

No. 63876-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Russell Phillips, *Appellant/Cross Respondent*

v.

Valley Communications, *Respondent/Cross Appellant*

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT FOR
CROSS APPEAL

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Respondent/Cross-Appellant, Valley Communications (Valley Com), submits the following reply in support of its cross appeal and its request for sanctions.

I. REPLY TO RESPONSE TO CROSS APPEAL

Valley Com cross-appealed a denial of injunctive relief, requesting injunctive relief to protect itself from further duplicative litigation and from continued, burdensome, duplicative, harassing public record requests from Appellant/Cross-Respondent, Phillips. **CP-1094-1096; CP-1068-1081; CP-1114-1118**. Despite finding merit in Valley Com's request, Judge White denied the motion, indicating that he was unsure if the Court had the legal authority under the Public Records Act to grant the specific type of relief requested. **RP-61-62, 81-83**. As explained in its cross-appeal brief, Valley Com seeks to modify or overturn current judicial interpretation which has lead to the nullification of the injunctive relief section of the Public Records Act, RCW 42.56.540. Valley Com also contends that the Judge erred in limiting his equitable authority to the narrow interpretation of the public record statute, when other authority exists which enables courts to exert proper controls over litigants, litigation and access to the courts. These provisions still provide the Court with authority to control litigation as in any other legal

proceeding. Thus, the Court should have granted the request. *See cross-appeal brief p. 44-59.*

Phillips has failed to respond to most of Valley Com's cross appeal arguments. His response is limited to the final page of a section of his reply brief, which attempts to bootstrap an untimely challenge to the Court's CR 11 sanctions ruling into his appeal. *Reply p. 20.* Phillips did not identify his response to Valley Com's cross appeal in the brief nor did he directly address Valley Com's assignment of errors. Failure to respond to the issues indicates that he concedes these points.¹ *State v. Ward*, 125 Wn.App. 138, 144, 104 P.3d 61 (2005).

A. Injunctive relief is available under a Court's inherent and Constitutional equitable authority

It is undisputed that a Washington Court has inherent Constitutional and statutory authority to grant equitable relief. Wash. Const. Art. IV, § 6; RCW 2.28.010 (3); *Yurtis v. Phipps*, 143 Wn.App. 680, 693, 181 P.3d 849 (2008) *review denied* 164 Wn.2d 1037, 197 P.3d 1186 (2008). The Courts have the power to control the conduct of litigants, and may place reasonable restrictions on any litigant who abuses the judicial process. This includes enjoining a party from further litigation

¹ It would seem that he agrees with Valley Com's position that the trial court should have granted the injunctive relief. He concludes his reply brief with the request that the trial court's ruling denying injunctive relief be reversed. "Phillips asks this Court to reverse the Superior Court's rulings on Valley Com's Motion for a Preliminary Injunction." *Reply p. 21.*

concerning the same subject as prior frivolous or abusive litigation. *Id.* Because the Court's equitable authority flows from the state Constitution, it cannot be restricted or abrogated by statute. Wash. Const. Art. IV, § 6; *Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 415, 63 P.2d 397 (1936); *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999). Thus, regardless of any interpretation of the Public Record Act, the trial court had the authority to enjoin Phillips's continued frivolous litigation over the same public records that have now been the subject of two lawsuits and an appeal.

Phillips has tacitly acknowledged the validity of Valley Com's cross-appeal on the basis of the Court's inherent statutory and Constitutional authority. He did not address the Constitutional issues presented in Valley Com's appeal, or the Court's authority under RCW 2.28.010(3). He offered no argument or case law to rebut Valley Com's argument that the Court has authority under both to enjoin Phillips from further litigation over his prior public record requests and any related public records. Failure to respond to these issues indicates that he concedes these points. *State v. Ward, supra* at 144.

Having found merit in Valley Com's request, Judge White should have granted the proposed protective order, or any alternative relief, under the Court's inherent equitable authority. In denying Valley Com's request

for injunctive relief, he relied on an erroneous view of the law that his equitable authority was unduly restricted by the Public Records Act. A trial court necessarily abuses its discretion where it has based its ruling on an erroneous view of the law. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). The cross appeal and injunctive relief may be granted on this basis.

