

NO. 70851-1

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

LYNN DALRING, Plaintiff
MIKE AMES, Respondent

v.

PIERCE COUNTY, a Municipal Corporation, Appellant

APPELLANT'S OPENING BRIEF

MARK LINDQUIST
Prosecuting Attorney

By
DANIEL R. HAMILTON
Deputy Prosecuting Attorney
Attorneys for Pierce County

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-7746

GW
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 MAR -7 PM 4:31

Table of Contents

	<u>Page</u>
I. ASSIGNMENTS OF ERROR.....	1
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
II. STATEMENT OF THE CASE.....	2
A. DALSING CRIMINAL INVESTIGATION AND PROSECUTION.....	2
B. DALSING PURSUES CIVIL DISCOVERY OF PROSECUTORIAL WORK PRODUCT DURING OPEN CRIMINAL INVESTIGATION.....	4
C. WITNESS AMES UNILATERALLY FILES <i>ULTRA VIRE</i> S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL AND MOVES TO SEAL PROSECUTORIAL MENTAL IMPRESSION DOCUMENTS IN ONGOING CRIMINAL INVESTIGATION.....	8
D. TRIAL COURT AWARDS JUDGMENT AGAINST COUNTY FOR WITNESS AMES' PRIVATE ATTORNEY FEES AND COSTS.....	12
E. COURT OF APPEALS DENIES DISCRETIONARY REVIEW OF DISCOVERY ORDER BUT RULES TRIAL COURT ERRED TO EXTENT IT ORDERED DISCOVERY OF PROSECUTOR WORK PRODUCT COMMUNICATIONS TO DETECTIVES AND THAT TRIAL COURT SHOULD CONSIDER DISCOVERY STAY DURING INVESTIGATION.....	18

III.	ARGUMENT	20
A.	TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES AND COSTS TO NON- PARTY AMES	20
1.	CR 26 Does Not Support Judgment Award to Ames	21
2.	CR 37 Does Not Support Witness Ames' Judgment	23
3.	<i>Eugster</i> Does Not Support Witness Ames' Judgment	25
4.	County Objections Were Substantially Justified	27
5.	Ames' Violations of CR 26(i) Preclude Any Award	31
B.	AMES DID NOT MEET HIS BURDEN OF PROVING THE AMOUNT CLAIMED	33
1.	Attorney's Billed Services Were Not "Reasonable or Essential to the Outcome," and Were "Unnecessary"	35
2.	Hourly Rates Demanded Were Not Proved Reasonable	37
3.	No Findings Support the Attorney Fees Award	42
IV.	CONCLUSION	43

Table of Authorities

	<u>Page</u>
Cases	
<i>Alexander v. FBI</i> , 186 F.R.D. 144, 147 (D.D.C. 1999)	28
<i>Amy v. Kmart of Washington</i> , 153 Wn.App. 846, 863, 223 P.3d 1247 (2009).....	31, 32
<i>Blair v. Ta-Seattle East No. 176</i> , 171 Wn.2d 342, 348, 254 P.3d 797 (2011).....	20
<i>Bonner v. Normandy Park</i> , 2009 WL 302278	39
<i>Bowers v. Transamerican Title Co.</i> , 100 Wn.2d 581, 599, 675 P.2d 193 (1983).....	33
<i>Bradford v. City of Seattle</i> , 2008 WL 2856647	39
<i>Case v. Dundom</i> , 115 Wn.App. 199, 58 P.3d 919 (2002)	32
<i>Clarke v. State Attorney General's Office</i> , 133 Wn.App. 767, 138 P.3d 144, <i>rev. denied</i> 160 Wn.2d 1006, 158 P.3d 614 (2006).....	32
<i>Eugster v. City of Spokane</i> , 121 Wn. App. 799, 816, 91 P.3d 117 (2004), <i>rev. denied</i> , 153 Wn.2d 1012 (2005)	passim
<i>Fellows v. Moynihan</i> , 175 Wn.2d 641, 649-50, 285 P.3d 864 (2012).....	19
<i>H & H Partnership v. State</i> , 115 Wn.App. 164, 171, 62 P.3d 510 (2003).....	28
<i>Highland School Dist. No. 203 v. Racy</i> , 149 Wn.App. 307, 316, 202 P.3d 1024 (2009).....	33, 42
<i>Johnson v. State, Dept. of Transp.</i> , 177 Wn.App. 684, 699, 313 P.3d 1197 (2013).....	34, 41
<i>King v. Olympic Pipeline Co.</i> , 104 Wn.App. 338, 348, 16 P.3d 45 (2000).....	20, 30

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 435, 957 P.2d 632 (1998).....	33, 34, 41, 42
<i>Mayer v. City of Seattle</i> , 102 Wn.App. 66, 79, 10 P.3d 408 (2000).....	20
<i>Pierce v. Underwood</i> , 487 U.S. 522 (1988).....	28
<i>Rudolph v. Empirical Research Systems, Inc.</i> , 107 Wn.App. 861, 28 P.3d 813(2001).....	31
<i>State v. Heiner</i> , 29 Wn.App. 193, 627 P.2d 983 (1981).....	18
<i>State v. Lewis</i> , 141 Wn. App. 367, 389 (2007).....	39
<i>Theonnes v. Hazen</i> , 37 Wn. App. 644, 648-649, 681 P.2d 1284 (1984).....	39
<i>Torno v. Hayek</i> , 133 Wn. App. 244 (2006).....	39
<i>Vizcanino v. Microsoft Corp</i> , 290 F.3d 1043(2002).....	39

Statutes

RCW 42.56.240	5, 30
---------------------	-------

Other Authorities

J. Moore, 7 <i>Moore's Federal Practice</i> , §37, 62 at 37-134 (3 rd ed. 2013).....	30
--	----

Rules

CR 26	passim
CR 26(b).....	5, 7
CR 26(c).....	21, 23, 25, 30
CR 26(i)	passim

CR 37	passim
CR 37(a)(4)	passim
ER 602	38
ER 702	39
ER 703	39
ER 1101(a)	38
GR 15	9, 22, 24, 26
KCLGR 15	22
RAP 2.2(a)(1)	18
RAP 2.3(b)	18
RAP 13.5(a)	19
RPC 1.5	40

I. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by awarding attorney fees and costs to a non-party witness who *sua sponte* filed discovery materials in a lawsuit asking that they be sealed and that he be provided "guidance."

2. The trial court abused its discretion in awarding a non-party witness \$4,749.99 in attorney fees and costs where there is no supporting contemporaneous documentation or factual finding supporting the amount awarded. *See* CP 763-64 (III), CP 766-67 (V4).

3. The trial court abused its discretion by awarding a non-party witness attorney fees and costs where there was no admissible evidence those services and costs were reasonable or essential. *See* CP 763-64 (III), CP 766-67 (V4).

4. The trial court abused its discretion by awarding a non-party witness attorney fees and costs where there was no admissible evidence those services and costs were necessary. *See* CP 763-64 (III), CP 766-67 (V4).

5. The trial court abused its discretion by awarding a non-party witness attorney fees and costs where there was no admissible evidence the hourly rates were reasonable. *See* CP 763-64 (III), CP 766-67 (V4).

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion in awarding a non-party wit-

ness attorney fees and costs under the discovery rules CR 26 and CR 37 where he did not move to compel or seek protection from discovery, where there was substantial justification for defendant's underlying objection to discovery materials at issue, and where the non-party witness did not comply with CR 26(i) by first meeting and conferring with counsel?

