

NO. 70851-1

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

LYNN DALRING, Plaintiff  
MIKE AMES, Respondent

v.

PIERCE COUNTY, a Municipal Corporation, Appellant

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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## I. INTRODUCTION

Appellant Pierce County's appeal concerns whether attorneys fees can be awarded to a non-party, Respondent Michael Ames, for his intervention in civil litigation to resist the County's protection of prosecutorial work product from disclosure to a criminal suspect during an ongoing criminal investigation. Ames' response, however, concerns extended irrelevant and baseless personal attacks against various Deputy Prosecuting Attorneys (hereinafter "DPAs"). Specifically, Ames mischaracterizes the issue as whether "the trial court should be affirmed for" supposedly "addressing the DPAs' deception" and then "sanction[ing] ... misconduct." RB 1, 19. To avoid any confusion created by Ames' irrelevant attacks that might distract from a focused analysis of the actual issues, it should be noted that neither "deception" nor "misconduct" by any DPA existed or was "address[ed]" by – much less a factor in – the trial court's disputed award.

Ames begins by accusing criminal prosecutors of "deception initiated in the criminal action" against Lynn Dalsing, alleging her criminal defense counsel somehow should have been given email communications between those prosecutors and their investigators concerning attorney mental impressions on whether to also bring a "charge of possession" of child pornography against Dalsing. RB 1-3. The prosecutor's email at issue simply responded to Ames' report he had found "no link to her and the child porn,"

CP 606 (emphasis added), and resulted in prosecutors deciding not to charge Dalsing with that additional crime.<sup>1</sup> Thus, both before and after the emails, the charges against Dalsing remained "Child Molestation in the First Degree" and "exploitation of a minor" and always were based on far more than just Ames' bringing child pornography from Dalsing's computer to the attention of investigators and telling them one such photograph depicted a woman whose "body style resembles the same body style that Lynn Dalsing has." CP 19-23, 215, 238-39, 247. For this reason, the order on fees is devoid of any statement it was based, or even "address[ed]," a supposed "deception" or "misconduct" by criminal DPAs. *See* CP 763-64.<sup>2</sup>

Next, Ames accuses the civil DPA defending the County in Dalsing's civil suit of "continu[ing] the deception" in that action, RB 1, presumably because Ames claims he had an "expectation that his e-mails would be disclosed" despite the fact the County long before had consistently objected to disclosure of Ames' email communications with the State's prosecu-

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<sup>1</sup> As to the never filed charge of possessing child pornography, a later analysis by an independent expert found the computers upon which the child pornography was found could in fact be linked to Dalsing and would have supported a charge of child pornography if Ames had conducted a proper computer analysis. *See* CP 834-36.

<sup>2</sup> Without citing the record, Ames in a footnote ironically attacks the "prosecutor's office" when it made required disclosures in criminal prosecutions concerning Ames' testimony wherein he had disputed the factual record. *See* RB 9 n. 4. Though Ames states he has "sought judicial relief" in "another matter" outside the record on that issue, he neglects to reveal that the State's disclosure of his potential impeachment evidence not only was judicially upheld as constitutionally required in that action, but that Ames' suit to prevent such prosecutorial disclosure has been judicially held frivolous and warranted sanctions against both him and his counsel. *See* Appendix: 4/7/14 Order in P.C. Cause #13-2-13551-1. *See also* ER 201 (judicial notice can be taken at any stage of proceeding).

tors because they were "work product and privileged" as well as part of ongoing criminal litigation. RB 1, 4-5. Though the County never disputed those emails between criminal prosecutors and their investigators existed and were in its possession,<sup>3</sup> the sworn declaration of the DPA in question confirms he never told Ames that prosecutorial work product emails would be disclosed in discovery to the suspect of an ongoing criminal investigation. CP 715, 718-19. Indeed, contemporary records confirm the County long before had repeatedly and formally objected in writing to such disclosure because the emails were not discoverable "under CR 26(b)(1) [*i.e.*, protecting attorney work product] and privileged under

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<sup>3</sup> Ames includes in his brief's appendix a declaration filed in another matter before another court, *but see* RAP 10.3(a)(8), and claims it shows the DPA in question admitted Ames sent him the emails on October 18, 2012, and that somehow he "deliberately and intentionally mislead the court about having the emails to disclose on October 18th." *See* RB 9 n. 4, 22 & App. 3. The issue has never been whether the County "ha[d] the emails to disclose" since they were created by its criminal prosecutors and its sheriff's detectives on its computers and it had long before formally objected to their disclosure. The only issue was Ames' factually false and legally irrelevant claim those emails were discussed when he supposedly provided them to the DPA at an earlier October 2012 meeting, when in fact they were never produced by Ames at those meetings and never discussed with him at any time. *See id.*; CP 48, 715-18. If the timing of Ames' delivery to prosecutors of additional copies of those emails had been an issue, Ames' repeated contradictions about when and how he allegedly shared those emails with prosecutors undermine his most recent version of the facts. *See e.g.* RB 5 (Ames cites "CP 633" to show he allegedly "shared with civil deputies the emails" before "new civil deputies became involved") (emphasis added); CP 633 (Ames claimed that when he met with the first civil DPAs he "expressed my concerns" and that later the currently assigned DPA "advised me he was aware of those concerns when I asked him about them at our first meeting") (emphasis added); RB 9 (Ames' brief notes the current DPA denies that Ames provided him the emails at that first meeting and Ames contradicts page 5 of his responsive brief by now saying he "agreed, and never testified to the contrary" *citing* CP 758) (emphasis added); CP 758 (Ames claims he met with current civil trial DPAs on October 16, 2012, and it only "was after that meeting that I contacted Mr. Richmond and discussed the emails because they had not come up in that meeting") (emphasis added).

RCW 42.56.240 [*i.e.*, protecting ongoing criminal investigations] ...." CP 200-01, 718. Indeed, it was only when the County reiterated those same objections at Ames' deposition months later that Dalsing's counsel for the first time disputed the County's formal earlier objections to producing litigation communications between prosecutors and their investigators during the ongoing criminal investigation. *See* CP 586, 718-19, 725-26.