B. Injunctive relief is available under the PRA.

Injunctive relief is also available under the Public Record Act (PRA). Contrary to Phillips' unsupported assertion, injunctive relief does not go against legislative intent. Section 540, as well as recent amendments, clearly indicates the Legislature's continued intent to allow injunctive relief under the PRA. RCW 42.56.540; RCW 42.56.565. Even under the restrictive interpretation given it in *PAWS II*, section 540 still provides a procedure for enjoining the examination of responsive documents if they are exempt under another provision of the act.

Progressive Animal Welfare Society (PAWS II) v. University of Washington, 125 Wn.2d 243, 257, 884 P.2d 592 (1994); *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007)

Valley Com simply seeks to give reasonable meaning to the full text of section 540. To do so, as more fully explained previously (*see Response/cross-appeal brief p. 50-58*), the reading of *PAWS II* should be

changed or modified to avoid rendering Section 540 superfluous and to avoid nullifying the law's legitimate equitable considerations. Valley Com suggests that the proper interpretation of the injunctive relief section lies in the Supreme Court's original unanimous ruling on it. *Dawson v. Daly* 120 Wn.2d 782, 794, 845 P.2d 995 (1993) ("We hold that 42.17.330 [RCW 42.56.540] does create an independent basis upon which a court may find that disclosure is not required, if the court, upon a request for an injunction under RCW 42.17.330 [RCW 42.56.540], finds (1) that disclosure is not in the public interest and (2) that disclosure would cause substantial and irreparable damage to a person or a vital government function.").

Phillips does not present any argument or legal citations to rebut Valley Com's discussion of *PAWS II* or *Dawson* or the effect of *PAWS II* has had on effectively rendering Section 540 meaningless. The only "argument" he put forth against Valley Com's reasoning is his claim that Valley Com's position challenges the ruling of *PAWS II*. This ignores the fact that *Dawson* (and the present case) is distinguishable from *PAWS II* because injunctive relief was actually at issue in that (and this) case, whereas *PAWS II* only involved a challenge to previously withheld documents and an attempt to convert the injunctive relief section into a post-withholding exemption. In any case, precedent can be overruled

when, as here, it is incorrect or harmful. *State v. Baldwin*, 150 Wn.2d 448, 460, 78 P.3d 1005 (2003).

The *PAWS II*'s narrow limitation on section 540 is both incorrect and harmful. As previously explained, its interpretation is contrary to the plain language of the statute which clearly states:

“[t]he examination of any specific public record may be enjoined if, upon motion and affidavit ... the superior court ... finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.”

RCW 42.56.540. The *PAWS II* interpretation rendered this section superfluous because there is no need to seek an injunction if a document can already be withheld under an enumerated exemption. In undermining the intent and scope of the injunctive relief section of the PDA statute, this precedent harms those who are impacted by the unavailability of discretionary, equitable relief, particularly when injunctive relief may be in the public's interest.²

² *Soter*'s attempt to give “meaning” to section 540 after *PAWS II* further demonstrates the absurdity of this interpretation. In that case, the Court clarified “that to impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest” *Soter* at 757. Thus, even though an agency may withhold a document because it is exempt under a specific exemption, it must undergo additional obstacles to enjoin the disclosure of the already exempt document. Not only is there no reason to seek an injunction if a document can already be withheld under an enumerated exemption, there is no reason to undergo these additional requirements if the document can already be legally withheld. Again the interpretation effectively makes section 540 superfluous.

It is only when the specific exemptions still fail to protect persons or vital government interests that injunctive relief becomes necessary and appropriate. The Legislature recognized, through the language of section 540, that it may not have considered or articulated every particular circumstance or document worthy of a separate exemption, and therefore left open the availability of injunctive relief where disclosure will cause “substantial and irreparable damage to any person or vital governmental functions.” RCW 42.56.540. Yet the problem with the *PAWS II* interpretation is that it ends injunctive relief at precisely the point where the Legislature recognized that relief is needed and appropriate. Thus, under the restrictive interpretation of *PAWS II* no equitable relief is available if the legislature has not expressly identified an exemption, even if release is not in the public interest and will cause substantial irreparable damage to a person or vital government agency.³ This interpretation is clearly harmful and warrants overruling or modifying *PAWS II*.

