

NO. 70851-1

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

LYNN DALRING, Plaintiff
MIKE AMES, Respondent

v.

PIERCE COUNTY, a Municipal Corporation, Appellant

RESPONDENT'S BRIEF

JOAN K. MELL, WSBA #21319
Attorney for Respondent Det. Michael Ames
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2014 JUN -9 PM 2:13

ml

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii
I. INTRODUCTION.....	1
II. ISSUE STATEMENTS.....	2
(A) May a trial court sanction a prosecutor’s office when a sheriff’s department detective incurs fees and costs complying with the County’s discovery obligations?.....	2
(B) Has the trial court properly assessed sanctions as described in the court’s findings of fact and conclusions of law based upon a sufficient record?.....	2
(C) Should the appellate court also award fees and costs on appeal?.....	2
III. STATEMENT OF THE CASE.....	2
IV. LEGAL ARGUMENT.....	10
(A) County fails to Show Abuse of Discretion.....	10
(B) Det. Ames Properly Moved Under CR 26(b)(6) for Relief.....	11
(C) CR 37 Allows Sanctions Against the County For Asserting Work Product Erroneously.....	13
(D) No Substantial Justification for Withholding Discoverable Evidence.....	17
(E) Conference Requirements Offer No Procedural Protection to DPA.....	20

(F) Amount Claimed Supported by the Record.....20

(G) The Court Entered Express Findings.....22

(H) Further Evidence Justifies the Award.....22

(I) Attorney’s Fees and Costs on Appeal.....22

V. CONCLUSION.....24

TABLE OF AUTHORITIES

Page

Table of Cases

Amy v. Kmart of Washington, LLC, 153 Wn. App. 846, 223 P.3d 1247 (2009).....20

Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123 (1991).....11

Diaz v. WA State Migrant Council, 165 Wn. App. 59, 265 P.3d 956 (2011).....13

Eugster v. City of Spokane, 121 Wn.App. 799, 91 P.3d 117 (2004).....13

Fluke Capital and Management Services v. Richmond 106 Wn.2d 614, 620 (1986).....15

Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817 (2011).....18

Harris v. Drake, 116 Wn. App. 261, 65 P.3d 350 (2003).....18

In re Recall of Pearsall-Stipek, 136 Wn. 2d 255, 961 P.2d 343 (1998).....23

Lutheran Daycare v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746, 757.....15

Matter of Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996).....13

Roberson v. Perez, 123 Wn. App. 320, 96 P.3d 420 (2004).....10, 13

Rowe v. Vaagen Bros. Lumber, Inc., 100 Wn. App. 268, 996 P.2d 1103 (2000).....18, 23

State v. S.H., 102 Wn. App. 468, 8 P.3d 1058 (2000).....23

U.S. v. Columbia Broadcasting System, Inc., 666 F. 2d 364
(9th Cir. 1982).....13

*WA State Physicians Ins. Exchange & Ass'n v. Fisons
Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).....10, 19

Statutes

RCW 4.96.041.....23

Codes

PCC 2.120.010.....23

I. INTRODUCTION

Det. Ames brought to the court's attention improperly withheld evidence. The trial court appropriately exercised its discretionary authority when it sanctioned the County for intentionally withholding discoverable evidence. The involved deputy prosecuting attorney (DPA) had the requested e-mails, but chose to continue the deception initiated in the criminal action throughout these civil proceedings until Det. Ames retained independent counsel. The trial court ordered the evidence produced.

The evidence essentially concerns two pieces of relevant evidence in this wrongful incarceration case. First, an e-mail from Det. Ames to the lead detective forwarded to the criminal DPA that states Det. Ames cannot see Lynn Dalsing in or link her in anyway to a pornographic photograph that formed the basis of her incarceration. Second, the criminal DPA's response to him that she would have to disclose to the criminal defense attorney Det. Ames' aforementioned exculpatory e-mail. The criminal DPA did not timely disclose the e-mails in the criminal matter. The civil DPAs did not timely disclose the e-mails in this civil matter. The County's lengthy opening brief, besmirching Lynn Dalsing and Det. Ames, in no way detracts from its sanctionable conduct at issue here. The trial court should be affirmed for properly addressing the DPA's deception.

II. ISSUE STATEMENTS

- A. May a trial court sanction a prosecutor's office when a sheriff's department detective incurs fees and costs complying with the County's discovery obligations?
- B. Has the trial court properly assessed sanctions as described in the court's findings of fact and conclusions of law based upon a sufficient record?
- C. Should the appellate court also award fees and costs on appeal?

III. STATEMENT OF THE CASE

Lynn Dalsing, the plaintiff in this case, sat in the Pierce County Jail for over seven months on charges the prosecutor's office could not prove from Det. Ames' testimony. CP 2, 81. Det. Ames never identified Lynn Dalsing as the subject of any pornographic photographs. CP 267 - 284, 454.¹ He did not identify Lynn Dalsing or report that Lynn Dalsing appeared "naked" in any photograph with a child. Id. and CP 124 - 125. Det. Ames' clearly expressed his lack of probable cause to the lead detective and the criminal deputies on June 9th, 2011. CP 454, see also, CP 127.

In his e-mail, Det. Ames stated the following in response to the lead detective asking him whether Lynn Dalsing had any type of account or files on the computers to support a charge of possession:

¹ The lead detective's report erroneously attributes a statement to this effect to Det. Ames. CP 638. He did not identify Dalsing in any such photograph. CP 274. Det. Ames found nude photos of Dalsing alone that were not considered pornography. CP 274.

“No, it appeared that he was the computer person. There is no way you can get by the defense that she will use which will be it was him and especially now that he is pleading to it. I could easily link him to the child porn but not her. No way do I want to go back into that case to look for something that I cannot prove. Definitely no link to her and the child porn other than that one picture but we can’t see her so no way to prove that either. I did look hard at the porn that was downloaded from the internet and nothing leads back to her. I did look at that angle too especially after I found that one picture.” CP 454/606

Deputy criminal prosecutor Lori Kooiman responded:

“We will have to meet, all of us, early next week and go through the evidence. I think you’re missing the boat to some degree Mike, as he did not plead to any of the child porn, he pled to raping four kids. I do have to provide your e-mail to defense. I do want to discuss some of your assertions.” CP 454.

The prosecutor’s office did not disclose Det. Ames’ e-mail to Lynn Dalsing’s criminal defense attorney. App. 1 (Clower Dec. In Response to PC’s Motion for Stay). She remained incarcerated another month or so after this e-mail. CP 81(June 9th, 2011 - July 13th, 2011).