In any case, this Court again will look in vain for any trial court finding that its fee order was based on a supposed "deception" or that it was a "sanction[]" for "misconduct" by the civil DPA. *See* CP 763-64. Instead, as even Ames notes, *see* RB 19, the trial court awarded fees asserting – without citation to authority or any legal analysis – that the County's prior formal written and oral discovery objections made pursuant to CR 30 (g)(3) and CR 33 (a) were not "substantially justified" because the County had not also filed for a protective order and produced an exemption log. *See* CP 766. As later shown below, this legal conclusion was error.

Finally, in the midst of making personal attacks, Ames ironically accuses the County's opening appellate brief of somehow "besmirching Lynn Dalsing and Det. Ames," RB 1, but fails to state exactly how it does so. Rather, unlike Ames' *ad hominem* attacks, every factual assertion in the County's brief regarding Dalsing and Ames' actions are relevant to the appellate issues and supported by its record citations – and Ames makes no

attempt to show otherwise. *See* AB 2-20. Thus, as to previous briefing on Dalsing's criminal charges, those charges not only are shown by the record to have been exactly as stated by the County but – on completion of the State's investigation – they and additional charges were judicially held to be supported by probable cause. *See* CP 831-41. As to Ames' conduct described in the County's brief, he identifies nothing therein that "be-smirch[es]" him. Rather, the County simply disputes his baseless attacks on DPAs and his claim it was sanctioned for "deception" and "misconduct" when the facts are demonstrably otherwise. *See* RB 9, 19; CP 718.

## **II. REPLY TO AMES' FACTUAL MISSTATEMENTS**

Though Ames makes too many additional, irrelevant misstatements to list and rebut within a Reply's page limitations, it is appropriate to respond to those erroneous allegations that actually relate to the appellate issues.

As to those issues, Ames does not dispute he never filed in Dalsing's civil suit a motion to compel discovery but only: 1) filed a "Motion for an Order Permitting Documents Be Filed Under Seal" in which he merely said he was "requesting guidance from the court on how to proceed;" and 2) filed a "declaration on Dalsing's motion to compel" wherein he repeated that he only "sought direction from the court regarding the scope of his deposition testimony and whether he should answer." *See* RB 6 (emphasis added). Instead he claims as to his motion to file documents under seal: 1)

it alleged it was brought "under CR 26(c);" 2) he did not later deny that rule was a legal basis for his motion and that the words he used to deny the rule applied somehow was "misquote[d];" and 3) his motion "asked for a ruling that would allow him to clear his name through the production of his supporting documentation ...." RB 6, 11, 14. The record is otherwise.

When the County opposed Ames' motion to file documents under seal because he had not complied with CR 26(i) certification requirements, CP 293-94, 300, Ames' counsel expressly argued to the trial court: "This certification requirement does not appear to apply to Det. Ames' motion to file records under seal. Det. Ames is responding to Lynn Dalsing's motion to compel." CP 365 (emphasis added). Now on appeal, Ames does not explain either this earlier representation to the trial court that his motion only was in response to Dalsing's motion or how the County somehow "misquote[d]" it. Further, neither Ames' March 12, 2013, motion nor declaration on its face anywhere argued the trial Court should have granted Dalsing's preexisting March 8, 2013, discovery motion and rejected the asserted County privileges. *See* CP 265, 285. Though his declaration stated he wanted to "produce the documents I have that support my testimony," it also stated he only was "willing and able to testify to matters not privileged." CP 266 (emphasis added). Likewise, his motion "defers this matter to the court for a ruling on the scope of any applicable privilege or

work product" and asserts he was providing communications with prosecutors "*in camera* so that the Court may decide whether any portion of them should be disclosed to Plaintiff under CR 26 when it rules on Lynn Dalsing's Motion to Compel Discovery." CP 285-86 (emphasis added). Indeed, Ames' proposed order nowhere requested the court compel production. CP 290. On appeal he cannot now claim his motion to file sealed documents instead argued the County's assertion of privilege was invalid.

Ames' next relevant misrepresentation is that the record supposedly shows his counsel "conferenced with the DPAs before seeking relief from the court" and that "the County simply misstates the facts on this point." RB 20 (emphasis added). In fact, none of his supposedly supporting record citations even mention Ames' motion before he filed it on March 12, 2013 – much less shows he "conferenced" about it beforehand. Rather, before his filings the only "forthcoming" motion he mentioned was Dalsing's "motion to compel regarding my client's testimony." *See* CP 370-75.

Ames further claims it was only after he "insisted his emails were not work product" that "the County started to respond to discovery" and "first produced a privilege log on March 13, after Det. Ames filed his emails with the court under seal." RB 7. In fact, the record establishes both that the County had been providing exhaustive discovery long before Ames' motion to file sealed documents, *see* CP 326-27, as well as that before

Ames' motion the County already had agreed with Dalsing to provide a privilege log for the protected documents. *See* CP 249, 319. Ames' later filings did not and could not cause the County's prior discovery responses.

Ames also asserts without citation to the record that "the County was ... claiming that sometime after April 25<sup>th</sup>, the County decided to start investigating criminal proceedings more than two years after dismissing the case on June [sic] 14 [sic], 2011." RB 8 (emphasis added). In fact, the order dismissing the criminal charges back in July 13, 2011, not only was "without prejudice," but expressly stated it was entered because the "State is still processing the thousands of images child pornography that were seized in this matter to determine if there are other charges to file against the defendant." CP 146-48 (emphasis added). Indeed, when Dalsing filed her March 19, 2012, complaint, she expressly claimed there was a "continued and ongoing threat of prosecution" against her, CP 6 (emphasis added), while her March 13, 2013, motion to compel expressly argued she was "entitled to discover ... essential facts respecting the ongoing investigation and prosecution" against her. CP 132. Thus, the uncontested record confirms the criminal investigation never stopped so as to be capable of being started "sometime after April 25<sup>th</sup>," 2013. Even now the amount of evidence is so extensive and technical that a "significant amount of forensic analysis still [is] being conducted" in the criminal matter. *See* CP 836.

*See also Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997) (recognizing criminal investigation had been ongoing for almost 30 years).