2. Did the trial court abuse its discretion in awarding a non-party witness \$4,749.99 in attorney fees and costs under the discovery rules CR 26 and CR 37 where there is no admissible evidence those services and costs were essential, necessary, and the hourly rates reasonable, no supporting contemporaneous documentation, and no finding supporting the amount awarded?

II. STATEMENT OF THE CASE

A. DALRING CRIMINAL INVESTIGATION AND PROSECUTION

In the fall of 2010, Mike Ames was a Pierce County Sheriff's "Computer Crimes Detective" who analyzed computers seized from plaintiff Lynn Dalring and her husband as part of a criminal investigation of the sexual abuse of their daughter and granddaughter. CP 2, 208, 266. After processing images from Dalring's computers, Ames notified the lead detective in the investigation, Debbie Heishman, that he had discovered both "naked photographs of Lynn Dalring posing on a bed" and child pornog-

raphy of a naked woman "whose body style resembles the same body style that Lynn Dalsing has" also laying on a bed but with a naked female child on top of her in a sexually explicit pose. CP 214-15, 238-39, 247. Because Ames was "in a lab -- no windows" -- doing "computer stuff," he had "limited information ... available to [him], which was just the computer end," and did not know the rest of the evidence developed in the criminal investigation of Dalsing. CP 230, 745.

Detective Heishman, on the other hand, directly interviewed Dalsing and learned that she knew her husband was a child molester and nevertheless had allowed their minor daughter to sleep in the same bed with him as well as caught him with a camera while watching their daughter and her girlfriend take a bath. CP 241-42. Further, her minor daughter revealed to a forensic interviewer that Dalsing knew "what her father ... was doing to her" and "even watched it happen" yet told the child not to "talk" about her sexual abuse. CP 242, 459, 599. Dalsing's husband was arrested, charged and plead guilty to rape. CP 153, 156, 167. Dalsing also was arrested and charged with "Child Molestation in the First Degree" based on the aforementioned photograph, as well as with "Exploitation of a Minor" based on her knowledge and enabling of her husband to abuse their daughter. *See* CP 22-23.

Thereafter, sheriff's investigators learned from experts at the "National Center for Missing and Exploited Children" that Dalsing was not the woman shown sexually abusing a child in the pornographic photograph stored on her computer, and prosecutors dismissed the charges against Dalsing. CP 146-48. In reassessing the State's position, however, the order obtained by the prosecution expressly made dismissal "without prejudice" so that further investigation could be made of the "thousands of images [of] child pornography that were seized in this matter to determine if there are other charges to file against the defendant" also. *Id.* (emphasis added). Several months later Dalsing filed a civil action against Pierce County alleging "a seriously flawed investigation by members of the Pierce County's Sheriff's Department, including Detective Debbie Heishman and Detective Mike Ames," claiming this caused her to be falsely arrested and maliciously prosecuted. *See* CP 1. The complaint did not name as a party Heishman, Ames, or any other of the numerous County employees it listed. CP 1-2, 5.

B. DALSING PURSUES CIVIL DISCOVERY OF PROSECUTORIAL WORK PRODUCT DURING OPEN CRIMINAL INVESTIGATION

While the open and ongoing criminal investigation of her role in the sexual abuse of her daughter continued, Dalsing attempted to use discovery in her civil case to demand production of "the entire Pierce County

Sheriff's Department Files" related to the criminal investigation of her -- including "any and all email communications ... to and from the Pierce County Prosecutors Office" -- to which the County repeatedly objected before and throughout October 2012 on the grounds the request was "overbroad, and outside the scope of discovery under CR 26(b)(1) [*i.e.*, protecting attorney work product] and privileged under RCW 42.56.240 [*i.e.*, protecting ongoing criminal investigations]" CP 200-201, 718. When counsel for the parties conferred repeatedly on discovery before October 2012, Dalsing's counsel never disputed the validity of the County's objections against producing prosecutor and investigator email. *See* CP 326, 586, 718-19, 725-26. Thus, when witness Ames met with two of the County's defense attorneys and their paralegal regarding the civil suit on October 16, 2012, there was no discussion of his email communications with prosecutors. CP 715, 718. On February 7, 2013, Ames met again with County attorneys to prepare for his deposition and, though emails still were not discussed, Ames was provided written deposition guidelines that cautioned him that if during his deposition his employer's counsel advised him not to answer and he felt "the advice was erroneous," he should "request a break to confer with counsel." CP 719. *See also* CP 660, 716.

A week later, on February 14, 2013, Dalsing's counsel questioned Ames for over six hours without objection about his computer forensics

work leading up to Dalsing's original criminal charges and his conclusions based on his limited information. *See e.g.* CP 203-220, 662-74, 719, 728-746. When Dalsing's counsel demanded what prosecutors had "instructed" or "informed" their investigating detectives about preparing the State's case, CP 204-05, the County repeated its earlier discovery objections and advised Ames not to answer.¹ *See id.* *See also e.g.* CP 585, 735, 738. Ames complied and neither requested a break to meet and confer about this advice as he had been instructed earlier, nor otherwise expressed any concern about that advice. *Id.* *See also e.g.* CP 585-86.

When Dalsing's counsel asked what Ames had reviewed in preparation for his deposition, Ames made no mention of emails. CP 741. Thus, when specifically asked about email with prosecutors, Ames testified only that he thought there "was maybe only one or just a couple" and that they "would have been in June 2011 to the best of my recollection." CP 741-42. When Ames then responded to plaintiff's counsel with his own question about whether those emails had been requested by plaintiff before his deposition, Dalsing's attorney admitted he did not know and that "I need to

¹ Of the questions Ames was advised not to answer, only two did not involve attempts to obtain attorney work product communications from prosecutors to their investigating detectives -- and neither were the subject of Dalsing's discovery motion. *See* CP 204-05. Specifically, the first of the two addressed any assistance other detectives had provided Ames, *see* CP 204, and was resolved by the County agreeing and then providing Dalsing on February 27, 2013, the communications between the detectives. *See* CP 249, 294, 319. The second concerned an objection to plaintiff's counsel's examining Ames with an exhibit the attorney could only provide from his computer, which also was resolved during the deposition. *See id.*; CP 665-666.

go back and see what requests were made." CP 742. In this way, defense counsel learned for the first time during Ames' deposition that Dalsing disputed the County's objections to email production -- indeed disputed them adamantly enough that one of her counsel during the deposition repeatedly invited defense counsel to "step outside" over its work product objections. CP 228. In any case, the parties thereafter agreed the County would provide Dalsing all emails sent between the detectives who were conducting her criminal investigation and a log of the privileged emails -- such as those between deputy prosecutors and Ames in the criminal case -- that would not be provided. CP 249, 772. On February 27, 2013, a week after the adjourned deposition of Ames, the County produced the emails between the detectives in time for Detective Heishman's scheduled deposition and any completion of Ames' continued deposition. *See* CP 319.

On March 8, 2013, Dalsing brought a CR 26(b)(4) motion to compel the County to have its employee Ames "answer questions concerning communications with ... Deputy Prosecutors Kooiman and Lewis re: the criminal investigation, between September 10, 2010, and July 20, 2011 [sic] related to the criminal prosecution of Lynn Dalsing." *See* CP 121 (emphasis added). The motion also sought an order compelling the County to produce "emails between the Pierce County Prosecutor's Office (Criminal Division) and Detectives Heishman, Ames and/or any and all

other police personnel ... concerning the investigation of facts related to the prosecution of Lynn Dalsing, for in camera review." *Id.* (emphasis added). The County opposed the motion. *See* CP 305. Plaintiff Dalsing did not request attorney's fees. *See* CP 132.