The underlying case is her civil tort action brought after her release from jail. CP 1 - 6. In her complaint, she unknowingly assigns blame to

Det. Ames:

“Upon reviewing the information on computers and other computer equipment, Detective Ames and Heishman falsely and/or without probable cause identified photographs as depicting Lynn Dalsing posing nakedly with a small, naked female child.” CP 2.

She names him in the body of the complaint, although she does not separately sue Det. Ames in any individual capacity.

Pierce County appeared through the civil division of the Prosecutor's Office. Civil deputies contacted Det. Ames to defend. Det. Ames promptly shared with the civil deputies his e-mail and his testimony that he never had probable cause to link Lynn Dalsing to any child pornography. CP 633. He expected the first civil deputies to disclose his e-mails in the civil discovery process. Id.

Ms. Dalsing's discovery requests include a Request for Production for all e-mail communications.² She made this request in July of 2012. She did not get them. CP 793. The County did not disclose them to her. Id. The County did not prepare a privilege log. Id.

As the case progressed, new civil deputies became involved. Again, Det. Ames shared his e-mails with the expectation that his e-mails would be disclosed. Det. Ames has his e-mail to civil deputy Jim Richmond that confirms Richmond received the relevant communications. CP 607. On October 18th, 2012, Det. Ames e-mailed DPA Richmond his e-mails about no probable cause. Id. The civil

² Request for Production No. 5: Produce the entire Pierce County Sheriff's Department Files involving the following investigations: A. Incident #102510339, including any and all evidence, including but not limited to photographs, videotapes, computer files and records, and any and all "documents" and tangible items of evidence. This request includes requests for any and all email communications, within the Pierce County Sheriff's Department, to and from the Pierce County Prosecutor's Office, and to and from the Department of Social & Health Services; CP 200, 379.

division had these e-mails to disclose to Lynn Dalsing's civil attorney for certain on October 18th, 2012. The County did not disclose them.

Det. Ames was deposed on February 14th, 2013. CP 518 - 524. This was the first time Det. Ames learned the prosecutor's office did not disclose his e-mail. CP 515, 520. The civil deputy instructed Det. Ames not to answer questions about the e-mails and his communications with the civil deputies. Id. and 303 - 304. Richmond claimed all contact between Det. Ames and the DPA's office was work product and privileged. Id. Thus, Dalsing still did not have the requested discovery revealing exculpatory evidence.

After this deposition, Det. Ames had independent counsel appear on his behalf. Ames' lawyer appeared on February 20th, 2013, and notified Pierce County Risk Management and the involved civil DPAs. CP 370, 505, 507. Det. Ames believed the prosecutor's office was conflicted, and was not disclosing the information because it implicated the prosecutor's office and cleared Det. Ames and his department from the incorrect accusations against the PCSD contained in the complaint. Attorney Mell and DPA Richmond exchanged e-mails and spoke over the phone about this apparent conflict. CP 364 - 367, 373. DPA Richmond referred counsel to CR 26 while demanding return of the e-mails. CP 374. DPA Richmond did not allow counsel to participate in the CR 26(i)

conference held with plaintiff's counsel, setting a separate conference instead. CP 365. The County continued to oppose disclosure of all the information. CP 249. The County still did not produce the e-mails or a privilege log. CP 264, 794.

Det. Ames has considerable experience as a Pierce County Sheriff's Department Detective specializing in computer forensics. CP 265 - 266. He has been with the department nearly thirty years. He is well reputed to be honest, which DPA Richmond pointed out to the trial court.³ Consistent with his reputation, Det. Ames requested guidance from the court on how to proceed because his ethical obligations were implicated. He filed a Motion for An Order Permitting Documents Be Filed Under Seal, and filed under seal all e-mails in his possession. CP 285. He brought his motion under CR 26(c). *Id.* He did not agree with the asserted work product claim, but he was cautious not to prejudice the County in the event the court thought otherwise.

On March 7th, 2013 following the CR 26(i) conference on February 22nd, Lynn Dalsing filed a motion to compel discovery. CP 121, 764. Det. Ames filed his declaration on Dalsing's Motion to compel on March 12, 2013. CP 764. He sought direction from the court regarding

³ Civil Deputy Jim Richmond: "When Ms. Mell called me, she said someone's not telling the truth. And I said I know Mr. Ames said the truth, and I always felt that way." RP 40, May 8, 2013.

the scope of his deposition testimony and whether he could answer questions about his conversations with the criminal DPAs. CP 266, 425.

On March 22nd, the County opposed the motion to seal and the motion to compel. CP 293, 305. After Det. Ames appeared, and after Det. Ames insisted his e-mails were not work product, then the county started to respond to discovery. After Det. Ames filed his declaration and motion, the County finally produced a privilege log and objected to disclosure of Det. Ames' e-mail forwarded to the criminal DPAs and DPA Kooiman's response back to him. CP 319, 764. The County first produced a privilege log on March 13th, after Det. Ames filed his e-mails with the court under seal. CP 319, 764. The privilege log contained hundreds of additional communications never before identified. CP 329 - 360.

The court initially granted Det. Ames' motion to seal, but then reversed and ordered the documents be filed in open court. CP 384 - 385. App. 2 (E-mail instruction from Judge Andrus). The court compelled disclosure of the e-mails to include Det. Ames' e-mail to DPA Richmond showing the prosecutor's office had the communications to disclose earlier:

“All of the documents submitted to the Court by Detective Michael Ames are discoverable. Even if arguably “work product,” these emails contain facts that are discoverable, they contain information relevant to mental impressions

that are directly at issue in this case, and Plaintiff has demonstrated a substantial need for access to these documents. Plaintiff is permitted to question Detective Ames about these email communications. Plaintiffs' motion to compel is GRANTED as to these records.

The Court finds no need to file these documents under seal. Any request to seal these records is DENIED." CP 535.

The court also compelled disclosure of many of the other withheld communications. CP 399 - 419. The court entered its order compelling production of the previously non-disclosed communications from the prosecutor's office on April 22nd, 2013. CP 399. By May 2nd, the County was moving to stay the ruling, claiming that sometime after April 25th, the county decided to start investigating criminal proceedings more than two years after dismissing the case on June 14th, 2011. The County now claimed it could not respond to discovery without interfering in criminal matters. CP 459 - 460. The County said it referred the case to a different law enforcement agency and Snohomish County Prosecutor's Office to "avoid any appearances of a conflict of interest." CP 459, 635. Det. Ames questioned the County's tactics. CP. 467 - 471. The County sought discretionary review to obtain a stay, which this Court has twice denied. CP 525. *See*, COA Nos. 70455-9-I and 70850-3-I. The issue of a stay is now before the Supreme Court. *See*, Supreme Court No. 90173-2.

