

No. 45039-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GLEND A NISSEN,

Appellant/Cross-Respondent,

v.

PIERCE COUNTY, a public agency, PIERCE COUNTY
PROSECUTOR'S OFFICE, a public entity,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS
PIERCE COUNTY AND
PIERCE COUNTY PROSECUTOR'S OFFICE

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A. INTRODUCTION

Appellant/Cross-Respondent Glenda Nissen's reply brief/brief of cross-respondent is a mish-mash of unsubstantiated facts and rhetoric that fails to engage the arguments set forth in Pierce County's ("County") brief. She seeks to reargue the substantive issues on the Public Records Act, RCW 42.56 ("PRA") that have already been briefed and argued to this Court in Cause No. 44852-1-II ("*Nissen I*").

Fundamentally misrepresenting the facts of what transpired with respect to her second PRA request for essentially the same documents that Judge Pomeroy had ruled in *Nissen I* were not subject to the PRA, Nissen does not fully engage on the question of whether her second PRA request and consequent lawsuit to obtain the records, statutory penalties, and attorney fees ("*Nissen II*") was barred by principles of res judicata or collateral estoppel. Similarly, Nissen evades the actual content of the County's argument on sanctions, whether under CR 11/RCW 4.84.185 or under the courts' inherent authority to sanction bad faith conduct.

The trial court here abused its discretion by failing to sanction Nissen for her improper resort to litigation a second time in *Nissen II* when she was fully aware that the *Nissen I* court had expressly ruled she was not entitled to the documents she sought under the PRA.

B. STATEMENT OF THE CASE¹

Nissen's "statement of the case" on cross-review, reply br. at 34-41, is replete with irrelevant and unsupported "facts." Her discussion of her "first strategy," *id.* at 34, or her extended discussion of the litigation from her perspective, *id.* at 34-36, is *irrelevant* to the issue before this Court.²

Nissen quibbles about the counting of the number of times she complained to government authorities, *id.* at 36-37. Suffice it to say, her *numerous* complaints about the Pierce County Prosecutor's Office ("Office") or Prosecutor Lindquist were rejected. CP 1183-85.

Nissen's effort to claim she never really threatened County officials with criminal sanctions, *id.* at 37-38, is belied by her very argument. She *concedes* she cited criminal sanctions in her pleadings. *Id.*

Perhaps most misleading is Nissen's treatment of what she represented to courts regarding the nature of the records she sought in *Nissen I* and *Nissen II*. *Id.* at 39-40. Nissen seems to be saying that what she told the court in those proceedings was not what she actually told the

¹ By confining its response on the "facts" asserted by Nissen on cross-review, the County in no way concedes that Nissen's general factual recitation, reply br. at 2-13, is either accurate or properly supported in the record. RAP 10.3(a)(5).

² A lawyer's subjective intent regarding a pleading is irrelevant. Plainly, nearly every lawyer submitting a frivolous pleading subjectively believes the filing is meritorious. The test for whether a pleading is frivolous, however, is an objective one. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

court. In fact, on the record, Nissen, through counsel, advised the court in *Nissen I*, that she was not seeking text records when, in fact, she was. Similarly, Nissen misrepresented to the court in *Nissen II* through counsel that *Nissen I* did not involve text records. Nissen's statements to the court in both instances were simply *false*. County's br. at 7-9.

Lost in Nissen's obfuscation of the record and the facts are certain glaring points. Nissen made her second PRA request in *Nissen I* beginning on December 9, 2011, CP 28, that the County ultimately denied. CP 29, 31. Nissen's lawsuit in *Nissen I* concluded by February 28, 2012. CP 367. Nissen and her counsel had the benefit of Judge Pomeroy's PRA decision at that point.

Nearly *9 months* after the trial court's final order on the merits in *Nissen I*, Nissen filed *Nissen II* on November 30, 2012. CP 6-15. Nissen's counsel understood the collateral estoppel implications of *Nissen I*, as indicated in the discussion of that issue in her *Nissen II* complaint. CP 7.

C. SUMMARY OF ARGUMENT

The trial court abused its discretion in failing to impose sanctions against Nissen and/or her counsel in *Nissen II* for the filing of a complaint whose basis was expressly rejected in *Nissen I*.

Under CR 11/RCW 4.84.185, Nissen’s counsel failed to undertake a reasonable inquiry into the law and facts in filing *Nissen II*, justifying an award of fees as sanctions.

Additionally, under CR 11 and the equitable principle of procedural bad faith in litigation, the filing of *Nissen II* was for a vexatious purpose – to harass the Office and its staff. Moreover, the conduct of Nissen’s counsel in *Nissen II* in misrepresenting to the trial court the nature of Nissen’s PRA request in *Nissen I* to avoid the preclusive effect of the *Nissen I* trial court’s decision, is an independent basis for the imposition of sanctions.