### III. REPLY TO AMES' LEGAL ARGUMENT

It is well settled that a "ruling based on an error of law constitutes an abuse of discretion." *See King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 355, 16 P.3d 45 (2000). As shown earlier as well as below, the ruling awarding fees and costs to Ames was based on numerous errors of law.

#### A. AWARD TO NON-PARTY AMES WAS ABUSE OF DISCRETION

##### 1. CR 26(c) Still Does Not Support a Fee Award to Witness Ames

Though the trial court ruled "CR 26 ... authorize[s] an award of attorney fees and costs," *see* CP 767, as noted above, the record shows Ames instead told the trial court that CR 26(i) did not "apply to Det. Ames' motion to file records under seal" because he only was "responding to Lynn Dalsing's motion to compel." *See* discussion *supra* at 5-6; CP 365. On appeal Ames not only declines to explain his earlier contradictory argument to the trial court, but declines also to address the actual language of CR 26(c). That rule specifically states it applies only to "the person from whom discovery is sought," and requires him to successfully seek "protect[ion]" ... from annoyance, embarrassment, oppression, or undue burden of expense" by a "motion for a protective order." (Emphasis added).

First, Ames was not "the person from whom discovery [was] sought"

for copies of the County's emails because he was neither a party nor had been served with a discovery request for them. *See e.g.* CP 200-01, 717. Second, Ames never sought to "protect" those County documents from discovery because, as the trial court noted: "Det. Ames's motion did not seek a protective order; it sought *in camera* review of emails he wanted to produce to Plaintiff Dalsing." CP 765 (emphasis added). Indeed, Ames now claims he affirmatively opposed the County's efforts to protect those records, and affirmatively worked against their protection so he could produce "discovery over the objections of the prosecutor's office" because he deemed himself the true representative for the County. *See* RB 11-13.<sup>4</sup>

Ames thereby fails to show how the record, law, or his argument satisfy CR 26(c). Failing to confront the actual issues raised by the express language of CR 26(c) and the County's appellate brief, *see* AB 21-23, Ames does not refute that the trial court based its decision to award fees on an error of law and thereby abused its discretion as a matter of law.

## 2. CR 37 Still Does Not Support Witness Ames' Judgment

The trial court also ruled "CR 37 authorize[s] an award of attorney fees and costs," CP 767, but Ames' attempted justification for that conclusion again fails to quote – much less confront – the actual language of CR

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<sup>4</sup> Executive authority to act for the County rests exclusively in its Executive, RCW 36.56-.040, and exclusive authority to act as its attorney rests in its Prosecutor. RCW 36.27.020(4).

37. Indeed, rather than address most of the County's argument on the issue he chooses to mischaracterize it.<sup>5</sup> *Compare* RB 13-16 *with* AB 23-25.

Thus, Ames ignores that the express provisions of that rule benefit only a "party" who applies for "an order compelling discovery," *see* CR 37(a), or a "party or deponent who opposed the motion." *See* CR 37(a)(4). As noted above, Ames is neither a "party" who applied for "an order compelling discovery," nor a "deponent who opposed" such a motion. Instead, as also noted above, Ames moved solely for an "Order Permitting Documents to Be Filed Under Seal (GR 15)" for the purpose – he claimed at the time – of "responding to Lynn Dalsing's motion to compel" and seeking the Court's "guidance." CP 266, 285, 365 (emphasis added). The trial court's error of law concerning CR 37 is unrefuted by Ames.

Ames instead only opaquely discusses CR 37(a)(4)'s additional requirement that responsibility to pay expenses of a motion to compel can be imposed on "the party ... whose conduct necessitated the motion." RB 13-16. Ignoring the actual language of that rule, Ames argues only that the supposed "erroneous assertion of work product precipitated Det. Ames

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<sup>5</sup> For example, Ames claims the County "argues it never instructed Det. Ames to not answer questions about his e-mail" and "never demanding this email back to prevent Det. Ames from disclosing it." RB 15-16 (emphasis added). A review of his supposedly supporting citation to page 27 of the County's brief, RB 16, shows this is a mischaracterization. The County's brief at page 27 instead notes the County never told Ames "not to produce legally discoverable documents" or had ever filed a "motion for a protective order, which Det. Ames resisted." AB 27.

seeking relief from the Court" and his providing it "the information it needed to correctly address the discovery motion to compel before it." RB 14 (emphasis added). Even ignoring for now that asserting protections for work product and a pending criminal prosecution was not "erroneous," much less "misconduct," *see* AB 27-31; *discussion infra.* at 14-17; CP 204-05; 12/18/13 Com. Ruling at 9 in COA #70455-9-I,<sup>6</sup> CR 37(a)(4) does not concern whatever might have "precipitated" Ames to intervene for his own reasons and move "to file sealed documents." Rather, the express language of CR 37(a)(4) requires a showing instead that the assertion of evidentiary privileges "necessitated the motion [to compel]" – a motion that Ames never filed. Even apart from Ames never having filed a "motion to compel," he concedes there already was a real "motion to compel before" the trial court that was filed by Dalsing. *See* CP 121. Similarly, prior to Ames' filings, the record confirms Dalsing's motion also independently had requested an *in camera* review of those emails. *See id.*

Thus, the record affirmatively shows that even as to Ames' indirect and partial discussion of just one requirement under CR 37(a)(4), his mo-

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<sup>6</sup> Ames argues "this court denying discretionary review ... supported the trial court's decision," but that its Commissioner's decision denying that review – which agreed the trial court "erred" on the issue – has "no binding effect." RB 14-15. As to any alleged "support[]" of plaintiff, RAP 2.3(c) instead states "denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision." (Emphasis added.) As to the Commissioner's analysis, RAP 1.1(f) states such acts "performed on the authority of these rules is action taken by the appellate court whether that act is performed by the ... commissioner or by the judges of the Supreme Court or the Court of Appeals." (Emphasis added.)

tion to file sealed documents was entirely unnecessary and did not meet even the element of the rule he chooses to acknowledge.