Det. Ames asked the trial court to consider entering an order compelling Pierce County to pay the costs of independent counsel for him given the conflict of interest. CP 514 - 516. The court denied this motion, but indicated a willingness to consider a motion for limited sanctions under the applicable discovery rules of CR 26 and 37. Det. Ames proceeded to bring his motion under those rules. CR 645.

When opposing the request for fees, DPA Richmond filed an opposing declaration attacking Det. Ames, a witness he represented:

“Mr. Ames’ reply declaration in support of his motion to compel payment of his attorney’s fees and costs contains false assertions made under oath about Mr. Ames’ interactions with the Prosecutor’s office.” CP 718.

“Mr. Ames falsely states he turned over to me County e-mails that would “clear his named and his department.” Id.

It appeared from his response that DPA Richmond wanted the court to believe that Det. Ames never gave him the e-mails. He and another deputy brought up a meeting, not mentioned by Det. Ames in his declaration. CP 679 - 681. They claimed the e-mails were never discussed in the meeting. CP 715, 718. Det. Ames agreed, and never testified to the contrary. CP 758.⁴

⁴ DPA Richmond has since admitted in another matter he did in fact receive the e-mails from Det. Ames by e-mail on October 18th. App. 3 Richmond Dec. The prosecutor’s office labeled Det. Ames a “Brady” officer based upon DPA Richmond and DPA Ryuf’s declarations in this matter. Det. Ames sought declaratory relief in Pierce County and the matter is presently on appeal.

Counsel's hourly rate was \$325.00/ \$125.00, set forth in an itemized statement. The special deputy the County ultimately selected for Det. Ames billed the County \$275.00 per hour/ \$100.0 for paralegal time. The court heard the motion and entered the requisite findings of fact and conclusions of law to support the award. CP 792 - 797. The court concluded it had the authority to award attorney's fees and costs to Det. Ames under CR 26(c), and the *Eugster* decision. The court further concluded that "Det. 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." CP 766. The court further found the fee rate commensurate with rates charged in the community. CP 767, 778. And, the time incurred both reasonable and necessary. Id.

IV. LEGAL ARGUMENT

A. County Fails to Show Abuse of Discretion

A trial court must enter an order that is manifestly unreasonable or that is based upon untenable grounds for this Court to find the trial court abused its discretion. *WA State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). The sanctioned party must present a "clear showing" that the determination was "manifestly unreasonable" or was based upon "untenable grounds."

Roberson v. Perez, 123 Wn. App. 320, 96 P.3d 420 (2004). The County offers no evidence that a sanction award is “manifestly unreasonable” or based on “untenable grounds.” The trial court carefully considered the County’s misconduct in withholding evidence. The court used its discretionary authority to reasonably compensate Det. Ames for recognizing the County’s discovery duties, and to mitigate in part his expenses associated with taking appropriate action to comply with discovery over the objections of the prosecutor’s office. The crux of the County’s position is that a trial court has no discretionary authority to impose sanctions even with the County violates the rules, suppressing exculpatory evidence from a key witness. The courts have inherent power to impose sanctions for bad-faith conduct that is not displaced by any scheme of statutes and rules. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123 (1991). The trial court did not abuse its discretion.

B. Det. Ames Properly Moved Under CR 26(b)(6) for Relief

The County first argues CR 26 affords no relief to Det. Ames because he did not move for a protective order to protect himself from annoyance, embarrassment, oppression, or undue burden or expense. App. Br. 21. The County attempts to convince this Court that Det. Ames conceded his motion was not brought under CR 26 by misquoting a declaration. *Id.* The declaration does not admit Det. Ames was not

seeking relief under CR 26. In fact, the declaration says Det. Ames did not consider a CR 26(i) conference necessary as to him; however, he did indeed meet and confer before moving under CR 26 for relief. CP 364. Det. Ames procedurally took two steps to insure his conduct did not inadvertently prejudice the County. He moved to present under CR 26(b)(6) the records in camera for the court to determine whether the e-mail communications were work product or privileged as claimed by the County. *See*, CP 685. (“Thank you Jim for directing my attention to CR 26(b)(6). Consistent with the rule, I have sequestered the e-mails and have promptly moved the court for in camera review to resolve the claim.”) At the same time, Det. Ames filed his declaration on Dalsing’s motion to compel, advising the parties what documents he had in his possession without disclosing the content until the court ruled. He also sought direction from the court regarding his deposition testimony and whether he could answer questions about the documents he filed under seal. He was indeed seeking protection from an erroneous assertion of work product where non-disclosure prevented him from clearing his name and the name of his department. The County’s assertion of work product to hide exculpatory communication that implicated the prosecutor’s office was indeed oppressive to Det. Ames. Det. Ames’ reputation was at stake and he was confronted with the annoyance of being erroneously silenced.

When the County refused him separate counsel, he was exposed to undue burden and expense in seeking out the correct application of the County's work product assertion as to him. Det. Ames properly sought relief from the court that the court properly granted.

C. CR 37 Allows Sanctions Against the County For Asserting Work Product Erroneously

Sanctions are appropriately awarded as necessary to properly manage discovery. *Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996). Compensation to the impacted person is a legitimate reason to sanction, even where the person is a non-party. *Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d 420 (2004). The court may make any order which justice requires to protect a party or **person** from annoyance, embarrassment, oppression, or undue burden or expense. *Eugster v. City of Spokane*, 121 Wn.App. 799, 91 P.3d 117 (2004). *U.S. v. Columbia Broadcasting System, Inc.*, 666 F. 2d 364 (9th Cir. 1982). Det. Ames' is a "person" who needed protection. He is also an identified agent of the county, which is a party. A county may only act through its officials and individual employees. *Diaz v. WA State Migrant Council*, 165 Wn. App. 59, 265 P.3d 956 (2011). In this capacity he should be afforded protection from civil discovery abuses that harm him and his department, particularly given the apparent conflict among departments.