D. ARGUMENT³

(1) Nissen Has Not Properly Raised an Issue of the County’s Standing

³ The County does not repeat the arguments advanced on the merits of Nissen’s PRA argument here except to note that other courts are agreeing with the County’s *Nissen I* analysis. For example, the California Court of Appeals in *City of San Jose v. Superior Court of Santa Clara County*, 169 Cal. Rptr. 3d 840 (Cal. 2014) held that written communications, including emails and text messages, by public employees on their private electronic devices using their private accounts were exempt from California’s PRA. The court concluded such materials were not public records, noting that “it does not follow that every act of an official is necessarily an act of the agency.” *Id.* at 849. To constitute a public record, the government entity must prepare, own, use, or retain the record to make it public. *Id.* at 850. The court further noted that any potential abuse of private communications devices to circumvent openness in government was a matter for the Legislature. *Id.* at 850-51.

Further, on the constitutional arguments advanced by the County in *Nissen I*, the United States Supreme Court recently granted certiorari and heard argument in cases involving the question of whether the Fourth Amendment applies to private cell phones. *Riley v. California* (Supreme Ct. Cause No. 13-132) and *United States v. Wurie* (Supreme Ct. Cause No. 13-212).

For the first time this case, Nissen raises an issue of the County's standing. Reply br. at 31.⁴ This Court should disregard this belated, unsupported argument.

First, an issue raised in a reply brief for the first time should be disregarded. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Johnson v. State*, 164 Wn. App. 740, 753, 265 P.3d 199 (2011), *review denied*, 173 Wn.2d 1027 (2012). A reply brief is confined to "a response to the issues in the brief to which the reply brief is directed." RAP 10.3(c).

Second, it is unambiguous that Nissen never raised the County's standing in her opening brief. That brief fails to contain an assignment of error or an issue pertaining to an assignment of error on standing. Br. of Appellant at 2-3. Similarly, that brief does not have a section in its argument devoted to her alleged standing issue. Finally, nowhere in that brief does Nissen make mention of anything resembling the standing principles under Washington law generally or how such principles are not met here. An "issue" raised in as cavalier a fashion as Nissen has done with her putative standing argument, without authority or cogent argument, should be disregarded by this Court. RAP 10.3(a)(6); *Fishburn*

⁴ Commissioner Bearse's ruling on the County's motion to strike Nissen's reply brief authorized the County to respond to this new argument in this brief.

v. Pierce County Planning & Land Services Dep't, 161 Wn. App. 452, 471 n.15, 250 P.3d 146, *review denied*, 172 Wn.2d 1012 (2011).

If the Court chooses to reach the standing issue, Nissen's argument fails on the merits. Nissen contends that the County cannot raise the constitutional rights of Mark Lindquist. Reply br. at 31-32. But Nissen engages in misdirection. Mark Lindquist's constitutional rights to his private cell phone records, or the constitutional rights of any public employees to their records of their private cell phones, only illustrate why the trial court's decision on the merits in *Nissen I* was ultimately correct.

The important point here is that the focus of *Nissen I* and *Nissen II* is the County's obligation to provide records to Nissen pursuant to the PRA. Res judicata or collateral estoppel applies because *Nissen II* involved the same parties, and same PRA cause of action and legal theories as *Nissen I*. The County plainly had standing to contend that Nissen's PRA request and subsequent lawsuit in *Nissen II* was collaterally estopped or barred on res judicata principles.

(2) The Trial Court Erred in Failing to Sanction Nissen and/or Her Counsel

On the legal arguments for sanctions articulated in the County's brief at 27-42, Nissen offers little in the way of disagreement. Nissen seemingly *concedes* the standards for CR 11/RCW 4.84.185 sanctions

argued by the County generally. County br. at 27-28. Nissen filed *Nissen II*, which was not well grounded in fact or in law, after Judge Pomeroy's decision in *Nissen I*. Her "horizontal stare decisis" argument that she made below for contending collateral estoppel did not apply was simply baseless. She does not repeat that argument here.

Nissen's principal contentions relate to the standard of review on sanctions and her attempt to distinguish *Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 979 P.2d 464 (1999), *review denied*, 139 Wn.2d 1027 (2000) and *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009).

With respect to the standard of review as to sanctions, Nissen is correct that such decisions are ordinarily committed to the trial court's discretion and reviewed on appeal for their abuse. *Racy*, 149 Wn. App. at 312.⁵ But a court can abuse its discretion if its decision constitutes an erroneous application of governing legal principles. *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 229, 339, 858 P.2d 1054 (1993) ("A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court

⁵ *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009) cited by Nissen is a discovery sanctions case.

would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.”). That was true here.

The County cited two cases, *Déjà Vu* and *Racy*, that discuss how a second lawsuit can be deemed frivolous when a party is aware that it is barred by clearly applicable cases. Nissen’s contention that these cases are inapplicable is meritless. Reply br. at 41-42. Nissen has no real answer to the fact that *she knew* her *Nissen II* arguments were precluded by the court’s decision in *Nissen I*. County br. at 29-34.

Nissen also *concedes* that CR 11 sanctions apply to actions commenced for improper purposes, as she nowhere disputes the cases cited in the County’s opening brief at 34-35. She offers *no argument* on the reasons set forth in the County’s opening brief at 35-38 that document the basis for sanctions; instead, she quibbles in her statement of the case on cross-appeal regarding some of the County’s grounds for asserting that her conduct was vexatious. Reply br. at 34-41.