3. Eugster Still Does Not Support Non-Party Witness Ames' Award

The trial court also based its decision on its conclusion it had "authority under *Eugster* [*v. City of Spokane*, 121 Wn.App. 799, 91 P.3d 117 (2004)] to award attorney fees and costs to Det. Ames," CP 765, but this also has been shown error. Indeed, even the trial court conceded *Eugster* only 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)." *Id.* (emphasis added). *See also* 121 Wn.App. at 805 (non-parties "filed motions to quash the subpoenas"); AB 25. The record is uncontested Ames never "prevailed on a motion for protective order through the application of CR 37(a)(4)." Instead, Ames only moved for an "Order Permitting Documents to Be Filed Under Seal (GR 15)," *see* CP 285, 365, so (as he now argues) discovery would be compelled (rather than just to seek "guidance" as he stated at the time or for "protection" as CR 26(c) requires). Under any scenario, *Eugster* provides no authority for fees.

Ames' sole mention of *Eugster* does not respond to the County's argument but instead only misstates that case as supporting the broad proposition that a "court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue bur-

den or expense." RB 13. This overlooks that the complete *Eugster* quote actually requires such an order be made "under CR 26(c)." 121 Wn.App. at 814. Again, this additional error of law by the trial court concerning the erroneous legal basis for its decision remains undefended by Ames.

#### 4. County's Discovery Objections Remain More Than Justified

Other than citing to general definitions of work product without applying them to the facts or issues here, RB 18, Ames fails to mention – much less refute – the County's legal analysis and authority establishing its work product objection was far more than just "substantially justified." *See* AB 28-30; CP 204-05. Having shown its work product objections instead were correct, the County fell well outside the requirements of CR 37(a)(4) for an award of fees because it at least had a "reasonable basis in law and fact" for asserting that protection. *See e.g. H & H Partnership v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003). *See also* 12/18/13 Comm. Ruling 9 (finding this trial court "erred" in analyzing exception to work product).

The County also asserted the additional separate protection under *King v. Olympic Pipeline*, 104 Wn.App. at 357, "where the matter of the parallel civil and criminal proceeding or investigation is the same." Here, the record confirms a parallel criminal investigation on the same subject matter: 1) was ongoing at the time of both the July 13, 2011, dismissal "without prejudice" and the March 19, 2012, filing of Dalsing's complaint, *see* CP

16-17, 146-48; 2) was expressly asserted as a discovery objection by at least October 31, 2012, *see* CP 200-01; and 3) culminated in a currently pending parallel criminal proceeding on March 28, 2014. *See* 825-82. Though Ames states without legal analysis that there is no "legitimate[] claim [the County's] asserted objection to ongoing law enforcement materials ... justifies the withholding," RB 19,<sup>7</sup> he cannot explain away the fact: 1) this Court's Commissioner later 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" due to the parallel criminal matter that Ames claims did not exist, *see* 12/18/13 Comm. Ruling 15; and 2) even the trial court – both before and after Ames moved for attorneys fees – agreed the pending criminal matter was a proper ground for staying his discovery request. *See* CP 473, 769.

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<sup>7</sup> Ames argues an oral argument transcript shows the current civil DPA in Dalsing's Superior Court action "conceded there was no active law enforcement investigation going on during the relevant time frame." RB 19. Instead, the cited transcript shows the DPA in response to that court's question only advised he was merely "the civil attorney and I'm not involved in the criminal in any way except that I got Mr. Auser's [sic] declaration," that he could respond only by "relying upon his – what he told me," that he "could provide all the answers ... as soon as I got back to my office" but that he would offer his hearsay understanding that at that time the "matter has been turned over" to another agency "apparently 10 days ago" for a criminal investigation concerning allegations from a witness that Dalsing's representatives had "bullied" and "threatened" her. *See* 5/8/13 VRP 13-14. He nowhere "conceded there was no active law enforcement investigation going on during the relevant time frame" concerning Dalsing's crimes against her daughter. The County's civil defense counsel neither had that knowledge nor would such a statement have been correct. *See* CP 146-48, 200-01, 825-42. Indeed, as noted above, the ongoing criminal investigation and prosecution was affirmatively pled by Dalsing as early as her complaint, *see* CP 16-17, and was her stated basis for the very preexisting motion to compel that Ames now wants to be compensated for supporting. *See* CP 132.

Finally, Ames cites the trial court's legal conclusion that protection of prosecutorial work product communications during the ongoing investigation was not "substantially justified" because the County had not sought a protective order or served a privilege log before Ames moved to file sealed documents. *See* RB 4, 6-7, 16, 19; CP 766. As a factual matter, the record is undisputed the County had long before made formal discovery objections based on work product and the ongoing criminal investigation, *see* CP 200-201, as well as had agreed to provide a privilege log before Ames' filed his motion to seal. *See* CP 249, 319. In any case, as a legal matter, neither a protective order nor privilege log was or is a prerequisite to asserting Pierce County's discovery objections.

Because the County had already formally objected to the discovery pursuant to CR 30(g)(3) and CR 33(a), no protective order was required as a matter of law. *See e.g. Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 197 220 P.3d 191 (2009) ("A party must answer or object to an interrogatory or a request for production. If the party does not, it must seek a protective order under CR 26(c)") (*citing* CR 37(d)) (emphasis added). Likewise, though the Public Records Act requires a privilege log in response to a request under that statute, *see e.g. Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536-40, 199 P.3d 393 (2009), neither the trial court nor Ames cited any authority, *see* CP 766,

and the County has found none, that recognizes a civil rule discovery violation occurs absent such a log for common law tort actions where the court has not previously ordered it. *See e.g. Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 695-96, 295 P.3d 239 (2013) (a "best practice is for the trial court to require a document log") (emphasis added).

Thus, the trial court's mistaken conclusion that the County's discovery response "was not substantially justified" also was based on a legal error.