CR 37 expressly refers to a deponent, which was precisely Det. Ames' status when he sought relief from the court. The County erroneously asserted work product privilege to prevent disclosure of the communications between Det. Ames and the prosecutor's office. The prosecutor's office directed Det. Ames' not to answer questions in his deposition and did not disclose his e-mail communications with the prosecutors. The DPA's erroneous assertion of work product precipitated Det. Ames seeking relief from the court. If Det. Ames had not come forward with the information in his possession, the trial court would not have had the information it needed to correctly address the discovery motion to compel before it. The trial court entered specific findings to this effect. CP 766. The County's speculation that the court would have been properly informed absent Det. Ames' involvement does not mitigate against the award. The trial court did not agree. Thus, Det. Ames' input was necessary to a just result. Det. Ames' has never "expressly denied" his motion was not brought under the rules of discovery. It was. Det. Ames did indeed expressly request a particular outcome. He asked for a ruling that would allow him to clear his name through the production of his supporting documentation and allow him to testify truthfully. CP 678, 680, 761.

The trial court and this court denying discretionary review have supported the trial court's decision. There is no ruling to date to attach any privilege or work product to the materials produced by Det. Ames. The County repeatedly cites to the 12/18/13 Ruling of the Commissioner at 9 as if the Commissioner's ruling is binding authority on the work product objection the County erroneously asserted. The Commissioner's order has no binding effect, particularly where this Court has denied discretionary review to the County. The Commissioner's comment to the effect that the "trial court erred in concluding that Kooiman is not absolutely immune" is dicta and changes nothing about the trial court's decision to order the e-mail disclosed. The "law of the case" doctrine only applies to issues actually decided in a prior appellate decision. *Fluke Capital and Management Services v. Richmond*, 106 Wn.2d 614, 620 (1986). Both the "law of the case" doctrine and the related doctrine of collateral estoppel only apply to "necessary findings." *Lutheran Daycare v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746, 757 (1992), citing 15 Lewis Orland and Karl Tegland, *Washington Practice: Judgments* 380 at 55-56 (4th Ed. 1986). The Commissioner recognized, the *dicta* in her opinion on the immunity question stating immunity "does not end the inquiry," because work product may still be disclosed where it is directly at issue in the action. Op. at 9. Det. Ames did not appear before the

Commissioner and did not present the actual e-mail for review and consideration. Only the trial court has had the benefit of that knowledge.

The County next argues it never instructed Det. Ames to not answer questions about his e-mail affirming he had no probable cause, an e-mail initially communicated to the lead detective. Also, the County claims it never demanded this e-mail back to prevent Det. Ames from disclosing it. The County did both. See, demand for return of all e-mails at CP 686 and instructions not to answer deposition questions at CP 662 - 674, 677. The County did indeed instruct Det. Ames “not to produce legally discoverable documents.” App. Br. at 27.

The County contends Det. Ames did not need to produce the documents he possessed because the County produced one of his e-mails before he filed his motion and promised to produce a privilege log for the remainder. App. Br. at 27. The County never included Det. Ames in any correspondence that would have affirmed for him the disclosure of any of his e-mail communications. In fact, he understood the County was demanding he return all e-mails to it. CP 508. Importantly, the privilege log was never actually provided until after Det. Ames filed with the court.

Det. Ames did not agree Kooiman’s e-mail to him was work product. The only e-mail arguably work product from his perspective was his e-mail forwarding the other e-mails to Richmond. There was little to

no deliberative content on his e-mail to Richmond on the 18th. He properly sought affirmation from the court about the disclosures. The court ordered the disclosure, and the trial court's decision has never been reversed.

D. No Substantial Justification for Withholding Discoverable Evidence

To support its argument that sanctions were not warranted, the County again cites to the commissioner's ruling from this court. Nothing in the commissioner's ruling provides a substantial justification for the County hiding Det. Ames' e-mail on the lack of probable cause for years. When the current civil deputy had it on October 18th, the County still refused disclosure until Det. Ames retained independent counsel who challenged their non-disclosure approximately four months later. Det. Ames should not incur the expense of disclosure, when the County was duty bound to disclose and chose to ignore its obligations. There is no dispute that the County did not act properly. Awarding Det. Ames nominal fees and expenses was the just result. The award was well within the resources allocated by the County to independent counsel after the County reluctantly appointed a special deputy of its own choosing to Det. Ames. CP 691 - 703.

The Kooiman response to Det. Ames has no arguable work product protection when Kooiman is notifying the lead detective that his

communication will be disclosed to the defense. The DPAs for obvious reasons want to suppress this information, but the Kooiman response identifies the precise point in time when the prosecutor should have disclosed to defense counsel the lack of probable cause and precipitated Lynn Dalsing's release from jail. The criminal prosecutors did not ever share Det. Ames' e-mail, and Lynn Dalsing sat in jail for an additional approximate five weeks. Under these circumstances, there is absolutely no reasonable basis to attempt to hide the Kooiman communication as "work product." The goal of the work product privilege is to protect the adversary process by insuring that neither party pirates the trial preparation of another party. *Harris v. Drake*, 116 Wn. App. 261, 65 P.3d 350 (2003). The privilege traditionally applies to communications with a retained expert with whom counsel is working on developing a trial strategy. See *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (2011); *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 996 P. 2d 1103 (2000). With retained experts, a party may choose not to call the witness to testify regarding the opinions and theories developed. Here Det. Ames is not a retained expert for one side or the other in the criminal matter. He is a fact witness with technical expertise. He is not a consultant who the prosecutor may choose to exclude or to whom the defense may be denied access. The Kooiman e-mail is so directly linked

to Det. Ames' lack of probable cause which are facts that the defense was entitled to know that it cannot be legitimately claimed by the County that the communication is not directly at issue. Kooiman's communications to Ames are simply not privileged.

Finally, the County's position has no merit because the County refused to even disclose by way of a privilege log the fact that this critical exchange in writing existed. It was not until Det. Ames sought outside counsel that a privilege log was even considered. The privilege log was disseminated after Det. Ames filed for his relief.

The County cannot legitimately claim its asserted objection to ongoing law enforcement investigation materials in its discovery response justifies the withholding. The County withheld all of Det. Ames' e-mails without a privilege log. At the same time, the County produced the police reports. CP 201. The asserted objection was baseless when asserted. There was no active law enforcement investigation. If there was, the criminal investigation reports would not have been produced. The County conceded there was no active law enforcement investigation going on during the relevant time frame at oral argument. RP 05/08/13 at 14. The discovery sanctions rule is judged by an objective standard; subjective belief or good faith alone does not shield attorney from sanctions. *WA State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299,

858 P.2d 1054 (1993). There is nothing objectively reasonable about withholding the evidence in this case. The trial court properly sanctioned the County for its misconduct.