³ The *PAWS II* Court even noted that the number of specific exemptions had grown from 10 in the original initiative to 40-odd exemptions by 1994. *PAWS II at nt. 6*. This number has increased further since the *PAWS II* decision nullified the injunctive relief safety valve. The current statute has 28 separate sections dealing with specific exemptions, which contain more than 120 specific exemptions total. *RCW 42.56.230-480*. These numbers do not include exemptions based in other statutes. *RCW 42.56.070(1)*. This ever-growing list of narrow exemptions demonstrates the impossibility of legislatively identifying every type of document or situation for which disclosure is harmful and does not serve the public interest. Allowing injunctive relief along the lines of *Dawson* would mitigate the need for the continuous addition of new exemptions and ensure that irreparable harm does not come from release of documents, simply because the Legislature has not foreseen and articulated a specific exemption in advance of a request for documents.

Phillips' assertion that injunctive relief should be withheld because "Valley Com has not sought to utilize the protections that already exist in the PRA," *Reply p.20*, is unfounded. Valley Com requested relief from having to respond to or litigate further two specific, narrowly-tailored types of public record requests under both the Court's inherent equitable authority and under the PRA. **CP-1068-1081; CP-1114-1118**. *See response/cross-appeal brief p.3, p.16-17 and p.45-47*. In his response, Phillips has not challenged Valley Com's request of relief from the first request which was to restrict duplicative requests for documents which Phillips has already examined (most of which he has received copies of on numerous occasions). Furthermore, Valley Com requested relief from any requirement to produce documents which Phillips had prepared, had already received in litigation or reasonably could be expected to have in his possession. Most of these documents have already been the subject of PRA litigation initiated by Phillips. He presented no argument that relief against this type of unreasonably cumulative, duplicative, or unduly burdensome requests is unavailable under the PRA. Injunctive relief is available through the plain meaning of the PRA, and through the incorporation of Civil Rules 26(b) and reference to RCW 42.56.290, and the "other statutes" section RCW 42.56.070(1). Again, failure to contest

these issues indicates that he has conceded these points. *State v. Ward*, *supra* at 144.

Phillips only focuses on the second type of documents Valley Com requested be enjoined, documents which involve attorney-client privilege, work-product or litigation-related matters which are clearly exempt under the PRA. Even utilizing the *PAWS II*'s limited interpretation of section 540, these documents were exempt and thus an injunctive order would be allowed. Phillips' made repeated requests for all documents referencing himself (which, due to his on-going public record requests and litigation, encompassed many privileged communications between Valley Com and its attorneys concerning those matters). He also specifically requested confidential communications between Valley Com and its attorneys, which had often already been explicitly ruled exempt in Phillips first litigation.⁴ His continued requests for documents Judge Yu had already ruled were exempt under attorney-client privilege or work product, prompted Valley Com to ask that "Phillips be enjoined from making requests for documents that involve communications between Valley Com and its attorneys" or, if a request was broad enough to cover attorney-client privileged communications, Valley Com be relieved of the burden of providing a detailed privilege log. **CP-1079-80.**

⁴ For examples of requests involving attorney-client privilege or work product, see, CP-64 #1, CP-71-77; CP-677 #1; CP-678 #5 and CP-417 #8(e)(i).

“The attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery. The privilege encourages free and open communication by assuring that communications will not later be revealed directly or indirectly.” *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) (internal citations omitted). “Even absent an existing controversy, RCW 5.60.060(2)(a) is an ‘other statute’ which justifies exemption of attorney-client privileged communications.” *Soter* at nt.15. Where a document involves matters of an existing controversy or anticipated litigation it is also exempt under RCW 42.56.290. *Id.* “It is essential that lawyers representing our public agencies work with a certain degree of privacy free from unnecessary intrusion, in order to assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare legal theories, and plan strategy without undue interference.” *Id.* at 748-49.

Phillips does not deny that attorney client privilege and work-product are exempt under the PRA. He merely speculates that non-exempt documents would be improperly labeled as attorney-client privilege/work product. This is an unsupportable assertion. Valley Com has not asked that previously undisclosed, non-exempt or even debatably exempt documents be enjoined. The requested injunction would not relieve

Valley Com of its obligation to disclose new non-exempt documents, or to identify in general new but privileged communications where the request is not obviously targeted at attorney-client communications. Phillips' unfounded accusation, therefore, is baseless and distracts from the true issue of whether the Court had authority to issue an injunction covering documents exempt under attorney-client privilege and work-product. Because it is well settled that attorney-client communications are exempt under the PRA, the request would meet even the restrictive limitations placed on injunctive relief by *PAWS II* under section 540. It also meets *Soter's* clarification that, based on *PAWS II*, injunctive relief requires both a specific exemption and a finding that the disclosure would not be in the public interest and would substantially damage vital government interest. *Soter* at 757.