C. WITNESS AMES UNILATERALLY FILES *ULTRA VIRES* RESPONSE TO PLAINTIFF'S MOTION TO COMPEL AND MOVES TO SEAL PROSECUTORIAL MENTAL IMPRESSION DOCUMENTS IN ONGOING CRIMINAL INVESTIGATION

After his February 2013 deposition, Ames consulted his own previously retained private attorney. CP 515-16. Ames thereafter concluded the County's objection to discovery of "my email communications that support my testimony is not in my best interest" and that advising him to "remain silent about my contact with the deputy prosecutors in the criminal matter is also contrary to my interests" because -- even though he is not a party -- he wanted to prove "I did not do the things she claims I did" and thereby to persuade "Dalsing [to] amend her complaint, striking her allegations against me" as the County's agent. *See id.* *See also* CP 647.

Accordingly, four days after plaintiff filed her motion to compel, non-party Ames on March 12, 2013, unilaterally filed a "Declaration on Lynn Dalsing's Motion to Compel" in which he stated he was "willing and able to testify to matters not privileged" about his employer Pierce County. *See* CP 265-66 (emphasis added). *See also* CP 366. Ames' surprise *ultra vires*

declaration, however, did not advocate a particular outcome on Dalsing's motion or claim the County's attorney had made any representations to him about disclosure of the emails but simply sought "the guidance of the court[.]" CP 265-69. He attached to this declaration his emails with other detectives (which the County had already produced to Dalsing, *see* CP 249, 319), and a privileged June 2011 email chain between Ames and Deputy Prosecuting Attorney (hereinafter "DPA") Kooiman reflecting the latter's legal opinions and mental impressions. *See* CP 268-69. Ames had obtained these emails by copying them from his County email account, sending them to his home email address, and then delivering them to his private attorney. CP 717. These emails were identified in the County's exemption log provided two days later pursuant to its prior agreement with plaintiff Dalsing. CP 319, 341-43.

Accompanying his declaration was Ames' "Motion for Order Permitting Documents to Be Filed Under Seal (GR 15)," which asked the Court to receive for "in camera review" the emails already identified in plaintiff's March 8, 2013, motion to compel "in camera review," and acknowledged by the County -- as early as February 22, 2013 -- to be documents that either would be produced to plaintiff or identified in a privilege log. *See* CP 121, CP 249, 285, 319, 772. Again, Ames took no position on discovery

but "defer[red] this matter to the court for a ruling on the scope of any applicable privilege or work product." CP 285.

On March 22, 2013, the County opposed the motion to seal because, among other things, it "did not comply with CR 26(i)" because "the movant's attorney has not met and conferred about her motion."² CP 293-94, 300. On March 25, 2013, Ames' personal attorney, Joan Mell, responded in a declaration with the argument that CR 26 did not apply to Ames' motion to seal because the former controls a "motion to compel discovery or obtain protection" and instead "Ames is responding to Lynn Dalsing's motion to compel" only. *See* CP 365 (emphasis added). Though Ames' attorney's declaration admitted she had not provided the CR 26(i) certification, it asserted she at least had discussed "the subject of his motion" with the County sometime after it was filed. CP 365-66. On April 5, 2013, without addressing the County's CR 26(i) objection, the trial court granted Ames' motion to seal. *See* CP 384-88.

On April 22, 2013, the trial court ordered Dalsing's pre-existing Motion to Compel be "GRANTED in part and DENIED in part," and sealed the emails the County had submitted for *in camera* review in response to Dalsing's motion. *See* CP 390, 420, 455. Specifically, the trial court or-

² The County's response also confirmed that, as it had promised, it had provided Dalsing -- along with its response in opposition to Ames' motion to seal -- the "Emails between the detectives" as well as the County's privilege log. CP 294, 329-60 (emphasis added).

dered the County provide to Dalsing Ames' case-related communications with deputy prosecutors because it held -- without reference to the record -- that even if they were "arguably 'work product,'" Dalsing had demonstrated an unspecified substantial need for them. CP 397. The order did not find the County's work product objections were overcome by the witness Ames' expressed willingness to testify to matters not privileged, by his motion to seal emails the County had already disclosed to plaintiff Dalsing or listed in its privilege log, or by anything Ames had submitted in response to Dalsing's motion to compel. *Id.*³ The County's timely motion for reconsideration of the order compelling discovery was directly opposed by Ames' counsel and ultimately denied by the trial court despite the County's assertion of the protections for work product and for open criminal investigations and prosecutions. CP 463, 466, 472, 635, 769.

To preserve its right to appellate review of the otherwise irreversible compelled disclosure of prosecutorial work product during an ongoing criminal matter, the County timely filed notices for discretionary review of the pertinent discovery orders. *See* CP 525, 639, 802, 811.

³ Two days after that ruling, and before the County could file its notice for discretionary review or seek a stay from this Court, Ames inexplicably *sua sponte* filed a second "Declaration on Lynn Dalsing's Motion to Compel" placing directly into the record both police reports that already had been provided to Dalsing as well as a prosecutor's protected work product email containing attorney mental impressions. *See* CP 427-28, 451-54.

D. TRIAL COURT AWARDS JUDGMENT AGAINST COUNTY FOR WITNESS AMES' PRIVATE ATTORNEY FEES AND COSTS

On May 15, 2013, witness Ames moved to have its employer Pierce County pay \$22,295 for his private attorney fees and costs "in this matter" based on its supposed "statutory and code obligations to its employees." *See* CP 479, 485-87, 496, 516. In opposition, the County's briefing noted that no such statutory or code obligation existed to compel the use of public funds to pay Ames' private counsel. *See* CP 571. Though on June 14, 2013, the trial court declined to grant Ames' motion, it *sua sponte* suggested he move instead under discovery rules CR 26 and 37 and offered him the opportunity to do so. *See* 6/14/13 VRP 53-56; CP 635, 645-46.

Pursuant to the trial court's suggestion, on July 2, 2013, witness Ames moved under discovery rules CR 26 and 37 for \$4,554 in fees and costs that he now claimed were "incurred bringing his Motion for Order Permitting Documents to Be Filed Under Seal." CP 645. He did so without addressing: 1) his previous argument, at the time he sought that order, that CR 26 did not "apply to Det. Ames' motion to file records under seal," *see* CP 365; or 2) that he had not requested any particular outcome on Dalsing's motion to compel but only sought "the guidance of the court" and "defer[red] this matter to the court for a ruling on the scope of any applicable privilege or work product." CP 265-69, 285. As with his earlier

motion to seal, Ames' new motion for fees and costs under the discovery rules again failed to comply with those same discovery rules' requirements under CR 26(i) for an attorney conference and certification. *See* CP 723.

As part of his second attempt to have the County pay his private counsel, Ames for the first time claimed that before his February 2013 deposition he had met with the County's defense counsel in October 2012 and discussed the criminal prosecutor's emails and supposedly was told by defense counsel those emails were "exculpatory regarding my involvement in the case" and that the County "would see to it that it was turned over as part of discovery." CP 632-33. He claimed this now despite contemporary records showing the County at the time had consistently objected to such production, *see* CP 201, 718, as well as despite Ames' own deposition testimony wherein he failed to mention those emails as being among the matters he had reviewed in preparation for his deposition. *See* CP 720, 741. Though Ames' new allegation about these supposed representations to him was legally irrelevant, it was directly disputed by the opposing sworn declarations of County attorneys who had participated in the October and other meetings with him. *See* CP 715-19. In reply, Ames' version of facts evolved to claim it was instead sometime "after" his October 2012 meeting with County defense counsel that he actually had electronically provided the email and discussed it by telephone with one of the County's

attorneys -- but still declined to address why he had not disclosed at deposition the emails he now claimed to have reviewed beforehand. *See* CP 758.

