. CP 96, 102, 106, 110-111.

The *Corter v. Groseclose* litigation involving Douglas County ended in Summary Judgment being granted to the County and the County being dismissed from the litigation. CP 100, 112.

Groseclose, Corter and Douglas County were all parties in the *Corter v. Groseclose* litigation. CP 93, 100.

Application of issue preclusion in this case does not work an injustice against Groseclose and Groseclose. Douglas County never advised nor represented to Groseclose that the County was providing a defense for him in the *Corter v. Groseclose* litigation or



that the County would indemnify him from any judgment against him. Groseclose was clearly put on notice of Douglas County's position that Groseclose had *not* acted and was *not* purporting to act within the performance of his official duties. CP 100. The Risk Pool advised Groseclose the Risk Pool was (1) providing a defense to the lawsuit under a reservation of rights, and (2) reserving its right to decline to pay any judgment or settlement if it was determined that either Groseclose was not acting in good faith on behalf of Douglas County or if Carter's alleged damages were intentionally caused by Groseclose. CP 177.

Carter alleged in her Complaint that Groseclose was an agent of Douglas County and Groseclose was acting or purporting to act in the performance of his official duties as a law enforcement officer when he accessed Carter's information. CP 94, 96. Carter's allegations were clearly intended to impose liability upon Douglas County, as the employer of Groseclose.

Both Carter and Groseclose had the opportunity to defend against Douglas County's Motion for Summary Judgment and seek to avoid dismissal of Douglas County from the *Carter v. Groseclose* litigation. Application of issue preclusion does not work an injustice as to either Carter or Groseclose.

Issue preclusion bars both Groseclose and Corter from relitigating whether Groseclose acted or was purporting to act within the performance of his official duties when he accessed Corter's information through the Spillman system.

3. *Acting Under Color of Law is Not Synonymous With Performing Within the Scope of Official Duties*

As part of the Verdict issued in the *Corter v. Groseclose* litigation, the jury found that Groseclose acted “under color of law when he accessed the March 30, 2009, law enforcement incident report via Spillman.” CP 149.

Groseclose and Corter rely upon *LaMon v. City of Westport*, 22 Wn.App. 215, 588 P.2d 1205 (1978), to argue the phrases “scope of official duties” and “under color of state law” are similar, if not identical, and dispositive of the issues in this case. (Police chief indemnified for legal fees incurred defending civil rights action, prior to enactment of RCW 4.96.041.) The Court of Appeals held there was no evidence the Police Chief acted outside the scope of his official duties. *Id.*, 22 Wn.App. at 218-219. The Court of Appeals further held the City had the power to indemnify the Police Chief incurred in suits resulting from an action or failure to act **within the scope of his duties**. *Id.*, 22 Wn.App. at 220. The Court of

Appeals did not discuss whether the term “color of state law” was synonymous with “scope of official duties. Conversely, the court held a United States District Court’s prior finding that the Police Chief acted “under color of state law” was not dispositive as to whether the Police Chief was acting within the scope of his duties. *Id.*, 22 Wn.App. at 220. Contrary to the assertion of Corter and Groseclose, a holding that the Police Chief acted within “the scope of the employee’s duties” was the basis for affirming the judgment granting the Police Chief indemnity.

Other jurisdictions have distinguished the term “under color of law” when determining whether there is a duty to indemnify. In *Cameron v. City of Milwaukee*, 102 Wis.2d 448, 307 N.W.2d 164 (1981), police officers sued their municipal employer to compel it to pay a §1983 judgment entered against them for their off-duty assaults against African-Americans. The off-duty officers were found to have been acting “under color of law” in the prior §1983 action. The officers asserted that acting “under color of law” was synonymous with their actions being “within the scope of employment.” The Wisconsin Supreme Court disagreed and held, at 457-458:

[A] finding with regard to action under "color of law" is not identical to a finding that specific acts are done "within the scope of employment" of a public official or employee. A resolution of the question of whether the petitioners were acting within the scope of their employment was not essential to the rendering of the sec. 1983 judgment.

\* \* \*

We do not perceive a substantial equation between conduct which is within the scope of a municipal or state employee's employment and conduct which may be termed under color of law. Rather, conduct within the scope of employment is limited to those acts which by law are attributable to the employer while acts under color of state law are not so limited.

A panel of the Ninth Circuit Court of Appeals addressed this issue in a case having very similar facts to the case before this Court. *McDade v. West*, 60 Fed.Appx. 146 (9th Cir. 2003).

McDade sued her ex-husband, West, his current wife, and Ventura County for violation of McDade's civil rights under 42 U.S.C. §1983. The current Mrs. West was employed by Ventura County and had accessed a county database to locate McDade's address at a battered women's shelter and used the information to serve McDade with child custody documents. McDade settled with West and his current wife. In addition to a judgment against them, McDade received an assignment from the current Mrs. West for the wife's claims against Ventura County for indemnification. The

United States District Court and the 9th Circuit Court of Appeals concluded that Ventura County had no obligation to indemnify its employee from the judgment. The issues of “under color of law” and “within the scope of employment” were held “not coextensive,” and a prior ruling that the current Mrs. West acted “under color of law” was held not to be determinative. The Ninth Circuit Court of Appeals further held the county employee acted “for personal reasons and deviated from her employment obligations when she accessed the database” and that “illegal use of the database was not within the scope of her employment.” Contrary to the assertions of Corter and Groseclose the *McDade* case does not support synonymous use of the phrases “scope of employment,” “scope of official duties” and “under color of law.”