Phillips does not deny that his requests are not in the public interest. He continues to confirm the purpose of his public record requests is purely personal. *Reply p. 1*. He admits his multiple requests for records include records already in his possession. **CP-14-19, 1172-1179, 1146 #3**. He admits he previously litigated his access to documents he claims he was denied in an earlier court battle, at considerable public expense. **RP-19-22**. He admits he is requesting attorney-client privileged communication that pursuant to public policy and statute is exempt (and

which the prior Court confirmed were exempt). **RP-38** 114-8, 11.21-22; **CP-417 #8(e)(i)**. He admits he is using the PDA as a substitute for the discovery process, despite the fact no alternate litigation has yet been filed. **CP-800** 11. 3-4; *Response to motion to modify p.3, 11.5-6*. He also admits he has access to the same information he has requested through public disclosure by other means, such as RCW 49.12.240 (the statute governing access to personnel files).⁵ **RP-23** 11.4-12. In his own words, Phillips’:

“request was for documents in his own personnel file that he needed to defend himself in termination proceedings.... Russell made a number of records requests to investigate the events leading to his discharge. He hoped the records as evidence of both his and his employer’s actions prior to his dismissal.”

Reply brief p. 1. He has also acknowledged that he is seeking re-disclosure of the same documents or copies of documents that originated from him. **RP 24** 11.1-16,23-25. There is no public interest served in providing an individual with copies of documents he already has, and in many cases has requested separately several times, all of which requests have been responded to. The Courts have recognized the lack of any public interest in the re-disclosure of documents which are already in the plaintiff’s possession and have held that under those circumstances no

⁵ This statute does not provide a private right of action, so may have been a less desirable option for Phillips, if his goals were to make his former employer incur significant expense, as it has done in these proceedings.

cause of action exists under the PRA. *Daines v. Spokane County*, 111 Wn.App. 342, 44 P.3d 909 (2002). There is no public purpose in forcing a public agency to continually re-explain to the requesting party the basis for any withholding or redactions for the same documents, particularly where a Court has already approved the withholding or redaction or ordered a document to remain sealed.

Phillips does not dispute that his repetitious and confusing requests for documents are causing substantial and irreparable damage to vital government functions. He has diverted Valley Com's limited resources away from 9-1-1 emergency dispatch functions by forcing his former employer to respond to his private vendetta against it. **CP-1119-1121, 1124-1127**. Phillips does not deny that he has on multiple occasions been given access to and, in most cases copies of, all the non-exempt records requested. Demanding re-release of these documents and requiring Valley Com to repeatedly explain the basis for any withholding or redactions for the same documents serves no public interest. This is particularly true where a Court has already approved the withholding or redactions Valley Com undertook and has ordered certain documents to remain sealed. Duplicative litigation after the initial court's ruling, and after Phillips opted not to appeal that ruling, serves no public purpose and needlessly wastes Valley Com's limited resources. Thus, the requirements for

injunctive relief under RCW 42.56.540 have been met and relief could have been granted under the PRA.

C. Valley Com's request was recognized by Judge White to have merit and injunctive relief should have been granted under either basis

Judge White correctly recognized the merits of Valley Com's request for a protective order against Phillips's continued litigation and duplicative, harassing public record requests. **RP-83 II.12-13.** The PRA allows injunctive relief when, as here, release of public records is not in the public interest and would damage vital governmental interests. RCW 42.56 540. The plain statutory language does not support the restrictive interpretation given it by the *PAWS II* decision. Such a restrictive interpretation is harmful and it creates an unconstitutional limitation on a Court's equitable authority. Wash. Const. Art. IV, § 6 *Blanchard, supra*. A court's equitable power allows it to fashion broad remedies to put an end to litigation, and from enjoining a party, such as Phillips, from engaging in further litigation concerning the same subject as prior frivolous or abusive litigation. *Yurtis, supra; Hough v. Stockbridge* 150 Wn.2d 234, 236, 76 P.3d 216 (2003).⁶ In light of the Court's finding of

⁶ The lower court also confirmed Phillips' second cause of action lacked merit and was a violation of CR 11 by granting Valley Com an award of sanctions. That award and order were never appealed by Phillips. *CP-1145-1155*. This ruling may be the only remedy Judge White felt he had authority to grant in light of the restrictive language in *PAWS II*,

merit, and its inherent and statutory authority to grant the requested relief, Valley Com's request for an injunction should have been granted.