The only factual submissions provided to support Ames' \$4,554 request for fees and costs was Ames' own declaration and that of his personal attorney Mell. *See* CP 652, 682. Ames' declaration simply made the conclusory statement that the dates, category of legal work, supposed time involved, and hourly rate he was charged for the alleged "fees and costs in this matter" had been "incurred." CP 656-58. He did not provide any factual foundation for those conclusory statements nor allege those fees and costs "in this matter" were all related to his March 12, 2013, motion to seal. In turn, without referring to Ames' declaration, his counsel's declaration merely listed the claimed hourly rate she charged Ames for both her and her paralegal, claimed without evidentiary support that she "believes [they are] lower than the rates paid by the county for services" paid to other private counsel in another matter, and summarily asserted her similarly conclusory statement that all the "fees and costs in representing Det. Ames are \$4,554, for legal services and costs incurred on Det Ames' Motion to Seal under CR 26." CP 683. Neither Ames' nor his counsel's declaration identified a factual foundation for the amount requested, such as accom-

panying contemporary billing or other records. Indeed no such documentation was ever provided to the trial court.

In opposition, the County argued: 1) Ames again had failed to conduct the required CR 26(i) conference prior to bringing his CR 26 and CR 37 motion for fees and costs; 2) the discovery rules do not authorize such an award to non-party witnesses who neither file nor resist a discovery motion -- especially since the County's opposition was "substantially justified;" 3) Ames provided no evidence proving the claimed "services were essential ... and if there were any duplicative or unnecessary services ... and if the hourly rates were reasonable" as required by *Eugster v. City of Spokane*, 121 Wn. App. 799, 816, 91 P.3d 117 (2004), *rev. denied*, 153 Wn.2d 1012 (2005); and 4) disproved Ames factual assertions regarding his claimed fees and costs. CP 704-14. As to the latter, the County noted Ames' alleged December 2012 "conference" for which he sought an award predated his February 2013 deposition and his Dalsing-related contact with his private counsel, and that his counsel's attachments showed the County actually paid local outside counsel for similar discovery representation \$50 less per hour for both legal and paralegal work than the rate demanded by Ames' counsel here from the County. *Compare* CP 683 with CP 699, 713.

Ames' only declaration in response again ignored the absence of a factual foundation for the amount he sought and merely reiterated his contested factual disputes over the County's attorneys' irrelevant pre-deposition statements to him. *Compare* CP 586, 718 *with* CP 757. His brief, however, increased his demand to \$4,749.99 by unilaterally substituting -- again without explanation or cited factual support -- a larger charge for another supposedly longer but previously undisclosed meeting with his attorney Mell that allegedly was held after his February deposition. *See* CP 752. Neither the brief -- much less any evidentiary submission -- explained why Ames originally had sought compensation for an earlier unrelated legal "conference," why he had failed to list the new previously unmentioned and undocumented larger charge for a later, longer, and supposedly pertinent meeting with counsel, or why he had made this substitution exclusively through his brief rather than by sworn declaration and contemporary record. *Id.*

On July 22, 2013, the trial Court granted "non-party witness" Ames' motion for the full revised amount of \$4,749.99. CP 762, 767. The order adopted all Ames' disputed allegations regarding supposed statements of defense counsel without explaining either their legal relevance or that they had been directly contradicted by the other parties to those supposed communications and by Ames' own deposition. CP 763-64. Likewise, the

trial court awarded the entirety of the \$4,749.99 amount sought by Ames by stating that the "documentation is adequate" but without explaining how this was so in the absence of competent evidence and without acknowledging or applying the legal standard for proving attorney fees and costs. CP 767.

Because, among other things, the claimed hourly rate was refuted by the only evidence presented by either party on the correct market rate for this type of work while the requested substitution of a different charge for a different meeting was not supported by any evidence, the County again objected when non-party Ames then noted for presentation a judgment order on his award. CP 772. Ames' response was to file his own declaration stating that the newly revealed meeting his brief had substituted had been billed to him -- but did not provide any documentary support, claim the substituted meeting even concerned the Dalsing litigation, or was incurred as part of his motion to seal which was the sole ground for his award. CP 777-78. His declaration also repeated the unsupported hearsay opinions of his counsel and paralegal and included his own selective lay research supporting an hourly rate based on cases involving far more complicated issues that were handled by larger firms. *Compare id. with* CP 783-84. The County objected and moved to strike the latter on the grounds, among other things, that Ames provided no competent admissible evidence of the

reasonable hourly rate for attorneys and paralegals on such issues. *See* CP 780-85.

On August 5, 2013, the trial court -- without ruling on the County's motion to strike and without explanation -- entered judgment for the largest amount Ames had requested: \$4,749.99. *See* CP 786. On August 13, 2013, Pierce County filed this timely appeal. *See* CP 789. *See also* RAP 2.2(a)(1); *State v. Heiner*, 29 Wn.App. 193, 627 P.2d 983 (1981) (reviewing order concerning a non-party witness).

E. COURT OF APPEALS DENIES DISCRETIONARY REVIEW OF DISCOVERY ORDER BUT RULES TRIAL COURT ERRED TO EXTENT IT ORDERED DISCOVERY OF PROSECUTOR WORK PRODUCT COMMUNICATIONS TO DETECTIVES AND THAT TRIAL COURT SHOULD CONSIDER DISCOVERY STAY DURING INVESTIGATION

As to the original underlying trial court orders obtained by plaintiff Dalsing compelling discovery of prosecutorial work product that were the basis for the award to Ames, on December 18, 2013, Commissioner Mary Neel of this Court denied the County discretionary review on the ground: "At this juncture, Pierce County has not demonstrated obvious or probable error that warrants interlocutory review" under RAP 2.3(b). *See* 12/18/13 Comm. Ruling at 12 (emphasis added).⁴ In so doing, however, the ruling

⁴ On March 25, 2014, the County's motion to modify the ruling denying discretionary review of the trial court's order compelling work product discovery was denied. *See* 3/25/14 Order Denying Motion. As the Court Administrator/Clerk noted, that "order will become final unless counsel files a motion for discretionary review within thirty days

found "[t]o the extent the trial court compelled certain discovery based on its erroneous determination that [DPA] Kooiman is not immune, it also erred." *Id.* at 9 (emphasis added). The ruling explained discovery would be proper, however, to the extent it instead concerned communications reflecting whether "the detectives provided incomplete information to the prosecutors." *Id.* (emphasis added).

In short, the ruling recognized the trial court had erred in ordering discovery of communications from the prosecutors to the detectives which contained what the trial court correctly characterized as their "mental impressions." *See* CP 397. These protected prosecutor work product communications were the same as those that the order awarding Ames' costs and attorney fees had previously held: 1) were not properly the subject of the County's objections at Ames' deposition, *see* CP 204-05, 765-66; 2) were properly submitted by Ames for filing with the trial court, CP 397, 427-28, 452-54, 765-66; and 3) were a proper basis for sanctioning the County's opposition to their disclosure because its claim of protection was not "substantially justified." *See* CP 397, 427-28, 452-54, 765-66.

from the date of this order. RAP 13.5(a)." *See* 3/25/14 Ct. Adm in. Letter. *See also e.g. Fellows v. Moynihan*, 175 Wn.2d 641, 649-50, 285 P.3d 864 (2012) (granting petition for review of discovery orders after the court of appeals commissioner, and then a panel of judges, denied discretionary review). To protect its right to obtain review of an otherwise irremediable denial of its work product privilege and intrusion into the integrity of an ongoing criminal prosecution, the County will seek discretionary review of that order.