E. Conference Requirements Offer No Procedural Protection To DPA

A trial court has jurisdiction to hear a discovery motion and impose sanctions despite any alleged deficiencies in the requisite certification. *Amy v. Kmart of Washington, LLC*, 153 Wn. App. 846, 223 P.3d 1247 (2009)(Imposition of \$10,000.00 in sanctions of unexplained delay in providing discovery proper exercise of discretion as was award of attorney fees and costs totaling \$25,627.44). “A trial judge is in the best position to determine whether and to what extent to get involved in discovery disputes in a particular case.” *Id.* at 858. The court properly exercised its inherent jurisdiction in this case.

Counsel for Det. Ames conferenced with the DPAs before seeking relief from the court. CP 370, 372, 373, 375. The County simply misstates the facts on this point. In addition, the technical certification requirements were met when Dalsing filed one with her motion to compel. Det. Ames filed a supporting declaration to ensure the relief afforded included his concerns. CR 26(i) does not provide any grounds to reverse the trial court’s abundantly reasonable order and judgment in favor of Det. Ames.

F. Amount Claimed Supported By the Record

The County does not fairly represent the record that establishes the fees and costs awarded. Det. Mike Ames set forth the rates he was billed. CP 777. In addition, he provided to the trial court cross references to six separate cases where rates were approved in amounts approximately equal to or greater than the \$325.00 rate charged by his attorney. CP 778. He also testified that the rates he was quoted with other lawyers were equal to the rate charged by his counsel. The rate the County approved for the attorney it selected for him was also comparable. CP 699. The court considered the contemporaneous time records kept in the matter by counsel and produced in support of the motion. CP 657 - 658. Det. Ames testifies that he has incurred the itemized fees and costs related to the discovery motion for an order permitting him to file his e-mails under seal and to decide whether he could answer deposition questions. CP 656. When the County challenged his request, the County pointed out an erroneous entry, which made it apparent that the initial consult amount was never billed. The Court included this initial consult following his deposition into its award, which was reasonable and documented as necessary. CP 752.

The County's reference and reliance on RPC 1.5 is misplaced, as are its claims that only one element was addressed by the record. This rule

concerns the reasonableness of fees charged to clients. The court awarded fees as a sanction in an amount that was indeed reasonable. The rate assessed was comparable to other attorney rates charged in King County where the action was pending. The rate included consideration of counsel's education, training, experience, and ability to address the complexity of the unusual factual presentation, including the apparent conflict of the prosecutor's office. CP 489 - 496. The trial court had what it needed to appropriately exercise its discretion.

G. The Court Entered Express Findings

The County complains simply that the Court's factual findings were insufficient; however, the County failed to propose any alternative findings and took no exception to the order entered. The trial court prepared a notably concise set of findings to support the court's decision. The trial court details the misconduct of the county, and the timing of discovery showing the delays without justification. The findings are sufficient to support the judgment.

H. Further Evidence Justifies the Award

DPA Richmond has filed a declaration in a separate action showing he deliberately and intentionally misled the court about having the e-mails to disclose on October 18th. App. 3. DPA Richmond's intentional

misconduct provides additional support for the sanctions imposed. The trial court's order and judgment should be affirmed.

I. Attorney's Fees and Costs on Appeal

Det. Ames requests the Court award him attorney's fees and costs on appeal pursuant to the indemnification provisions of RCW 4.96.041 and PCC 2.120.010. Necessary expenses incurred in defending a proceeding shall be paid by the local governmental entity where the employee acts in good faith. Det. Ames has acted in good faith. He should not bear the costs and expense of protecting the sanctions he was awarded.

Det. Ames also requests an award of attorney's fees and costs under CR 27 and 37 because this appeal is simply a continuation of the County's failure to recognize and act on its discovery obligations. One of the purposes of sanctions is to educate. Here, the County has shown the existing sanctions are not sufficient for it to take responsibility for its deception and learn from its errors. *WA State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993). Further sanctions are apparently needed to make the point and deter future conduct. Det. Ames has incurred additional expenses in defending the propriety of his actions.

Finally, Det. Ames requests fees and costs on appeal because of the bad faith conduct of DPA Richmond in particular. Bad faith provides legitimate common law equity grounds for an award of sanctions. *In re Recall of Pearsall-Stipek*, 136 Wn. 2d 255, 961 P.2d 343 (1998), *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000). Here, DPA Richmond obfuscated the truth and labeled Det. Ames dishonest when all the while he had the e-mails at issue. His deceptive and misleading declarations where he flat out denies having received the e-mails when he did in fact have them is bad faith.

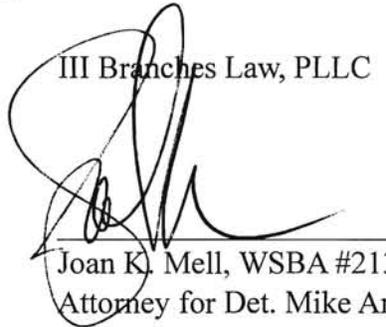
The County does not fairly represent the record in this matter, and further makes arguments that wholly lack merit and are designed to detract from its own misconduct. This appeal forced Det. Ames to incur additional fees and expenses to protect his interests and his good name. The County had the opportunity to cover the sanctions within the fees allocated to independent counsel retained at the urging of Det. Ames' attorney. The County refused to do so and instead forced Det. Ames to continue to litigate. The public resources expended on this appeal are unwarranted, and the prosecutor's office should have mitigated its losses by resolving these matters amicably without attacking Det. Ames' credibility.

V. CONCLUSION

The trial court carefully considered the discovery issues presented in this matter. The appropriate factual findings and legal conclusions entered support the trial court's rational exercise of discretion to support the judgment in favor of Det. Ames. The trial court's order and judgment should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of June, 2014, at Fircrest, WA.

III Branches Law, PLLC



Joan K. Mell, WSBA #21319
Attorney for Det. Mike Ames

CERTIFICATE OF SERVICE

I, Tess Hernandez, certify as follows:

I am over the age of eighteen, a resident of Pierce County, and not a party to the above action. On June 4, 2014, I caused to be served true and correct copies of the above document on all parties or their counsel of record for case no. 70851-1 by mail as follows:

Fred Diamondstone, Attorney
1218 Third Ave., Suite 1000
Seattle, WA 98101

Gordon Woodley, Attorney
512 6th Street S, Suite 101
Kirkland, WA 98033

Pierce County Prosecutors Office
Daniel Hamilton
955 Tacoma Ave. S, Suite 301
Tacoma, WA 98402

Karen Calhoun, AAG
P.O. Box 40100
Olympia, WA 98504

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 4th day of June, 2014 at Fircrest, WA.