#### 5. Ames' Violations of CR 26(i) Still Also Precludes Any Award

Though Ames' claim he "conferenced" with the County's attorney about his motion to file sealed documents before he filed it has been shown false, *see discussion supra* at 7, his brief makes no attempt to dispute that he also failed to conference with the County regarding his later motion for attorneys fees under the discovery rules. *Compare* AB 31-31. Instead, Ames cites *Amy v. Kmart of Wash. LLC*, 153 Wn.App. 846, 223 P.3d 1247 (2009), which held that "failure to comply strictly with the requirements of CR 26(i)" for certification did not preclude "jurisdiction." RB 20 (emphasis added). Though there is a dispute among the Courts of Appeals on the necessity of certification, here Ames did not just fail to certify conferences occurred but failed to conduct them. *See e.g. Clarke v. State Attorney General's Office*, 133 Wn.App. 767, 138 P.3d 144, *rev. denied* 160 Wn.2d 1006 (2006) (trial court did not have authority to hear dis-

covery 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); *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn.App. 861, 28 P.3d 813 (2001) (same). The County did not claim the trial court was barred by lack of jurisdiction from deciding Ames' motions to file sealed documents and for attorneys fees since it failed to certify conferences in strict compliance with the rule, AB 31-32, but that the court should have decided the motions and denied them since there was no compliance by either conferencing or certification.

Even if the trial court had the discretion to choose not to follow CR 26(i) altogether, reversal still would be required because it in fact did not exercise discretion but failed to acknowledge the CR 26(i) requirement at all. *Compare* CP 762-67 with CP 293-94, 300, 710. *See e.g. Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000) ("The court abused its discretion by failing to exercise discretion")(quoting *Bowcutt v. Delta N. Star Corp.*, 95 Wn.App. 311, 321, 976 P.2d 643(1999).

#### B. AMOUNT OF AWARD ALSO WAS AN ABUSE OF DISCRETION

Not only does the "party seeking fees ha[ve] the burden of proving that

which constitutes reasonable fees," but he "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 v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998)) (emphasis added). Here, Ames neither disputes these requirements nor satisfies them.

Instead, Ames cites "CP 657-58" and makes the factually baseless claim that "[t]he court considered the contemporaneous time records kept in the matter by counsel and produced in support of the motion." *See* RB 21. Neither the cited document in particular found at CP 657-58, nor the record in general, contain "contemporaneous time records" that were "kept in the matter by counsel" and "produced in support of the motion." The only document cited by Ames instead is a mere after the fact listing in a declaration by the client Ames of what he vaguely claims "I have incurred ... in this matter" – without: 1) stating what, if any, factual basis exists for that assertion; 2) producing as an attachment the required "contemporaneous records;" or 3) explaining if "this matter" refers to his motion to seal or his unrelated legal expenses in this and/or his numerous other civil actions. *See* CP 479, 489, 496, 514, 752. Ames' declaration does nothing more than repeat what he was told he was being charged for the alleged "fees and costs" that he supposedly had "incurred" regarding an undefined "matter." CP 656-58. Further, Ames refuses to acknowledge that even the

list he created to insert into his undocumented hearsay declaration did not include – much less explain and prove – an additional charge awarded by the trial court for a meeting that was listed only in the argument of his unsworn legal brief and nowhere else. *See* CP 752. *See also* AB 16-17, 36.

Just as "Courts should not simply accept unquestioningly fee affidavits" even when they are "from counsel," *Johnson*, 177 Wn.App. at 699 (*quoting Mahler*, 177 Wn.App. at 434-35), so too it was error to accept allegations contained only in an unsworn legal brief or a client's vague fee affidavit created after the fact and containing only hearsay rather than the required contemporaneous records documenting relevant hours worked.

Further, as shown previously and below, Ames similarly fails to meet his "burden of proving that which constitutes reasonable fees."

1. Services Still Not "Essential to the Outcome" but "Unnecessary"

The County's brief quoted *Eugster's* principle that to uphold a fee award an appellate court "needs to know," among other things, "if the services of the attorneys were ... essential to the successful outcome" and "if there were any duplicative or unnecessary services." 121 Wn.App. at 815-16 (vacating award and *citing Mahler*, 135 Wn.2d at 435). *See also* AB 35-37. There, and here, the County affirmatively demonstrated the legal services of Ames' attorney were not "essential to the successful outcome" of the discovery issue but were "duplicative" and "unnecessary" because at

the time of his filings there were already pending motions to compel and for *in camera* review filed by plaintiff Dalsing. *Compare* CP 121 with CP 265, 285. Though the trial court stated Ames had provided "information and evidence that the Court found important in rendering a decision on the discovery motions," CP 766, any "information and evidence" in Ames' motion to seal was not a stated basis for the court's legal conclusion concerning their discoverability, CP 397, and their availability for that court's review was already at issue pursuant to Dalsing's pending motion to compel which also sought *in camera* review. *See* CP 121, 380-82.

Ames' discussion of the amount awarded nowhere responds to the failure of his trial court filings to be "essential to the outcome" or the fatal presence of counsel's "duplicative or unnecessary services." *See* RB 20-22.

## 2. Hourly Rates Awarded Still Have Not Been Proved Reasonable

Ames argues he proved the hourly rates were reasonable because after the award order he cited "six other cases" and recounted hearsay concerning awards of supposedly similar hourly rates. *See* RB 21; CP 777. Ames' argument ignores the "cases" he belatedly cited were far more complex, involved greater recoveries and more experienced attorneys and larger firms for longer periods of time, as well as that his tardy hearsay was inadmissible and should have been stricken on the County's motion. *See* AB 39 n. 5. Ames also disingenuously argues the "rate approved for the attor-

ney it selected for him also was comparable," RB 21, when in fact those rates were \$50 less per hour for counsel and paralegal services than what Ames was awarded. *Compare* CP 683 with CP 699, 713. *See also* AB 38.

Ames next argues he did not need to address more than one of the elements for gauging the reasonableness of fees under RPC 1.5 because they concern "reasonableness of fees charged to clients" and here fees supposedly were awarded "as a sanction ...." RB 21. It has been repeatedly noted the law holds a "party seeking fees has the burden of proving that which constitutes reasonable fees," *Johnson* 177 Wn.App. at 699 (*citation omitted*), and that the trial court's award neither states it was a "sanction" to punish some "misconduct" nor describes any County discovery response that could be labeled "misconduct." *See* CP 762-67. *See also supra* at 14-17; AB 28-30; CP 473, 769; 12/18/13 Comm. Ruling 9, 15.