II. REPLY TO RESPONSE TO REQUEST FOR COSTS AND FEES

A. Valley Com should be awarded fees and costs for this Appeal because the Appeal is frivolous

Valley Com requested costs and fees, pursuant to RAP 14 and RAP 18, based on Phillips' filing a frivolous appeal and his failure to comply with Court rules. *Respondent's brief, p.42-44*. Phillips has failed to respond to this request indicating that he concedes these points. *State v. Ward, supra* at 144. His reply brief provides further support for the requested costs and fees because he continues his practice of violating the Rules of Appellate Procedure and misleading the Court.

B. Valley Com should be awarded fees and costs because Phillips fails to cite to the record.

Phillips fails to cite to the record as required under RAP 10.3 (5) and continues to mislead the Court with erroneous statements. He continues to discuss irrelevant matters, such as his termination, and makes unfounded assertions without any evidentiary support. *See, for example, Reply, p.1*. (Valley Com strongly disputes his many speculations and unsupportable allegations. *See CP 151-152 for a more accurate*

but preventative measures would have been far more effective in addressing the potential for frivolous claims.

description of his employment and nature of his termination). As an example of one of his many unsupportable assertions, Phillips portrays Valley Com's attorneys as "well-paid government attorneys with their armies of assistants" *Reply p. 2* and "experienced and well-paid government attorney's [*sic*] with their armies of assistants and knowledge of intricacies of the rules of procedure." *Reply p.19*. The record shows that Valley Com's counsel is a small private firm with 8-9 attorneys. **CP-67**. Phillips provides no support for this and his many unsupported factual assertions. Courts will not consider on appeal statements unsupported by the record. RAP 10.3(5); *Sherry v. Financial Indem. Co.* 160 Wn.2d 611, nt. 1, 160 P.3d 31 (2007).

C. Valley Com should be awarded fees and costs because Phillips attempts to mislead the Court.

Even where he discusses arguably relevant topics, his failure to cite to the record misleads the Court. For example, without citation to the record, he attempts to characterize his initial request for his personnel file as a public record request. *Reply, p. 1*. This contradicts his sworn testimony in the 2008 litigation. **CP-1158; CP-525 nt. 1**.

As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel ... to cite to the record. ...Strict adherence to [RAP 10.3] is not merely a technical nicety.

Rather, the rule recognizes that in most cases... there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Matter of Estate of Lint 135 Wn.2d 518, 531-532, 957 P.2d 755 (1998).

In another part of the brief, he continues to try to mislead the court about when the 2008 case concluded to avoid the consequences of *res judicata* and collateral estoppel, implying that the May 2008 order was the only final order in the first litigation. In doing so, he again fails to cite to the record. Instead, he allegedly quotes from a proposed order which does not even appear to be part of the present record on appeal. *Reply*, p. 8. The “quote” merely notes that the May 12, 2008 order was “a final ruling.” *Id.* In reality there were several final orders in the 2008 case, as Judge White recognized when he hand-wrote in the other orders. **CP-1147**. Phillips notably fails to cite to these orders, which belie his misrepresentations about which records and issues were in dispute in the first litigation. **CP-415-422, 688-689, 793-795, 797, 839-843, 845-846, 847-848, 909 and 574-576**. In doing so, he ignores the litigation in the

2008 case which occurred after the May 12th order⁷ and which clearly involved his 2008 public record requests. **CP-124-126, CP-871, 873, 875, 876-8, 1146 #4; See discussion, Response p.25-26.** He also ignores the fact that in his second court action he specifically tied all of his public disclosure requests to the original requests, and he admitted he brought (or could have brought) these issues before Judge Yu. **CP-1172-1179; RP-19 ll.1-13.**

D. Valley Com’s request for fees and costs is further supported by Phillips’ failure to supplement the record.

Furthermore, it is a clear violation of RAP 10.3(5) and RAP 9.6 to introduce new or undesignated material on appeal without requesting supplementation of the record. RAP 10.3(5); RAP 9.6; RAP 9.10. Yet Phillips has repeatedly done so in his reply brief. The proposed order “quoted” on page 8 of his reply and discussed above is one such example. In an even more flagrant example, he devotes almost an entire page of his reply brief to what appears to be selections from Valley Com’s attorney billing records. *Reply p. 16.* Not only does Phillips fail to identify the source of the “quotes,” the billing records are not part of the designated record on appeal. Moreover, their use is misleading.