The trial court erred in denying sanctions against Nissen for her vexatious conduct. *Nissen II* was unnecessary; it was motivated by the animus of Nissen and her counsel toward the Office⁶ and was part of her *many* actions asserting improper conduct by that Office that were

⁶ Nissen’s animus toward the Office is *repeatedly* evident in her reply brief. E.g., reply br. at 12, 18, 26-27, 38.

dismissed. She made vague threats of criminal sanctions against Prosecutor Lindquist and the Office.

Finally, Nissen does not really dispute the authorities cited in the County's opening brief at 38-42 that a court has inherent authority to sanction procedural bad faith.⁷ Nissen's *only* effort to distinguish this Court's key decision on procedural bad faith in *Rogerson Hiller Corp. v. City of Port Angeles*, 96 Wn. App. 918, 927-30, 982 P.2d 131 (1999), *review denied*, 140 Wn.2d 1010 (2000) is to state that the court there did not award sanctions. Reply br. at 44.⁸ She does not appreciate this Court's clear articulation of procedural bad faith, often cited with approval in other reported decisions. *See, e.g., Francis v. Dep't of Corrections*, 178 Wn. App. 42, 55-56, 313 P.3d 457 (2013); *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 525, 280 P.3d 1133, *review denied*, 175 Wn.2d 1028 (2012); *Forbes v. American Bldg Maintenance*

⁷ Nissen contends that *In re Recall of Lindquist*, 172 Wn.2d 120, 258 P.3d 9 (2011) and *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998) do not apply, but she does not actually cite them. Reply br. at 42-43. Both cases make clear that procedural bad faith may justify sanctions even in connection with constitutionally-sanctioned activities such as recalls. Our Supreme Court in *Lindquist* stated that "[m]isquoting or omitting material portions of documentary evidence constitutes procedural bad faith sufficient to award attorney fees." 172 Wn.2d at 136.

⁸ Contrary to Nissen's assertion, the fact that the sanctions were not awarded in *Rogerson Hiller Corp.* does not diminish this Court's discussion of the prevailing legal principles there.

Co. West, 148 Wn. App. 273, 300, 198 P.3d 1042 (2009), *reversed in part on other grounds*, 170 Wn.2d 157, 240 P.3d 790 (2010).

Simply stated, Nissen and/or her counsel here *misrepresented* to Judge Schaller the nature of her PRA request in *Nissen I*. The record is *unambiguous* that Nissen's counsel falsely asserted that text records were not sought by Nissen in her PRA request that is the subject of *Nissen I*. RPC 3.3(a). Such a falsehood on such a key factual point *is* procedural bad faith and sanctionable.

Nissen perpetuates this falsehood in her rely brief. Her attempt to suggest that the County somehow agreed that *Nissen I* did not carry preclusive effect, reply br. at 43-44, is yet again *false*. She even goes so far as to blame the County for the fact that she filed 2 lawsuits. *Id.*⁹ The County's position on consolidation of the two appeals was not in any fashion a concession that *Nissen I* did not carry preclusive effect in *Nissen II*.

(3) Nissen's Appeal Is Frivolous

Nissen does not offer a specific response to the County's discussion of how Nissen's present appeal is frivolous. County br. at 42-44. Instead, she only vaguely asserts that her appeal is not frivolous

⁹ Nissen's counsel seemingly offers her personal attestation that this case is different than the two cited Dale Washam recall cases. Whether Nissen's counsel was

because of the nature of the arguments and amici in *Nissen I*. Reply br. at 44-45.

Nissen seemingly *concedes* that if this Court reverses the trial court's decision on sanctions, appellate sanctions are also merited.

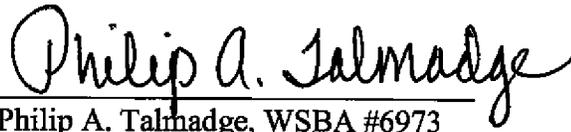
E. CONCLUSION

The trial court properly dismissed Nissen's complaint, but should have imposed sanctions against Nissen and/or her counsel.

This Court should affirm the trial court's order dismissing Nissen's complaint and reverse the trial court's order denying sanctions. The Court should remand the case to the trial court for entry of a fee award as sanctions against Nissen and her counsel. Costs on appeal, including reasonable attorney fees, should be awarded to the County.

DATED this 20~~th~~ day of May, 2014.

Respectfully submitted,



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involved in other litigation with Washam, reply br. at 43 n.14, is entirely irrelevant and should be disregarded.

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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Respondents/Cross-Appellants Pierce County and Pierce County Prosecutor's Office in Court of Appeals Cause No. 45039-9-II to the following parties:

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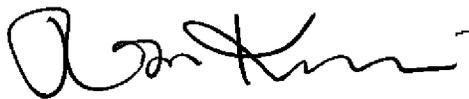
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 20th, 2014, at Seattle, Washington.



Roya Kolahi, Legal Assistant
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