### 3. Findings Still Do Not Support the Attorney Fees Award

Ames states the trial court entered factual findings supporting its decision but cites no record in support. RB 22. Ames' bald statements here cannot remedy the absence of any factual finding that supports the amount of fees awarded. Rather, the entirety of the trial court's discussion of the amount awarded contains only conclusions rather than supporting facts:

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. No facts are identified that would allow an appellate court to review what factual basis existed for: 1) the client's hearsay listing of attorney fees he was told he had incurred; 2) the additional claimed hours stated only in Ames' legal brief; 3) whether time spent, tasks performed, and hourly rates actually related only to Ames' motion to seal; and 4) how the fees were essential to a successful outcome of his motion to seal and not duplicative or unnecessary due to Dalsing's preexisting motions.

Alternatively, Ames argues the "County failed to propose any alternative findings and took no exception to the order entered." RB 22. The County, however, was never given the opportunity to propose alternative findings and did take exception to the order. *See* CP 772-776, 780-85. Further, Ames' brief neither argues this issue nor cites supporting authority for it, *see* RB 22, and "[s]uch '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *Joy v. Depart. of Labor and Indus.*, 170 Wn.App. 614, 629, 285 P.3d 187 (2012) (*quoting West v. Thurston County*, 168 Wn.App. 162, 187, 275 P.3d 1200

(2012), *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (1998)). *See also* RAP 10.3(a)(6).

C. NO BASIS EXISTS IN FACT OR LAW FOR FEES ON APPEAL

Finally, Ames seeks fees on appeal. RB 22-24. Appellate fees, however, "are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity." *Building Industry Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 750, 218 P.3d 196 (2009).

Ames first vaguely asserts in passing without any supporting legal argument that an award of appellate attorneys fees somehow is supported by "the indemnification provisions of RCW 4.96.041 and PCC 2.120.010." RB 23. Though this mere passing assertion again is insufficient, *see Joy, supra*; RAP 10.3(a)(6), on its face neither the cited statute nor ordinance applies. *See* RCW 4.96.041 (if "action or proceeding for damages is brought against any ... employee ... of a local government entity of this state, arising from acts or omissions while performing ... his or her official duties," the employee must "request the local governmental entity to authorize the defense of the action or proceeding") (emphasis added); PCC 2.120.010(A) (county will "defend upon proper request, all civil claims or civil actions for damages brought or maintained against its ... employees ... arising out of ... the performance" of "official duties") (emphasis added); PCC 2.120.020 ("To properly request [a defense], ... employee ...

shall make written request of defense to the Risk Manager and to the Prosecuting Attorney within seven days of receipt of notice of the filing of said claim or action") (emphasis added).

Otherwise, again without citing authority or rationale for how they would apply on appeal, Ames just repeats his refuted assertion that "CR 27 and 37" as well as his baseless claim of "bad faith conduct" warrants appellate fees also. *Compare* RB 23-24 *with discussion supra.* at 9-14. Because Ames "has not identified an applicable basis for awarding ... fees" on appeal, that claim also should be denied. *See McCarthy, supra.* at 750.

#### IV. CONCLUSION

The trial court erred in awarding fees to a non party witness for intervening when the County sought to protect prosecutorial work product from disclosure to a criminal suspect during an ongoing criminal matter. That court also erred in the amount it awarded. The County therefore respectfully requests reversal of the order awarding fees to non-party Ames.

DATED this 7th day of July, 2014.

MARK LINDQUIST, Prosecuting Attorney

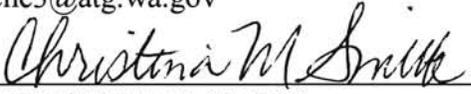


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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing APPELLANT'S  
SUBSTITUTE REPLY BRIEF was delivered this 7th day of July, 2014, to  
the following by electronic mail pursuant to the agreement of the parties:

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

MICHAEL AMES,

Plaintiff,

No. 13-2-13551-1

v.

**OPINION AND ORDER ON  
ATTORNEY'S FEES AND EXPENSES**

PIERCE COUNTY

Defendant.

**THIS MATTER** comes before the Court on Defendant Pierce County's Motion for Attorney's Fees and Expenses. Plaintiff Michael Ames responded in opposition to Pierce County's motion. On March 19, 2014, Ames and Pierce County both appeared through counsel for oral argument.

**FACTUAL HISTORY**

Plaintiff Michael Ames is a detective with the Pierce County Sheriff's Office. He is often called as a witness for the prosecution in criminal matters. The Pierce County Prosecutor's Office has a written procedure for providing potential impeachment evidence ("PIE") to defense counsel in criminal cases. The prosecutor's office provided notice to Ames that it was going to provide defense attorneys PIE regarding Ames in cases in which Ames was scheduled to testify. Ames objected to this evidence being disclosed as PIE. He

1 filed a petition for a writ of prohibition and declaratory relief on October 2, 2013.  
2 Specifically, Ames' primary objections are to evidence stemming from the following:

3 *Dalsing declarations*

4 Ames was an investigator in a criminal matter against Lynn Dalsing. Dalsing was  
5 arrested and charged with child molestation in the first degree and sexual exploitation of a  
6 minor. After the criminal charges were dismissed on the eve of trial, Dalsing sued Pierce  
7 County alleging the Prosecutor's Office delayed disclosing an exculpatory photograph to  
8 defense counsel and continued the prosecution despite knowledge of this exculpatory  
9 evidence. Ames states he had in his possession emails exculpating Dalsing, indicating there  
10 was no probable cause that she was involved or had possessed any child pornography. Civil  
11 deputy prosecuting attorney Jim Richmond, Ames' counsel at the time, instructed Ames to  
12 not answer certain questions at a deposition and claimed the emails were attorney work  
13 product. Ames later asserted there was a conflict of interest and retained independent  
14 counsel in the matter.

15 Ames alleges he provided the emails to the prosecutor in the criminal matter prior  
16 to the trial. Ames alleges he was told in an email from the criminal prosecutor on June 9,  
17 2011 that she would disclose the emails to defense counsel.

18 Likewise, Ames states he provided the emails to civil deputy prosecutor Richmond  
19 on October 18, 2012 during the discovery process for the civil matter. Ames alleges  
20 Richmond told him that the emails would be disclosed. When the emails were not  
21 disclosed, Ames provided copies to the judge. Ames made a motion for attorney's fees and  
22 in his supporting declaration alleged that he provided the emails to Richmond and was told  
23 the emails would be disclosed. Richmond disputes this in his own declaration, claiming he  
24 never received the emails and never told Ames the emails would be disclosed. Attorney's  
25 fees were awarded to Ames. The Prosecutor's Office was found to be "not justified" in its  
26 instructions to Ames. Pierce County has appealed the award of attorney's fees.