⁷ Curiously Phillips refers to a May 18, 2008 order. *Reply p.9, p.11-12.* However, no order was issued on May 18th in either of Phillips’s cases.

Juxtaposing comments about the non-existence of a master index in 2008, with a March 2009 invoice's reference to the creation of a master index one year later, is clearly an attempt to mislead this Court. Once again Phillips misstates the facts in another attempt to mislead the Court into believing that some requested document was withheld. It was not. Phillips' inquiry in 2008 and Valley Com's response about the non-existence of such an index was accurate at that time. **CP 90-91**. The 2009 invoice refers to an attorney's efforts to create a master index to keep the ever growing number of document requests and disclosure in order one year later. Liz Henecke's declaration where she explains how she knew what records had been provided to Phillips, but stated she had no master index of the records when the original litigation began in 2008 is accurate. **CP-616-617**. Her statements have no bearing on the creation of a master index done in 2009 in anticipation of further litigation. A document created more than nine months after a request is made does not create a violation of the PRA. Documents created after a request is made fall outside the scope of the request. WAC 14-44-04004(4)(a). Because the master index was created in anticipation of litigation, it is also exempt from release as attorney work-product. *Soter, supra*, RCW 42.56.290.

Statements that are outside of the record are outside of the scope of an appellate court's review and will not be considered. *Weems v. North*

Franklin School Dist. 109 Wn.App. 767,778-779, 37 P.3d 354 (2002).

Sanctions are clearly warranted for wasting Court and opposing party's time on matters that are not even part of the record. If Phillips wanted to supplement the record, he failed to comply with the rules for doing so, further warranting sanctions. Even if he had properly requested supplementation of the record, the rules dictate that "[t]he appellate court may impose sanctions as provided in rule 18.9(a) as a condition to correcting or supplementing the record on review." RAP 9.10.

E. Phillips also attempts to mislead the Court on legal issues.

In addition to misleading the Court as to facts, Phillips also misleads on legal issues. For example, in discussing whether Valley Com had claimed an exemption to sufficient trigger the one year statute of limitation under RCW 42.56.550(6), he claims that "required elements of the description of the withholding has been settled law for many years." *Reply*, p. 13. However, this assertion is clearly belied by the Supreme Court's recent split opinion and discussion on this issue. *RHA v City of DesMoines*, 165 Wn.2d 525, 199 P.3d 393 (2009). Both the concurrence and dissent found that the agency had fully claimed an exemption where the agency only generally described the withheld documents. "To extrapolate from *PAWS II* that an agency must provide a privilege log to initiate the running of the statute of limitations not only goes beyond the

specific wording of the PRA but also goes beyond a reasonable reading of *PAWS II*.” *Id.* at 547 (concurrency); see also dissent at 554-555. As Judge White correctly recognized, *Des Moines* was not authority at the time Phillips litigated his requests in 2008 (or at the time Valley Com responded to them in 2007 and 2008). **RP-19-21**. “If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation.” *Lynn v. Washington State Dept. of Labor and Industries*, 130 Wn.App. 829, 836, 125 P.3d 202 (Div I 2005). Moreover, Phillips fails to point out that he did not assign error to or preserve this issue for appeal as to Judge White’s reliance on the one year statute of limitations included in the PDA, thus his argument is not only misleading but inappropriate to this appeal and untimely. *Appellant’s brief* p.7; RAP 10.3.

Phillips also tries to mislead the Court regarding the nature of the sanctions order which he failed to appeal and now wishes to have this Court consider. Again he violates RAP 10.3 by not citing to the record. Neither in his opening brief nor his reply brief does he ever identify the order he is referring to by its clerk’s paper number.

As noted previously, the Order of November 2 was for CR 11 sanctions, not for attorney fees awarded to a prevailing party. *Response*, p. 42; **CR-1145-1155**. A CR 11 order is a separate issue and does not