As to the County's alternative argument "to postpone turning over evidence related to the past and ongoing criminal investigation," the Commissioner agreed the "County makes a strong argument that Dalsing cannot have it both ways, compelling the County to provide discovery but simultaneously declining to answer questions." *See* 12/18/13 Comm. Ruling at 15. Hence, the Commissioner ruled the trial court should "conduct this analysis." *Id.* at 15-16. This issue had been raised by the County but disregarded when the trial court ordered that discovery. *See e.g.* CP 463, 466, 472, 635, 769.

III. ARGUMENT

A. TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES AND COSTS TO NON-PARTY AMES

An appellate court "review[s] a trial court's sanctions for discovery violations for abuse of discretion." *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). A trial court abuses its discretion when its "decision is manifestly unreasonable or based upon untenable grounds[.]" *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 348, 16 P.3d 45 (2000). *See also Eugster*, 121 Wn.App. at 814 (*quoting Mayer v. City of Seattle*, 102 Wn.App. 66, 79, 10 P.3d 408 (2000)). Thus, a "ruling based on an error of law constitutes an abuse of discretion." *King*, 104 Wn.App. at 355.

As shown below, the holding of the trial court that "CR 26 and CR 37 authorize an award of attorney fees and costs to Det. Ames," CP 767, was based on numerous errors of law and thus was an abuse of discretion.

1. CR 26 Does Not Support Judgment Award to Ames

The language of CR 26(c) is specific: it provides only that "upon motion ... by the person from whom discovery is sought ... the court ... may make any order which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense ..." (emphasis added). This can authorize orders imposing limitations on discovery or on the conditions under which discovery may occur. *See* CR 26(c)(1)-(7). On the other hand, CR 26(c) provides "if the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order any party or person provide or permit discovery." *Id.* Thus, pursuant to its express language, CR 26(c) has no application unless "the person from whom discovery is sought" successfully seeks "protect[ion]" ... from annoyance, embarrassment, oppression, or undue burden of expense" and does so presumably through a "motion for a protective order." *Id.*

Here, the discovery submission for which sanctions were awarded -- *i.e.*, Ames' motion to seal -- neither sought "protect[ion] ... from annoyance, embarrassment, oppression, or undue burden or expense" caused by

any County discovery request nor did he do so by a "motion for a protection order." Indeed, Ames' personal attorney stated under oath that CR 26 did not apply to Ames' motion to seal because that rule only controls a "motion to compel discovery or obtain protection" and instead "Ames is responding to Lynn Dalsing motions to compel." *See* CP 365 (emphasis added). Ames' motion sought to file and then seal discovery that he was submitting *sua sponte* to the trial court. The record is clear the County did not file an unsuccessful "motion for a protective order" that Ames was forced to resist after he was deposed. *See e.g.* CP 326-27. Indeed, Ames expressly and repeatedly asserted his unilateral submissions simply were responding to Dalsing's pursuit of a motion to compel him to testify and compel the County to produce prosecutors' communications with him. *Compare* CP 121 (Dalsing moves to compel Ames to "answer questions concerning communications ... with Det. Debbie Heishman and with Deputy Prosecutors Kooiman and Lewis" and the County to produce "emails between the Pierce County Prosecutor's Office (Criminal Division) and Detectives Heishman, Ames and/or any and all other police personnel ... concerning the investigation of facts related to the prosecution of Lynn Dalsing, for in camera review") *with* CP 285 (Ames' "motion under GR 15 and LGR 15 [is] in support of sealing copies of emails that Detective Ames submits for *in camera* review with his declaration filed on

Lynn Dalsing's Motion to Compel Discovery") (emphasis added); CP 265 ("Ames' Declaration on Lynn Dalsing's Motion to Compel" is offered "on Lynn Dalsing's motion to compel discovery") (emphasis added). Ames' submissions made clear he was requesting no particular outcome on Dalsing's motion to compel and sought only "the guidance of the court" and therefore "defer[red] this matter to the court for a ruling on the scope of any applicable privilege or work product." CP 265-69, 285.

CR 26 does not support awarding fees to a non-party who unilaterally moves to seal materials he has produced to the trial court in response to a party's existing motion to compel discovery from and about him over another party's privilege objections, and who seeks no other relief. Because CR 26 only concerns "protective order[s]" for the purpose of "protect[ing] a party or person from annoyance, embarrassment, oppression, or undue burden of expense," it cannot be used to finance a non-party's intervention that seeks only an order to seal material he submits so as to obtain "guidance."

2. CR 37 Does Not Support Witness Ames' Judgment

Ames' judgment also does not come within CR 37(a)(4) because -- like CR 26(c) -- its language is specific. It conditionally authorizes an order only against "the party ... whose conduct necessitated the motion" compelling discovery, and then only to "pay to the moving party the reasona-

ble expenses incurred in obtaining the order, including attorneys fees, un-
less the ... opposition to the motion was substantially justified or ... other
circumstances make an award of expenses unjust." CR 37(a)(4) (emphasis
added).

Here, Pierce County's objections to discovery did not "necessitate[]"
that Ames file a "Motion for Order Permitting Documents to Be Filed Un-
der Seal (GR 15)." CP 285. This is especially so where: 1) an actual mo-
tion to compel had already been filed by plaintiff Dalsing; 2) Ames ex-
pressly denied his motion to seal was a discovery motion; and 3) Ames
requested no particular outcome. *See* CP 121, 265-69, 285, 365. Further,
those County deposition objections were proper and directed at protecting
prosecutors' work product communications to their investigating detec-
tives -- a protection with which this Court's Commissioner later agreed.
See CP 204-05; 12/18/13 Com. Ruling at 9. Likewise, Ames was neither a
"party" nor did he bring a motion to compel as expressly required by CR
37(a)(4), but filed a motion to seal solely as a witness unilaterally respond-
ing to Dalsing's pre-existing motion to compel -- and even then did so only
to obtain "guidance." CP 285, 365.

Similarly, Ames' declaration -- whose attachments his motion sought
to seal and for which he also was awarded costs and fees -- was not at the
time even claimed necessary to the trial court's ruling on Dalsing's motion

to compel. Indeed, before it granted Dalsing's discovery motion, the same work product emails that Ames *sua sponte* submitted already had been produced by the County pursuant to the trial court's order for an *in camera* review. Compare CP 451-54 with CP 343, 8__ [4/4/14 Supp. Designation of CP's (Sub 88 at 2)]. Instead, Ames' declaration merely stated he was ready to answer questions regarding matters "not privileged," did not advocate a particular outcome on Dalsing's motion and simply sought "the guidance of the court[.]" CP 266. Such was singularly unhelpful to plaintiff Dalsing's meeting her burden to demonstrate her need to discover matters that were otherwise protected. Because this declaration was unnecessary even to the issue presented by Dalsing's motion, there was no basis to impose on the County Ames' duplicative expense in drafting, filing, and arguing about his accompanying motion to seal his own declaration's attachments. This is especially so where CR 37(a)(4) instead is limited to only a "party" filing a "motion to compel."