27 Ames alleges the declarations countering his statements were made in retaliation for  
28 bringing forward the exculpatory emails. He claims these were created intentionally so that  
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there would be PIE to discredit him as a State witness and undermine his employment and ability to do his job.

*Coopersmith report*

The other piece of evidence Ames takes exception to being labeled PIE is known as "The Coopersmith Report." According to Ames, in July 2012 he took a mandatory child abuse report regarding a bullying and child neglect case in Gig Harbor. In October 2012, Ames was told there was a potential misconduct investigation against him regarding his conduct in that case. A lieutenant advised him there would be no investigation because the lieutenant found no problem with Ames' actions in that case, which according to Ames, were limited to creating the report.

In November 2012, Pierce County Prosecutor Mark Lindquist issued a press release indicating that the case would not be prosecuted because of a detective's improper relationship with the attorney representing the victim's family. Ames took this as an implication that the detective was in an attorney-client relationship in another civil case and that somehow it was improper for him to take the report. Ames believes the press release was referring to him and denies being in an attorney-client relationship with any attorney at the time he took the report.

In December 2012, Ames says he discovered a misconduct investigation did take place against him, despite the assurances by the lieutenant. Ames believes he should have been afforded due process and made aware of the investigation. Ames then requested an outside investigation be conducted into the handling of that case.

On March 27, 2013, Ames was informed that Jeff Coopersmith, an outside investigator, would be conducting the investigation of Ames' complaints. On May 24, 2013, Ames was informed that the investigation into his complaint had been completed and it had been determined that there was no merit to his allegations that he had been a victim of retaliation. Coopersmith's investigation also concluded that the misconduct investigation against Ames concerning the bullying and child neglect incident had been conducted properly.

Ames alleged two causes of action as part of his petition. He requested a writ of

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prohibition to prevent the Prosecutor’s Office’s dissemination of the above-referenced material as PIE to criminal defense counsel. He also sought declaratory relief and a fact-finding hearing so he could cross-examine Richmond and obtain relief declaring Ames as truthful and that the information is not PIE. The action was dismissed by this Court on February 6, 2014.

**STANDARD**

CR 11 allows sanctions when there is a “baseless” filing or filing for an improper purpose.<sup>1</sup> A filing is “baseless” if it is not well grounded in fact or not warranted by existing law or a good faith argument for altering existing law.<sup>2</sup> The Court has discretion to impose sanctions when the attorney who signed and filed the “baseless” motion failed to conduct a reasonable inquiry into the factual and legal basis of the claim.<sup>3</sup> The reasonableness of the inquiry is judged on an objective standard.<sup>4</sup> The trial court has broad discretion under CR 11 in determining the appropriate sanction and against whom the sanction is to be imposed.<sup>5</sup>

RCW 4.84.185 provides that a non-prevailing party in a civil action pay for the attorney’s fees and other costs of the prevailing party when the action is frivolous and advanced without reasonable cause. An action is frivolous when, considered in its entirety; there is no rational basis in law or fact for the action.<sup>6</sup>

**ANALYSIS**

*I. Writ of Prohibition*

A writ of prohibition “arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal,

<sup>1</sup> *Stiles v. Kearney*, 168 Wn.App. 250, 261, 277 P.3d 9 (2012), *rev. denied* 175 Wn.2d 1016, 287 P.3d 11(2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 261-62.

<sup>5</sup> *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.2d 530 (1988) *rev. denied*, 11 Wn.2d 1007 (1988).

<sup>6</sup> *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 218, 304 P.3d 914 (2013), *rev denied* 178 Wn.2d 1022, 312 P.3d 651 (2013).

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corporation, board or person.”<sup>7</sup> “Prohibition is a drastic remedy and may only be issued where (1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does not have a plain, speedy, and adequate legal remedy.”<sup>8</sup> “If either of these factors is absent, the court cannot issue a writ of prohibition.”<sup>9</sup> It is not a proper remedy where the only allegation is that the actor is exercising jurisdiction in an erroneous manner.<sup>10</sup>

To obtain a writ of prohibition, a state actor must be acting outside of his or her jurisdiction. Ames conceded that the prosecutor has a mandatory duty to disclose impeachment evidence under *Brady v. Maryland*.<sup>11</sup> *Kyles v. Whitley* provides that the prosecutor is the only person who knows of undisclosed evidence and therefore is charged with the responsibility to gauge which evidence should be disclosed.<sup>12</sup> The prosecutor is to decide this in favor of disclosure when he is unsure.<sup>13</sup> This means that it is in a prosecutor’s sole discretion as to which evidence he discloses as potential impeachment evidence under his mandatory duty. A reasonable inquiry into the law would have discovered that a writ of prohibition is not a proper remedy when a person is acting within his or her jurisdiction and the only allegation is that he is exercising that discretion erroneously.

Additionally, the only relief offered by a writ of prohibition is an arrest of proceedings. Ames and his counsel failed to identify which proceedings they wanted to prohibit. To the extent that he wished to arrest the prosecutor from disclosing evidence, this would not be a proper remedy based on the mandatory duty under *Brady* discussed above. If Ames wished to have any proceedings in which he was scheduled to testify arrested until a determination could be made regarding the evidence, this would also not be a proper remedy. Under both Washington law<sup>14</sup> and the United States constitution<sup>15</sup>, a criminal

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<sup>7</sup> RCW 7.16.290  
<sup>8</sup> *Brower v. Charles*, 82 Wn.App. 53, 57, 914 P.2d 1202 (1996), *rev. denied*, 130 Wn.2d 1028 (1997).  
<sup>9</sup> *Id* at 57-58.  
<sup>10</sup> *Id* at 59.  
<sup>11</sup> 373 U.S. 83, 83 S.Ct. 1194 (1983).  
<sup>12</sup> 514 U.S. 419, 437, 115 S.Ct. 1555 (1995) (“But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” is reached.”)  
<sup>13</sup> *Id* at 439 *quoting* U.S. v. Agurs, 427 U.S. 97, 108 (1976).  
<sup>14</sup> CrR 3.3; Wash. Const. art. I §22.  
<sup>15</sup> U.S. Const. amend. VI

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defendant has a right to speedy trial. If the Court were to grant Ames a writ of prohibition arresting the criminal proceedings at which he was scheduled to testify, it could potentially violate the criminal defendant's speedy trial rights.