Tess Hernandez, Paralegal

Appendix 1

The Honorable Beth Andrus
Noted for May 10, 2013

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LYNN DALSING

Plaintiff,

v.

PIERCE COUNTY, A MUNICIPAL CORPORATION,

Defendant.

NO. 12-2-08659-1-KNT

DECLARATION OF GARY CLOWER IN RESPONSE TO PIERCE COUNTY'S MOTION FOR STAY

AND

FOR RECONSIDERATION OF 4/22/13 and 4/25/13 ORDERS ON MOTION TO COMPEL

Gary Clover affirms and states:

1. *Identity.* I served as the criminal defense lawyer for Lynn Dalsing in the underlying criminal case, State vs. Lynn Dalsing, Pierce County Cause # 10-1-05184-0. I have been engaged in the practice of law in Washington state for the past 29 years. My practice is limited to criminal defense. I am competent to testify to the matters set forth herein.

2. *I Was Never Informed By Pierce County of the Substance of Det. Ames' Evidence.* During the entire time that I represented Lynn Dalsing, I was never informed that Det. Ames had questioned whether the photograph that was central to the accusation actually depicted her. For the time period from when I first appeared to defend Ms. Dalsing, in December

DECLARATION OF GARY CLOWER IN RESPONSE TO PIERCE COUNTY'S MOTION FOR STAY AND FOR RECONSIDERATION

PAGE - 1

KING COUNTY CASE NO. 12-2-08659-1

Fred Diamondstone
ATTORNEY AT LAW
1218 Third Avenue, # 4100
Seattle WA 98101
(206) 568-0082
(206) 568-1683 FAX

1 2010, until sometime in June 2011, I assumed that the County Prosecutor's Declaration for
2 Probable Cause had accurately described the evidence. While I made repeated, unsuccessful
3 inquiries and requests to obtain a copy of the photo, I never considered that the photo was
4 inaccurately described by Ms. Koolman or by Detective Helshman in the Declaration for
5 Determination of Probable Cause or in the police reports that I had received. While I am not
6 sure of the actual date that I finally received the subject photo, I believe that the date was on
7 or about May 31, 2011 or June 1, 2011. I saw Ms. Dalsing in jail the day I received the
8 photo, or the very next day, because I had been seeking the photo for the previous five to six
9 months and it was central to the case. I also saw Mr. Dalsing in the jail, with the consent of
10 his criminal defense lawyer, the next day. I understand that jail records show that I visited
11 Ms. Dalsing on June 1, 2011 and Mr. Dalsing on June 2, 2011. Mr. Dalsing advised me that
12 the photo was from the "Felisha" series. Within a couple of days of my receipt of the photo,
13 I did notify the Prosecutors, either Ms. Koolman or Mr. Lewis, that the photo did not show
14 Lynn Dalsing and, based on an investigation that I pursued, that the photo was from the
15 "Polisha" series of pornography

16 3. *E-Mails Were Never Produced In Discovery.* I never received any emails circulated
17 between the Sheriff's Department detectives, either amongst themselves, or with CPS or
18 other witnesses, or with the Pierce County Prosecutor's Office. I never saw ANY of the
19 emails that Plaintiff's counsel Fred Diamondstone received in discovery in the above
20 captioned civil case during the entire time that I represented Ms. Dalsing. The first time that
21 I saw ANY of the emails, was on the afternoon of April 5, 2013, when Mr. Diamondstone
22 shared with me the email exchange between Det. Ames and Det. Helshman, dated June 9,
23 2011, together with emails dated later on June 9 and the next day (June 10, 2011) among
24 those detectives and members of the Prosecutor's Office, but with the substance of the
25 exchanges blocked out. Nor was I ever advised that Det. Ames or any other law enforcement
26 official in Pierce County had raised the question that the photo did not show my client, Ms.

DECLARATION OF GARY CLOWER IN RESPONSE TO
PIERCE COUNTY'S MOTION FOR STAY AND FOR
RECONSIDERATION PAGE - 2

KING COUNTY CASE NO. 12-2-08659-1

Fred Diamondstone
ATTORNEY AT LAW
1218 Third Avenue, # 4100
Seattle WA 98101
(206) 568-0082
(206) 568-1683 FAX

1 Dalsing. (A true and correct copy of the email provided by Mr. Diamondstone is attached as
2 Exhibit I to this Declaration.)

3 4. *Effect of the Non-Disclosure on My Representation of Lynn Dalsing.* Had I known
4 that Det. Ames had advised Det. Heishman and the prosecutors that he had never identified
5 Lynn Dalsing, as early as June 9, 2011, I would likely have considered filing a *Knapstad*
6 motion at that time. CrR 8.3 and *State v. Knapstad*, 107 Wn.2d 346, 353-54 & n.1, 729 P.2d
7 48 (1986). By the time I finally received the photo and verified that the photo was not of
8 Lynn Dalsing, the July 8, 2011 pretrial, or omnibus hearing, was approaching and the case
9 was set for trial on July 12, 2011. Accordingly, in Court on July 8, 2011, I raised the issue
10 that the photo was not a photo of Lynn Dalsing. The County prosecutor, Tim Lewis,
11 acknowledged that the photo did not appear to show Ms. Dalsing, but sought additional time
12 for further investigation and to allow Ms. Koolman to respond. The matter was held over to
13 July 12, 2011, at which time Judge Culpepper ordered Ms. Dalsing released from jail on
14 personal recognizance, on conditions. The next day, the charges were dismissed against Ms.
15 Dalsing, on the Prosecutor's own motion "without prejudice," though I considered the case to
16 have been closed.

17 5. *E-mails of Lori Koolman Dated June 9 and 10, 2011.* I first received Ms. Koolman's
18 June 9 and 10 emails when I received the Declaration of Mike Ames, filed with the King
19 County Superior Court on April 24, 2013. I received that information for the very first time
20 on May 3, 2013. (A copy of the unredacted e-mail "chain" among Detectives Heishman
21 and Ames and DPAs Koolman and Lewis is attached hereto as Exhibit 2.) I do agree with
22 Ms. Koolman's observation in her email to Det. Mike Ames on June 9, 2010 at 4:19 pm. that:

23 "...I do have to provide your email to the defonso."

24 Neither Ms. Koolman, nor any Pierce County law enforcement officers (Sheriff's
25 Department or Prosecutor's Office) ever did so.