3. Eugster Does Not Support Witness Ames' Judgment

The trial court "reject[ed] this argument" that CR 26 and CR 37 do not support its order because it found it had "authority under *Eugster* [*v. City of Spokane*] to award attorney fees and costs to Det. Ames." CP 765. However, even the trial court noted *Eugster* actually held "trial courts have the authority under CR 26(c) to award attorney fees to a nonparty

who has prevailed on a motion for protective order through the application of CR 37(a)(4)" when opposing a subpoena duces tecum. *Id.* (emphasis added). The record is uncontested Ames never opposed a subpoena duces tecum or "prevailed on a motion for protective order through the application of CR 37(a)(4)," but only sought an "Order Permitting Documents to Be Filed Under Seal (GR 15)" -- which he expressly argued was not a discovery motion. *See* CP 285, 365. *Eugster* never considered awarding attorney fees for a nonparty's costs unrelated to compelling -- or seeking protection from -- discovery, and that did not concern CR 26 or CR 37. *See Eugster*, 121 Wn.App. at 805 (non parties successfully "filed motions to quash the subpoenas"). Again, at the time of filing the motion at issue here, Ames expressly denied he had filed "a motion to compel discovery or obtain protection" and instead claimed only to have submitted a "motion to file records under seal" that merely was "responding to Lynn Daling's motion to compel." CP 365 (emphasis added).

The trial court explained its fee order was based on its conclusion:

Det. Ames sought relief only after he was improperly instructed by Pierce County's counsel not to answer reasonable deposition questions and not to produce legally discoverable documents. Only after he and Plaintiff Dalsing sought a court order did Pierce County produce copies of his emails to Det. Heishman and a privilege log. The County filed a motion for a protective order, which Det. Ames resisted.

See CP 765-66. The trial court was mistaken in each of these conclusions. First, as a matter of law, the County's objections to disclosure of prosecutor mental impressions they conveyed to their investigators were not made "improperly." *See* 12/18/13 Com. Ruling at 9; CP 204-05. *See also* discussion *infra* at 28-29. Second, the record is devoid of any County instruction to Ames "not to produce legally discoverable documents." Third, the County "produce[d] copies of his emails to Det. Heishman" and agreed to provide a privilege log before -- not after -- the motions of Ames or Dalsing. *See* CP 249, 319. Fourth, the record contains no Pierce County "motion for a protective order, which Det. Ames resisted."

Finally, even where a court properly concludes a party somehow "improperly" advises its agent not to answer deposition questions about protected work product, neither Ames nor the trial court identified any legal basis for an award of attorney fees and costs to the witness just because he then *sua sponte* files materials responding to the opposing party's motion to compel and for the purpose only of seeking "guidance."

4. County Objections Were Substantially Justified

As noted above, even where -- unlike here -- a party's "conduct necessitated" a motion to compel by "the moving party," CR 37(a)(4) specifically provides an award still is not proper where the "opposition to the motion was substantially justified or ... other circumstances make an award

of expenses unjust." An action is "substantially justified if it has a reasonable basis both in law and fact." *H & H Partnership v. State*, 115 Wn.App. 164, 171, 62 P.3d 510 (2003). See also *Alexander v. FBI*, 186 F.R.D. 144, 147 (D.D.C. 1999) (opposition is "substantially justified" where there is a "genuine dispute" or if "reasonable people could differ" as to the appropriateness of the action) (citing *Pierce v. Underwood*, 487 U.S. 522 (1988)). Here, though the trial court held the County's "discovery conduct" was not substantially justified because its "assertion of the work product privilege during Det. Ames's deposition and instructing him not to answer questions was not substantially justified," CP 766, this Court's Commissioner ruled otherwise. See CP 204-05; 12/18/13 Comm. Ruling at 9. Further, as shown below, the County's objection to Dalsing's motion seeking to compel its prosecutorial work product was at the very least "substantially justified" because it had a "reasonable basis both in law and fact."

First, in its ruling on Dalsing's underlying motion to compel "Ames' Emails," the trial court agreed those emails at least were "arguably 'work product'" but noted "the mental impressions of attorneys or other representatives of a party are only absolutely protected from discovery if their mental impressions are not directly at issue." CP 396-97. Because the trial court held DPA Kooiman was not immune, it concluded her mental

impressions were at issue and her emails "contain information relevant to mental impressions that are directly at issue in this case." CP 392-394, 397. However, this Court's Commissioner disagreed, ruling: "To the extent the trial court compelled certain discovery based on its erroneous determination that [DPA] Kooiman is not immune, it also erred." *See* 12/18/13 Comm. Ruling at 9 (emphasis added). Thus, the County's objections to plaintiff's improper pursuit of those prosecutorial mental impressions, *see* CP 204-05, upon which the trial court based its award of costs and fees, *see* CP 765-66, at the very least was "substantially justified" because the Commissioner's ruling confirms "it has a reasonable basis both in law and fact." It was therefore not properly subject to penalty by the trial court.

Second, as to Ames' remaining emails that instead were from detectives and reflected information they provided to prosecutors during the open criminal matter, CP 426-27, such also were "substantially justified" because there was "a reasonable basis both in law and fact" upon which reasonable people could differ as to whether they were protected. The trial court overlooked, but the record confirms, that the County long before Ames' deposition had explicitly objected to production and testimony of the emails without any opposition from plaintiff because -- among other things -- they were "outside the scope of discovery" under CR 26 and sub-

ject to the statutory protection of RCW 42.56.240 for ongoing law enforcement investigations. CP 200-01. It raised this same objection concerning the order to compel. *See* CP 463, 466, 472, 635, 769. For example, under CR 26 the trial court was authorized to mandate that discovery "not be had," CR 26(c)(1), or "may be had but only on specified terms and conditions," CR 26(c)(2), and that such a discovery "stay is most appropriate where the matter of the parallel civil and criminal proceeding or investigation is the same" since "evidence of the criminal conduct may be found in the civil discovery." *See King v. Olympic Pipeline*, 104 Wn.App. 338, 357-58, 16 P.3d 45 (2000). Again, this Court's Commissioner agreed the "County makes a strong argument that Dalsing cannot have it both ways, compelling the County to provide discovery but simultaneously declining to answer questions." *See* 12/18/13 Comm. Ruling at 15.

As a matter of law the County's opposition was at the very least "substantially justified" because: "If a rational legal mind could conclude, without the excessive strain that only self serving motions would tolerate, that the duties which the law imposes do not require production of the evidence, the dispute should be deemed genuine, the party's position would be deemed substantially justified, and no sanction would be imposed." J. Moore, 7 *Moore's Federal Practice*, §37,62 at 37-134 (3rd ed. 2013).

5. Ames' Violations of CR 26(i) Preclude Any Award

Even if the facts were different and Ames -- rather than moving to seal documents and simply seeking the Court's "guidance" -- had made his own motion to compel production of his emails from the County, he still would not have satisfied the standing requirements imposed by CR 26(i) for either such a motion or his motion for costs and fees.

Subsection "i" of Rule 26 dictates that courts "will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection." CR 26(i) (emphasis added). Such meetings are required for all motions concerning discovery. See *Amy v. Kmart of Washington*, 153 Wn.App. 846, 863, 223 P.3d 1247 (2009) ("Discovery disputes are not limited to motions for orders to compel or for protective orders. We conclude that CR 26(i) is applicable to any motion or objection with respect to CR 26 through 37"). See also *Rudolph v. Empirical Research Systems, Inc.*, 107 Wn.App. 861, 28 P.3d 813(2001) (If counsel for the parties have not conferred with respect to a motion to compel discovery, or if such motion does not include counsel's certification that the conference requirements were met, the trial court does not have discretion to entertain the motion). Hence, that counsel must have conferred applies to discovery motions seeking sanctions. *Amy, supra*.