change or modify a decision which has already been appealed. *Leen v. Demopolis* 62 Wn.App. 473, 484-485, 815 P.2d 269 (Div. 1 1991). The imposition of CR 11 sanctions is a determination that the person signing the pleadings has abused the judicial process, and of what sanctions would be appropriate. *Biggs v Vail* 124 Wn.2d 193, 198, 876 P.2d 448 (1994). RAP 2.4(g), which only pertains to attorney fee orders, should not apply to an order for sanctions. Merely because the sanctions took the form of recoupment of some attorney fees, does not change the nature of the Order nor does it affect the matters that were appealed. This is particularly true, where the sanctions were not limited to the issues Phillips has included in this appeal. The sanctions order was based on a variety of other violations of Court Rules. **CP-1145-1155**. Because this decision was never appealed on its merits,⁸ Phillips appeal of a separate order dismissing his case is not sufficient to appeal this sanctions order under RAP 2.4(g). (Moreover, Phillips did not assign error to any of Judge White's factual findings in the sanctions order, making them verities on appeal. RAP 10.3 (g), *Cowiche Canyon Conservancy v. Bosley* 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Again his failure to mention this appears to be another attempt to mislead the Court by omission).

⁸ A timely appeal of this order, issued November 2, 2009 **CP-1145-1155** and was supplemented on November 25, 2009 **CP-1156-1157**, would require Phillips to amend his appeal no later than 30 days from the date of the order, to include this order in the scope of his present appeal.

In support of his argument about the Court's consideration of the sanctions order, he also misleadingly cites to RAP 2.5(a). *Reply, p. 19*. However, none of the points he identifies as part of RAP 2.5(a) are actually listed in the rule. This rule only identifies three situations where a party may raise errors for the first time on appeal: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). Compare this to his four point list: "(1) the application of a statute or court rule; (2) a party's standing to bring an action or claim; (3) matters affecting juveniles; and (4) matters of 'fundamental justice.'" *Reply, p.19*. Secondly, RAP 2.5 is irrelevant to the question of whether an Appellate Court can consider the sanctions order which has not been appealed.⁹

Finally, Phillips certificate of service is false, in violation of RAP 18.5 and CR 5 (b). It states that Phillips' counsel served Valley Com by mail and email on April 25, 2010—a Sunday. In fact, counsel's assistant did not email Valley Com the reply brief until after business hours the next day, April 26, 2010. In the same email she stated that she mailed a

⁹ RAP 2.5 only relates to whether issues which were not raised with the trial court may be considered for the first time on appeal. Again this indicates an improper attempt to disguise the true issues and the correct law from the Court's review.

hard copy the same day, thus belying Phillips' certificate of service.

*Certificate of service; Declaration of Betsy E. Green.*¹⁰

All of these violations provide an additional basis for granting Valley Com's request for costs and fees in this appeal. Valley Com respectfully requests it be awarded reasonable costs and fees to be determined upon submission of supporting documentation of actual costs and fees at the conclusion of this appeal process.

III. CONCLUSION

For the reasons set forth above, Valley Com requests that its cross appeal be granted, restoring the implicit and statutory authority to the court in granting injunctive relief, when appropriate, to public disclosure litigation. Valley Com requests an order be issued pursuant to this Court's authority under RCW 2.28.010 — or, in the alternative, that this Court remand this issue with directions to the trial court to issue an order — prohibiting Phillips from requesting documents which have already been provided to him, are otherwise in his possession or which were the subject of this or prior litigation between Phillips and Valley Com, or which are exempt under work product or attorney-client privilege, and prohibit

¹⁰ Valley Com hereby moves that it be allowed to supplement the record with this declaration for the limited purpose of supporting its request for sanctions. Should the Court require a separate motion for this limited supplementation of the record, Valley Com would be happy to provide it.

Phillips from engaging in further litigation over these same documents or requests.

Valley Com further respectfully request that its cross appeal be granted and that an order be issued prohibiting Phillips from requesting documents which have already been provided to him, are otherwise in his possession or which are the subject of this or prior litigation between him and Valley Com, or which are exempt under work product or attorney-client privilege, and enjoin him or his agents from engaging in further litigation over the documents or the requests already reviewed by or potentially litigated in prior court actions. Valley Com requests an order to issued pursuant to this Court's authority under RCW 2.28.010 — or, in the alternative, that it remand this issue with directions to the trial court to issue an order consistent with the protective order requested by Valley Com and outlined here.

Valley Com also respectfully requests that Phillips' appeal be dismissed and Judge White's order to dismiss Case No. 09-02-16309-0 KNT be affirmed. Phillips did not respond to Valley Com's requests for costs, fees and expenses. Valley Com asks that the request be granted pursuant to RAP 14 and RAP 18.1 and RAP 18.9 for Phillips' bringing a frivolous appeal and failing to comply with the Rules of Appellate Procedure.

Respectfully submitted this 15th day of May 2010,



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