26
DECLARATION OF GARY CLOWER IN RESPONSE TO
PIERCE COUNTY'S MOTION FOR STAY AND FOR
RECONSIDERATION PAGE - 3

KING COUNTY CASE NO. 12-2-08659-1

Fred Diamondstone
ATTORNEY AT LAW
1218 Third Avenue, # 4100
Seattle WA 98101
(206) 568-0082
(206) 568-1683 FAX

1
2 6. *Current, or Renewed, Investigation.* The first that I learned of any renewed
3 investigation of Ms. Dalsing was late on the afternoon of May 2, 2013, when Mr.
4 Diamondstone e-mailed the Declaration of Pierce County DPA Jared Ausserer to me.

5 I declare under penalty of perjury under the laws of the State of Washington that the
6 foregoing is true and correct and that the copies attached hereto are true and correct copies.

7 Executed this 6th day of May, 2013 at Tacoma, Washington.

8 
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
Gary Clower

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DECLARATION OF SERVICE

I, Jennifer K. Gluffre, make the following statement:

I am a resident of the State of Washington. I am over the age of eighteen (18) years of age, and I am not a party to the above-entitled action and am competent to be a witness herein.

On the date set forth below I served true and correct copies of the foregoing:

Declaration of Gary Clower, to which this is attached, as follows:

James P. Richmond Deputy Prosecuting Attorney 955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160	Via legal messenger for service by 5:00 p.m. on 5/8/2013 And by email to jrichmo@co.pierce.wa.us
Jason Ruyf Deputy Prosecuting Attorney 955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160	Via legal messenger for service by 5:00 p.m. on 5/8/2013 And by email to jruyff@co.pierce.wa.us
Gordon Woodley, Esq. 512 Sixth Street S., Suite 101 Kirkland, WA 98033	Via email to woodley@gmail.com
Ryan Krench Ass't. Attorney General Pierce County Office of DSHS 1250 Pacific Ave., Suite 105 PO Box 2317 Tacoma, WA 98401-2317	Via legal messenger for service by 5:00 p.m. on 5/8/2013 And by email (by NOON) to Ryank1@atg.wa.gov
Joan Mell III Branches Law, PLLC 1033 Regents Blvd., Suite 101 Fircrest, WA 98466	Via legal messenger for service by 5:00 p.m. on 5/8/2013 And by email to joan@3brancheslaw.com

///

///

///

DECLARATION OF GARY CLOWER IN RESPONSE TO
PIERCE COUNTY'S MOTION FOR STAY AND FOR
RECONSIDERATION PAGE - 5

KING COUNTY CASE NO. 12-2-08659-1

Fred Diamondstone
ATTORNEY AT LAW
1218 Third Avenue, # 4100
Seattle WA 98101
(206) 568-0082
(206) 568-1683 FAX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

Signed at Seattle, Washington on this 3rd day of May, 2013.



Jeffrey K. Giuffre
Paralegal to Fred Diamondstone, WSBA 7138

EXHIBIT 1

EXHIBIT 1

From: Debbie Helshman
To: Lori Koolman
Subject: RE: Dalsing case #10-2510339
Date: Friday, June 10, 2011 2:09:00 PM

[REDACTED]

From: Lori Koolman
Sent: Friday, June 10, 2011 1:17 PM
To: Mike Ames; Debbie Helshman
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

[REDACTED]

From: Mike Ames
Sent: Friday, June 10, 2011 12:43 PM
To: Lori Koolman; Debbie Helshman
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

[REDACTED]

From: Lori Koolman
Sent: Thursday, June 09, 2011 4:19 PM
To: Debbie Helshman; Mike Ames
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

[REDACTED]

From: Debbie Helshman
Sent: Thursday, June 09, 2011 2:59 PM
To: Lori Koolman
Subject: FW: Dalsing case #10-2510339

[REDACTED]

From: Mike Ames
Sent: Thursday, June 09, 2011 12:27 PM
To: Debbie Helshman
Subject: RE: Dalsing case #10-2510339

DALSING [DEF] 1587

No, it appeared that he was the computer person. There is no way you can get by the defense that she will use which will be it was him and especially now that he is pleading to it. I could easily link him to the child porn but not her. No way do I want to go back into that case to look for something that I cannot prove. Definately no link to her and the child porn other than that one picture but we can't see her so no way to prove that either. I did look hard at the porn that was downloaded from the Internet and nothing leads back to her. I did look at that angle too especially after I found that one picture.

Good Job on the case though and am very glad these monsters are going away!

Mike

From: Debbie Helshman
Sent: Thursday, June 09, 2011 11:07 AM
To: Mike Ames
Subject: Dalsing case #10-2510339

Mike,

Howdy you fabulous computer guy.. Both the bad men in this case have pled guilty - one will go away for life??!!

The female is not being so smart. Pros. are wondering if you were able to tell if Lynn Dalsing had any type of account or files on the computers so we can charge her with the possession also?

Thanks

Grammy

*Detective D. Helshman #205
Pierce County Sheriff
Special Assault Unit
930 Tacoma Ave So
Tacoma, WA 98402
253 798-7713*

DALSING [DEF] 1588

EXHIBIT 2

EXHIBIT 2

From: Mike Ames
Sent: Thursday, October 18, 2012 11:38 AM
To: James Richmond
Subject: FW: Dalsing case # 10-2510339

Michael Ames CFCE,CFI
Computer Crimes Unit
Pierce County Sheriff's Dept.
mjames1@co.pierce.wa.us
253-877-8438

From: Lori Koolman
Sent: Friday, June 10, 2011 1:17 PM
To: Mike Ames; Debbie Heishman
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

We're available at 9:00 on Monday. Meet you at your department. Thanks.

From: Mike Ames
Sent: Friday, June 10, 2011 12:47 PM
To: Lori Koolman; Debbie Heishman
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

I am available Monday at 9 or 1:30 in the afternoon, Tuesday morning till noon. If any of those times work.

Mike

From: Lori Koolman
Sent: Thursday, June 09, 2011 4:19 PM
To: Debbie Heishman; Mike Ames
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

We will have to meet, all of us, early next week and go through the evidence. I think you're missing the boat to some degree Mike, as he did not plead to any of the child porn, he pled to raping four kids. I do have to provide your e-mail to defense. I do want to discuss some of your assertions.