Though "[c]ounsel for the moving ... party shall arrange for a mutually convenient conference in person or by telephone," CR 26(i), and though a motion brought under those rules "shall include counsel's certification that the conference requirements of this rule have been met," *id.*, no such certification was provided here because no such meeting was ever arranged or conducted by Ames before either his motion to seal or his motion for fees and costs. *See* CP 293-94, 365-66, 723. Because he failed to meet this requirement for both the underlying motion to seal and for sanctions, the trial court as a matter of law lacked authority to award attorney fees and costs. *See e.g. Clarke v. State Attorney General's Office*, 133 Wn.App. 767, 138 P.3d 144, *rev. denied* 160 Wn.2d 1006, 158 P.3d 614 (2006) (trial court did not have authority to hear discovery motions because movant failed to comply with pre-filing conference requirement in support of her discovery motion); *Case v. Dundom*, 115 Wn.App. 199, 58 P.3d 919 (2002) (If counsel have not conferred with respect to a discovery motion, or if such motion does not include counsel's certification that the conference requirements were met, the trial court does not have authority to entertain the motion). *But see Amy, supra.* ("failure to comply strictly with the requirements of CR 26(i)" did not preclude subject matter jurisdiction).

B. AMES DID NOT MEET HIS BURDEN OF PROVING THE AMOUNT CLAIMED

Though an appellate court also reviews "the reasonableness of an award of attorney fees and costs for an abuse of discretion," to do so it "needs to know if the services of the attorneys were reasonable or essential to the successful outcome ..., if there were any duplicative or unnecessary services ..., [and] if the hourly rates were reasonable." *Eugster*, 121 Wn.App. at 815-16 (vacating award and *citing Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)). The absence of "an adequate record to review a fee award ... will result in a remand of the award to the trial court to develop such a record" because an appellate court needs "an adequate record to exercise our supervisory role to ensure that discretion is exercised on articulable grounds." *Id.*

It is well settled then that "[i]n awarding reasonable attorney fees, a trial court should have an objective basis for the award," *see Highland School Dist. No. 203 v. Racy*, 149 Wn.App. 307, 316, 202 P.3d 1024 (2009) (*citing Bowers v. Transamerican Title Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983)), and therefore "must sufficiently explain the basis for its fee award to permit appellate review and enter findings in support of that decision." *Id.* (*citing Mahler*, 135 Wn.2d at 435) (emphasis added). To enable the trial court to do this the "party seeking fees has the burden

of proving that which constitutes reasonable fees," and "must provide contemporaneous records documenting the hours worked." *Johnson v. State, Dept. of Transp.*, 177 Wn.App. 684, 699, 313 P.3d 1197 (2013) (citing *Mahler*, 135 Wn.2d at 434). Here, neither Ames nor the trial court met these requirements.

Specifically, the trial court's only explanation of Ames' supposed fee "documentation" and the basis for the amount it awarded him was:

Det. Ames has submitted a declaration identifying the attorney fees and costs he incurred in preparing discovery pleadings. This documentation is sufficient for the Court to determine the amount of time spent, the tasks performed and the hourly rate Det. Ames's attorney charged for the tasks performed. The documentation is adequate.

The requested fees are reasonable. The hourly rate of \$325 is consistent with the market rates in this legal community for an attorney of Ms. Mell's experience. The time incurred for addressing the work product privilege issues was reasonable and necessary.

CP 766-67. Again a review of the record offers no factual support for these conclusions -- much less a factual basis to make the required analysis of whether the services were "reasonable or essential to the successful outcome," if any were "duplicative or unnecessary," and if "hourly rates were reasonable." Further, the required "contemporaneous records documenting the hours worked" also are absent from the record, as are the required "findings in support" of the amount awarded.

It has been shown above that the trial court erroneously relied on *Eugster*, 121 Wn.App. 814, as support for its judgment for fees and costs to non-party Ames, and it is shown below the trial court thereafter ignored that decision in setting the amount of its award. Hence, the only similarity between this case and *Eugster* is that in both cases the trial courts committed reversible error by having "merely concluded the attorney's fees sought ... are reasonable and necessary." *Eugster*, 121 Wn.App. at 816.

1. Attorney's Billed Services Were Not "Reasonable or Essential to the Outcome," and Were "Unnecessary"

First, for the reasons described in section "A" above, no fee was "reasonable or essential to the successful outcome" of Dalsing's discovery motion.

Second, the record also nowhere meets Ames' burden of proving the award which the County was ordered to pay reflected only "reasonable or essential" services for his "Motion to Seal" -- rather than instead related to entirely different issues for which Ames had earlier unsuccessfully sought to have the County pay. *Compare* CP 656-58 with CP 479, 485-87, 496. In fact, Ames' declaration -- unsupported by the required contemporary documentation or any other evidence -- simply states the requested fees and costs were "incurred ... in this matter," CP 656 -- the same language he used when unsuccessfully seeking all his attorney's fees in the case, *see*

CP 516 -- and nowhere even claims he incurred all the identified fees and costs instead as part of his motion to seal.

For example, the County proved Ames improperly included in his initial request for fees a 15 minute December 8, 2012, "Conference with Client" when in fact it pre-dated Ames' February 14, 2013, deposition and therefore was a fee incurred before Ames allegedly sought private counsel for this case. *Compare* CP 657 *with* CP 515-16. Though Ames' responsive brief thereafter admitted he was not entitled to fees for the December 8, 2012, meeting because it concerned "a separate matter, not this matter," his brief without explanation or any external support in the record simply substituted for it a new longer one hour meeting not previously disclosed in the billings described by Ames -- and thereby increased his request to \$4,749.99. CP 752 (emphasis added). Though no explanation was offered as to how this longer meeting somehow had been suddenly discovered and Ames' brief nowhere cited any evidence for that meeting or even an allegation it related to Ames' motion to seal, *id.*, the trial court without explanation accepted the new larger amount, added it to the other unproven fees, and ordered the County pay it. *See* CP 767, 786-87.

Third, those services were "duplicative or unnecessary" as to Dalsing's pre-existing discovery order -- which at the time was all Ames argued his submissions concerned. *See* discussion *supra* at 24-25. *See also e.g.* CP

365. The trial court's later order granting Ames' attorney fees stated Ames' motion was helpful on Dalsing's motion because "Ames was in possession of information and evidence that the Court found important in rendering a decision on the discovery motions -- information that Plaintiff Dalsing does not know and has no ability to present to the Court." See CP 766. This overlooked that Ames' *sua sponte* submission was entirely unnecessary because, before Dalsing's motion to compel was granted, the trial court not only could but did obtain from the County for its *in camera* review the very same emails that Ames provided. Compare CP 451-54 with CP 343, 8__ [4/4/14 Supp. Designation of CP's (Sub 88 at 2)].

2. Hourly Rates Demanded Were Not Proved Reasonable

The trial court's order awarding attorney's fees also summarily concluded: "The requested fees are reasonable. The hourly rate of \$325 is consistent with the market rates in this legal community for an attorney of Ms. Mell's experience." CP 767. However, neither the order nor the record contains any explanation or even a factual statement claiming to compare -- much less provide evidentiary support for -- how \$325 per hour reflects "Ms. Mell's experience." *Id.*; CP 683-84; 777. Likewise, as shown below, the record provides no evidence that \$325 per hour for Ames' attorney and \$150 per hour for a paralegal was reasonable for discovery issues.