A reasonable inquiry into the law and the available relief pursuant to a writ of prohibition would have discovered that the relief requested in this situation is not warranted by law. If the relief requested were to be granted, it would violate a criminal defendant's right to potential impeachment evidence as well as his or her right to speedy trial. Without this reasonable inquiry in this case, a baseless and frivolous action was filed in violation of CR 11 and justifies an award of attorney's fees pursuant to RCW 4.84.185.

*II. Declaratory Relief*

A declaratory judgment is only available when there is a justiciable controversy or an issue of major public importance.<sup>16</sup> A justiciable controversy is "(1) an actual, present, and existing dispute; (2) between parties having genuine and opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive."<sup>17</sup>

It is in Pierce County's interest that its witnesses are considered credible. This is evident from Ames' Declaration Opposing Defendant's Special Motion to Strike. He indicates that in subsequent cases, the prosecutor's office has moved to not admit the evidence because it is irrelevant<sup>18</sup> and has defended against a motion for new trial by asserting that the evidence is not helpful for impeachment because two competing declarations do not assert that one party or the other is telling the truth, it just presents competing recollections of events.<sup>19</sup> This evidence indicates that the parties do not have genuine opposing interests, which is a requirement of a declaratory relief action. This alone is enough to indicate that there is no justiciable controversy.

If there had been a reasonable inquiry, Ames and his counsel would have discovered that a "name-clearing" hearing in this situation would not be conclusive. As

<sup>16</sup> *Bercier v. Kiga*, 127 Wn.App. 809, 822, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005).  
<sup>17</sup> *Id.*  
<sup>18</sup> Decl. of Det. Mike Ames Opposing Def's Special Mot. to Strike 11:19-31.  
<sup>19</sup> *Id* at 12:26-31; 13:3-7

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previously stated, the rights of criminal defendants are central to the matter of PIE. The admissibility of such evidence is decided by the trial judge and it is up to the defense on whether to use or seek admission of the PIE in each case. The prosecutor has a duty to turn over evidence that in his discretion could be considered PIE. Making a judgment here would invade the rights of other judges, the prosecutor, and criminal defendants to use their own judgment in determining the admissibility of evidence and credibility of Ames in each case.

Furthermore, the resolution of who was truthful in the declarations is best left with the court that is hearing the matter. In this situation, the court hearing the motion for attorney's fees made its judgment on credibility of the declarations when it decided in his favor. Another hearing on a matter that has essentially been decided would be useless as the evidence still creates a competing recollection which a criminal defendant could potentially view as impeachment evidence. Regardless of a declaration that Ames is truthful or considering the ruling in his favor in the *Dalsing* matter, the evidence still needs to be disclosed to the defense and the issue will continue to arise in cases Ames is scheduled to testify.

Ames alleges that even if there is no justiciable controversy, the action is not baseless because the issue of officers being subjected to the "Brady" officer label is a major public concern. In making a determination on whether there is an issue of major public importance, the Court looks to the public interest represented and whether the public interest would be enhanced by a court review.<sup>20</sup> Here, Ames was not asking the court to make a declaration regarding due process rights of police officers in the disclosure of "Brady" evidence; he is asking for a declaration that he was personally truthful. Regardless, the public concern regarding PIE is a fair trial for criminal defendants.

A reasonable inquiry into the facts and applicable law would have discovered that declaratory relief was not proper in this situation. Based on the facts available to Ames, there was no justiciable controversy. The procedure and law behind the application of a prosecutor's duty under *Brady* is clear. The prosecution's interest is for Ames to be

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<sup>20</sup> *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994).

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credible, which is the same interest he is trying to protect. A reasonable inquiry would have also discovered that any declaration would not be a final and conclusive determination of his credibility. Finally, a reasonable inquiry would have discovered that the public concern here is with regards to a criminal defendant's right to evidence he or she could potentially use for impeachment. A name-clearing hearing would not resolve any issues related to PIE. This is a baseless cause of action which is in violation of CR 11 and justifies attorney's fees pursuant to RCW 4.84.185.

**CONCLUSION AND ORDERS**

A reasonable inquiry into the law in this case would have discovered that the causes of action here cannot be supported.

Based on the foregoing, it is hereby,

**ORDERED** that defendant's motion for attorney's fees and expenses is **GRANTED**.

It is further,

**ORDERED** that the case be set for hearing to determine the amount of the award for fees and expenses.

Dated this 7<sup>th</sup> day of April 2014.

  
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Visiting Judge Kevin D. Hull  
Pierce County Superior Court

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**CERTIFICATE OF SERVICE**

I, Chris Jeter, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

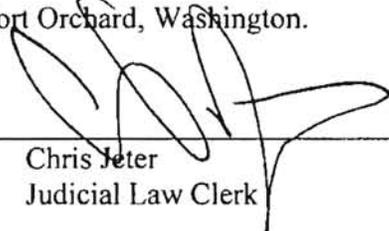
Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Joan Mell III Branches Law PLLC 1033 Regents Blvd Ste 101 Fircrest, WA 98466-6089	<input checked="" type="checkbox"/> Via U.S. Mail
Michael Patterson Patterson Buchanan Fobes Leitch PS 2112 3rd Ave Ste 500 Seattle, WA 98121-2391	<input checked="" type="checkbox"/> Via U.S. Mail

In addition, I caused the original of the foregoing document to be sent for filing in the manner noted on the following:

Cristina Platt, Judicial Calendar Coordinator Pierce County Superior Court 930 Tacoma Avenue South, Room 334 Tacoma, Washington 98402	<input checked="" type="checkbox"/> Via U.S. Mail
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DATED this 1<sup>st</sup> day of April 2014, at Port Orchard, Washington.



Chris Jeter  
Judicial Law Clerk