Lori

.....
From: Debbie Heishman
Sent: Thursday, June 09, 2011 2:58 PM
To: Lori Koolman
Subject: FW: Dalsing case #10-2510339

This is from Mike ,,duh
Debbie

.....
From: Mike Ames
Sent: Thursday, June 09, 2011 12:57 PM
To: Debbie Heishman
Subject: RE: Dalsing case #10-2510339

No, it appeared that he was the computer person. There is no way you can get by the defense that she will use which will be it was him and especially now that he is pleading to it. I could easily link him to the child porn but not her. No way do I want to go back into that case to look for something that I cannot prove. Definately no link to her and the child porn other than that one picture but we can't see her so no way to prove that either. I did look hard at the porn that was downloaded from the Internet and nothing leads back to her. I did look at that angle too especially after I found that one picture.

Good Job on the case though and am very glad these transfers are going away!

Mike

.....
From: Debbie Heishman
Sent: Thursday, June 09, 2011 11:07 AM
To: Mike Ames
Subject: Dalsing case #10-2510339

Mike,
Howdy you fabulous computer guy... Both the bad men in this case have pled guilty - one will go away for life??!!
The female is not being so smart. Pros. are wondering if you were able to tell if Lynn Dalsing had any type of account or files on the computers so we can charge her with the possession also?
Thanks
Grammy

Detective D. Heishman #205
Pierce County Sheriff
Special Assault Unit
930 Tacoma Ave So
Tacoma, WA 98402
253 798-7713

Appendix 2

Ms. Mell:

The original emails were in physical form and were part of the sealed record pursuant to the April 5 Motion and Order. To comply with the April 22 order, a new set will need to be filed with the Court.

Thank you,

Eric Anderson
Law Clerk/Bailiff to the Hon. Beth Andrus
King County Superior Court
516 Third Avenue, Courtroom W-719
Seattle, WA 98104
Tel (206) 296-9105
andrus.court@kingcounty.gov

Auto-Message: ***Please make sure to CC opposing counsel on all e-mails to the court in order to avoid improper ex parte contact. Thank you.***

*** Please Note: Court will be in recess beginning March 1 and reconvene March 25.***

From: Joan Mell [mailto:joan@3brancheslaw.com]
Sent: Tuesday, April 23, 2013 10:32 AM
To: Anderson, Eric
Cc: Fred Diamondstone; James Richmond; Gordon Woodley
Subject: Order Granting In Part and Denying In Part P's Motion to Compel

The court has found on Page 8 that Det. Michael Ames' Emails do not need to be filed under seal and any request to seal these records is denied. Since the e-mails were previously filed under seal for in camera review pursuant to the earlier order attached below, it appears that the e-mails should now be entered into the record. I am seeking the court's guidance as to whether the court will be filing the copies it has reviewed or whether I should refile Det. Ames' Dec. with the e-mails attached. Thank you for consideration.

Joan K. Mell
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
253-566-2510 ph
281-664-4643 fx
joan@3brancheslaw.com

Appendix 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

MICHAEL AMES,

Petitioner,

vs.

PIERCE COUNTY,

Respondent.

NO. 13-2-13551-1

DECLARATION OF JAMES P.
RICHMOND

I, James P. Richmond, declare that I am over the age of 18, have personal knowledge of the matters set forth below, and I am competent to testify to the matters stated herein.

1. I am a Deputy Prosecuting Attorney assigned to the Civil Division of the Pierce County Prosecutor's Office. I represent Pierce County in the matter of *Lynn Dalsing v. Pierce County*, King County Superior Court Case No. 12-2-08659-1. I have been an attorney for 32 years.

2. In preparation for the civil case, I met with Michael Ames on October 12, 2012, and discussed the police reports and Ames' computer forensic investigation. There was no discussion at that meeting about the June 9, 2011, email exchange involving Ames, Det. Heishman, and Deputy Prosecutors Lori Koolman and Tim Lewis in the criminal case. Ames forwarded the June 9, 2011 email exchange to me on October 18, 2012, nearly a week after our meeting. There was no cover memo or other explanation for forwarding this material. I

DECLARATION OF JAMES P. RICHMOND - 1
Jim Richmond dec. docx
Cause No 13-2-13551-1

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

1 reviewed it, considered it to be attorney work product, and retained it with other materials
2 pertaining to the litigation. Contrary to petitioner's repeated claims in the current case, I have
3 never denied receiving the June 9, 2011, email. Instead, I stated that it was not given to me at
4 the October 12, 2012 meeting.

5 3. Rather than raising his concerns with me or others in my office about work product
6 objections made at Ames' February 14, 2013, deposition, Ames consulted with attorney Joan
7 Mell, who telephoned me on February 21, 2013, and announced that she was representing
8 Ames and that there was an "unresolved conflict." When asked to explain the unresolved
9 conflict she stated that attorney-client privilege prevented her from discussing the details that
10 gave rise to her claim that there was an unresolved conflict. Ms. Mell cut the call short
11 claiming she had a client appointment, leaving me without an explanation.

12 4. Then, in an effort to have Pierce County pay attorney fees he owed Mell, Ames
13 filed in the *Dalsing* civil case a 7/13/13 declaration which falsely included the following at
14 paragraph 1.5:

15
16 Mr Richmond told me that the email I turned over to him from Lori Kooiman
17 in October 2012 was "exculpatory" regarding my involvement in this case. He
18 also told me that it would clear me of any wrong doing in the case and he
19 would see to it that it was turned over as part of discovery.

20 I was astonished to read this as I had never told Ames any such thing.

21 5. On July 17, 2013, I filed a responsive declaration stating at paragraph 2, "Mr.
22 Ames' reply declaration in support of his motion to compel payment of his attorney's fees and
23 costs contains false assertions made under oath about Mr. Ames' interactions with the
24 Prosecutor's office." This declaration was to become one of the documents which the
25 criminal division of the office later determined was potential impeachment evidence
concerning Ames, because it constituted a deputy prosecutor directly challenging the officer's

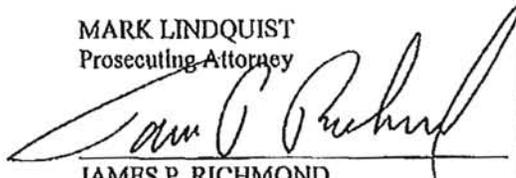
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

credibility. I discussed Ames' falsehoods in detail in later paragraphs of that declaration.
Ames' claim that we discussed the referenced email exchange and that I told him it was
"exculpatory" as to him is absolutely untrue.

I declare under penalty of perjury of the laws of the State of Washington the foregoing
to be true and correct.

EXECUTED this 12th day of May, 2014, at Tacoma, Pierce County, Washington.

MARK LINDQUIST
Prosecuting Attorney



JAMES P. RICHMOND
State Bar Number 15865
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-4265 / Fax: 253-798-6713