Corter and Groseclose discuss several federal decisions involving a determination of “color of law” as it relates to a public employee’s liability under 42 U.S.C. §1983. None of those cases involve claims by a public employee seeking employer indemnity from §1983 liability. Many have nothing to do with §1983 liability. *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed 1495 (1945) (This case preceded the adoption of 42 U.S.C. §1983, and held that “under color of law” means “under pretense of law” and

further held the use of excessive force in effecting an arrest subjected the arresting police officer to prosecution under the federal criminal code.); *Martinez v. Colon*, 54 F.3d 980 (1st Cir. 1995) (Failure to protect police officer from assault by fellow police officer held not to be acting "under color of law" as "under color of law" requires acts to be related in some meaningful way either to the officer's governmental status or to the performance of his duties, not "in the ambit of their personal pursuits."); *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997) (Police officer who sexually assaulted minor was not acting "under color of law," but acting in a purely personal capacity when he committed a private tort.); *Neuens v. City of Columbus*, 275 F.Supp.2d 894 (S.D. Ohio 2003) (Police officer who was with a group of friends that assaulted a restaurant patron was not acting "under color of law", but acting in pursuit of his own personal interests, not in accordance with any official authority.); *Gamage v. Peal*, 217 F.Supp. 384 (N.D. Cal. 1962) (Air Force contract physician was acting within scope of employment when examining plaintiff and entitled to immunity.); *Washington-Pope v. City of Philadelphia*, 979 F.Supp.2d 544 (E.D. Pa. 2013) (Police officer who threateningly held his service weapon at the head of fellow police officer while in patrol car held not to be

acting under "color of law," as act was not under pretense of law, was a private tort and was not fairly attributable to the city.); *Scherer v. Brennan*, 379 F.2d 609 (7th Cir. 1967) (Federal agents who conducted surveillance upon and restrained plaintiff were acting within the scope of their official duties to protect the President and immune from liability.); *Nietert v. Overby*, 816 F.2d 1464 (10th Cir. 1987) (Federal employee who reported misconduct of plaintiff and allegedly made defamatory statements regarding plaintiff was acting within scope of official duties and immune from liability.) *United States v. Street*, 66 F.3d 969 (8th Cir. 1995) (Army Corp of Engineers park ranger was acting within his official duties when checking "deer tags," and defendant's federal conviction for intimidating a federal employee engaged in performance of official duties was affirmed.); *United States v. Giordano*, 442 F.3d 30 (2nd Cir. 2006) (Federal conviction of city mayor affirmed, as mayor acted "under color of state law" when having sexual contact with underage victims in his mayoral office and official car based upon threats to use his authority as mayor and victims perceived authority of mayor.)

The cases relied upon by Corter and Groseclose provide no guidance to this Court. An employee or official acting within the

scope of his or official duties is also acting “under color of law,” but, conversely, an employee *not* acting within scope of his or her official duties may still be acting “under color of law.”

Applying the above analysis to the facts of this case, the jury’s finding in *Corter v. Groseclose* that Groseclose acted “under color of law” is not determinative of whether Groseclose was acting within the scope of his official duties. The contrary assertion by Defendants Corter and Groseclose is without merit.

E. *The County is Entitled to an Award of Fees and Costs*

This appeal by the Corter and Groseclose is frivolous, as it has been advanced without reasonable cause. Whether Groseclose was performing or in good faith performing his official duties when he accessed Corter’s constitutional protected personal information is not a debatable issue over which reasonable minds could differ.

The County should be awarded its reasonable attorney’s fees and costs incurred in this appeal pursuant to RAP 18.9(a) and/or RCW 4.84.185.

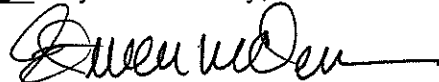


#### IV. CONCLUSION

Douglas County has no duty to indemnify Groseclose for the judgment obtained against him in the *Corter v. Groseclose* litigation.

The trial court's Order granting Summary Judgment to Douglas County should be affirmed.

Respectfully submitted this ~~12~~<sup>15</sup> day of February, 2015.



Steven M. Clem, WSBA #7466  
Prosecuting Attorney  
For Respondent Douglas County

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

WASHINGTON COUNTIES RISK )  
POOL, a public entity, )  
 )  
Respondent, )  
 )  
v. ) DECLARATION OF  
 ) SERVICE BY MAIL  
 )  
TAMARA MARIE CORTER, a )  
married individual, STEVE )  
GROSECLOSE, an individual, )  
 )  
Appellants, )  
 )  
and )  
 )  
DOUGLAS COUNTY, a municipal )  
corporation, )  
 )  
Respondent. )  
\_\_\_\_\_ )

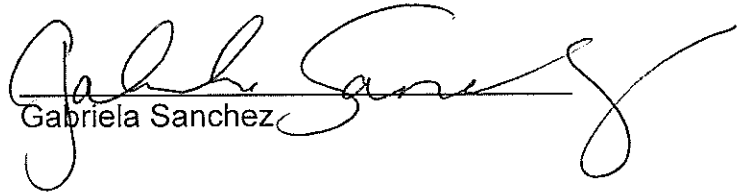
I declare, under penalty of perjury under the laws of  
Washington, that I served a copy of:

1. Respondent's Brief by Douglas County; and
2. Declaration of Service By Mail;

on each of the persons set forth below, by depositing the same in  
separate pre-addressed envelopes, postage prepaid, with the U.S.

Postal Service at Waterville, Washington, on this 18<sup>th</sup> day of  
February, 2015.

Signed this same day at Waterville, Washington.

  
Gabriela Sanchez

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