The only admissible evidence of record for the market rate in the legal community for comparable work was that of the attorney and paralegal the County had retained for Ames, and that legal representation from a well respected firm instead charged a rate of \$50 less an hour for both counsel and paralegal fees. *Compare* CP 683 *with* CP 699 (Eisenhower Carlson Personal Services Agreement charging \$275 per hour for counsel, \$100 per hour for paralegals to represent Ames on discovery issues). The declaration of Ames' counsel Mell, nowhere mentioned as a basis for the trial court's award of costs and fees, does not provide support for the court's order but only baldly states her demonstrably erroneous "belie[f]" for unstated reasons that her hourly rate was less than the rates charged by outside counsel whom the County has paid in the past. *See* CP 683. *See also e.g.* ER 602 ("witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"); ER 1101(a) (rules of evidence apply to all but specifically enumerated actions and proceedings in the state courts). As shown above, the only actual evidence is directly to the contrary. *See* CP 699.

After the order, Ames did submit his own inadmissible lay opinion on the reasonableness of the hourly rate charged by his attorney. *See* CP 777. This declaration, however, provided no foundation that allowed him to

opine about the comparability of his attorney's hourly rates, experience, reputation, or ability with those of other attorneys in the local community for discovery issues. Indeed, even an expert's opinion "must be based on facts" so that even an "opinion of an expert which is simply a conclusion or is based on an assumption is not evidence." *Theonnes v. Hazen*, 37 Wn. App. 644, 648-649, 681 P.2d 1284 (1984). Here no "fact" that could support even an actual expert's opinion was provided.⁵ See e.g. *State v. Lewis*, 141 Wn. App. 367, 389 (2007) (court properly excluded expert only prepared to testify in terms of generalities); *Torno v. Hayek*, 133 Wn. App. 244 (2006) (proper exclusion of two experts who based their opinions largely upon plaintiff's own description of her condition).

⁵ Ames' after the fact, late declaration described only unspecified hearsay contact with unidentified "attorneys" in his area and a paralegal-assisted "case law" research into fee awards for cases that were not demonstrated to have any similarity to the type of legal services his lawyer performed in this case. CP 777-78. For example, Ames offered as comparable fees those awarded to counsel for approximately two years of work that resulted in a \$96.885 million settlement in a class action litigating benefits the Microsoft Software Corporation should have provided to a subset of its employees (*Vizcanino v. Microsoft Corp*, 290 F.3d 1043(2002)); fees awarded to lead counsel after a \$268,000 jury verdict in a §1983 action for a Fourth Amendment violation that also included state law claims associated with claims of assault, battery, and false arrest (*Bradford v. City of Seattle*, 2008 WL 2856647) (associate counsel billed at \$200 per hour); and fees awarded following \$60,000 jury verdict following a six-day trial in an civil rights action related to an officer's use of a taser (*Bonner v. Normandy Park*, 2009 WL 302278). *Id.* Because Ames' unfounded lay opinions were inadmissible under ER 702 and 703, they could not be properly considered and were the subject of the County's motion to strike. CP 780-85. Without ruling on the County's motion to strike, the trial court without explanation entered judgment for the largest amount Ames had requested of \$4,749.99. CP 786.

Further, Ames' improper lay declaration addresses just one of RPC 1.5's nine factors that should be considered in determining the reasonableness of a fee:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; and (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

(Emphasis added). Thus, in addition to Ames' motion to seal being duplicative and unnecessary, Ames' lay and hearsay based declaration provided no factual basis upon which to make the award he demanded from the County.

Finally, though the trial court ruled the Ames' "declaration" alone constituted "documentation ... sufficient for the Court to determine the amount of time spent, the tasks performed and the hourly rate Det. Ames's attorney charged for the tasks performed" and therefore was "adequate," as a matter of law "Counsel must provide contemporaneous records docu-

menting the hours worked." *See Johnson*, 177 Wn.App at 699 (*quoting Mahler*, 135 Wn.2d at 434). Here, neither Ames' nor his counsel's declaration identified a factual foundation for the amount requested -- much less supplied the required "contemporaneous records." Ames' own declaration simply stated the dates, category of legal work, supposed time involved, and the hourly rate he was told he was being charged for the alleged "fees and costs in this matter" that he had "incurred." CP 656-58. He provided no factual foundation for those conclusory statements or ever alleged those fees and costs were all even related to his March 12, 2013, motion to seal. *Id.* Likewise, without referring to Ames' declaration, his counsel Mell's declaration merely listed the claimed hourly rate for both her and her paralegal, claimed without evidentiary support she "believes [they are] lower than the rates paid by the county for services" paid to other private counsel in another unidentified matter, and summarily stated a conclusory assertion that all the "fees and costs in representing Det. Ames are \$4,554, for legal services and costs incurred on Det Ames' Motion to Seal under CR 26." CP 682. Thus the trial court abused its discretion in awarding the amount sought because "Courts should not simply accept unquestioningly fee affidavits from counsel." *Johnson*, 177 Wn.App. at 699 (*quoting Mahler*, 177 Wn.App. at 434-35).

3. No Findings Support the Attorney Fees Award

Though the trial court made "FINDINGS OF FACT RELEVANT TO DISCOVERY MOTION," CP 763-64, its order contained no finding of fact in support of the fee award. In order to "support a fee award" our Supreme Court has expressly held that "findings of fact and conclusions of law are required to establish such a record." *Mahler*, 135 Wn.2d at 435 (emphasis added). *See also Highland School Dist. No. 203*, 149 Wn.App. at 316. The reason the order lacks factual findings to support the amount awarded is because, as has been shown above, there was no evidence that all the fees and costs awarded actually related to Ames' motion to seal, that they were "reasonable or essential to the successful outcome" of his motion to seal, that they were not "duplicative or unnecessary," and that the "hourly rates were reasonable." The order also makes no reference to the legal standard for determining the amount to award as attorney fees.

Though in order to review attorney fees awards this Court "needs to know if the services of the attorneys were reasonable or essential to the successful outcome ..., if there were any duplicative or unnecessary services ..., [and] if the hourly rates were reasonable," here there is an absence of "an adequate record to exercise our supervisory role to ensure that discretion is exercised on articulable grounds." *Eugster*, 121 Wn.App. at 815-16 (citing *Mahler, id.*).

IV. CONCLUSION

Pierce County respectfully requests the Court reverse the award of attorney fees and costs to Ames because the trial court based that award on an error of law as to: 1) the applicability of CR 26, CR 37, and *Eugster v. City of Spokane*; 2) the substantial justification for the County's discovery objections; 3) the necessity of a CR 26(i) conference and certification; 4) the need for admissible evidence that those services and costs were essential, necessary, and the hourly rates reasonable; and 5) the requirements of supportive contemporaneous documentation and of findings supporting the amount awarded.

RESPECTFULLY SUBMITTED this 7th day of April, 2013.

MARK LINDQUIST
Prosecuting Attorney

s/ DANIEL R. HAMILTON
DANIEL R. HAMILTON
State Bar Number 14658
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-7746 / Fax: 253-798-6713
E-mail: dhamilt@co.pierce.wa.us

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S
OPENING BRIEF was delivered this 7th day of April, 2014, to the fol-
lowing by electronic mail pursuant to the agreement of the parties:

- Fred Diamondstone: fred@freddiamondstone.com;
jennifer@freddiamondstone.com
- Gordon Woodley: woodley@gmail.com
- Joan Mell: joan@3brancheslaw.com;
jonathan@3brancheslaw.com
- Karen Calhoun, AAG: karenc3@atg.wa.gov

s/ CHRISTINA M. SMITH
CHRISTINA M. SMITH
Legal Assistant
Pierce County Prosecutor's Office
Civil Division, Suite 301
955 Tacoma Avenue South
Tacoma, WA 98402-2160
Ph: 253-798-7732 / Fax: 253-798-6713

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR - 7 PM 4: 31