

Received
Washington State Supreme Court

S. Ct. No. 90827-3
Ct. App., Div. III, No. 315193

OCT 30 2014
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Ronald R. Carpenter
Clerk

SUPREME COURT OF THE STATE OF WASHINGTON

D. ANGUS LEE, Grant County Prosecuting Attorney, by and through the
Office of the Grant County Prosecuting Attorney,

Respondent,

vs.

JERRY JASMAN, a single person, and CRAIG MORRISON,

Petitioners.

APPENDIX TO ANSWER TO CONDITIONAL
CROSS PETITION FOR REVIEW

George M. Ahrend
AHREND ALBRECHT PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

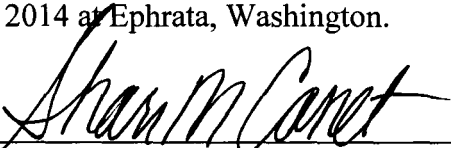
On October 27, 2014, I served the document to which this is annexed via email and First Class Mail, postage prepaid, as follows:

Ione S. George & Shelley Kneip
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Derek Angus Lee & Dalton Lee Pence
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Signed on October 27, 2014 at Ephrata, Washington.



Shari M. Canet, Paralegal

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

D. ANGUS LEE, Grant County)
Prosecuting Attorney, by and) NO. 315193
through the Office of the Grant)
County Prosecuting Attorney,) Grant County Cause
) No. 12-2-00877-5
)
Respondent/Cross-Appellant,) MOTION TO VACATE AND DISMISS
) BASED ON JUDICIAL ESTOPPEL AND
v.) LACK OF SUBJECT MATTER
) JURISDICTION
JERRY JASMAN, a single person,)
)
Appellant/Cross-Respondent,)
)
And)
)
CRAIG MORRISON,)
)
Appellant/Cross-Respondent.)
)

1. IDENTITY OF MOVING PARTIES

This motion is filed on behalf of Appellants Craig Morrison and Jerry Jasman.

2. RELIEF REQUESTED

Mssrs. Morrison and Jasman move the Court to: (a) dismiss this case on grounds of judicial estoppel and lack of subject matter jurisdiction, vacating the injunction entered by the superior court; and (b) award attorney fees and costs.

3. REFERENCE TO RECORD

In this case, Mr. Lee has filed an “information and complaint” against Mr. Jasman, which is styled as a “quo warranto” action. CP 4 (caption). He brings the action in his official capacity as the Grant County Prosecuting Attorney. CP 4 (§ 1.1). The complaint alleges jurisdiction under the quo warranto statute, CP 4 (§ 1.1, citing RCW 7.56.010 & .020); and requests the relief of “ouster” along with attorney fees and costs under the quo warranto statute, CP 8 (§ 4.1, citing Ch. 7.56 RCW); CP 9 (§ 5.4, citing RCW 7.56.100).

Mr. Lee initially filed a motion for preliminary injunction. CP 51 (motion p. 9, *ll.* 22-38, quoting RCW 7.56.010 & .020). However, before ruling on the preliminary injunction, the superior court disqualified Mr. Lee and the members of his office as counsel for interfering with the defense of the action by Messrs. Morrison and Jasman by advising the Grant County Commissioners to reverse their decision to defend and indemnify them in connection with the quo warranto action (although Mr. Lee remained as the nominal plaintiff). CP 348-50 (disqualification order); CP 351-55 (denial of reconsideration of disqualification). In the course of addressing the disqualification, Mr. Lee emphasized the fact that this is a quo warranto action. *See* CP 353 (denial of reconsideration, p. 3, *ll.* 3-9, rejecting Mr. Lee’s arguments).

Ultimately, the motion for preliminary injunction was converted to a motion for summary judgment requesting a permanent injunction. CP 252 (cross motion for summary judgment, p. 4, *ll.* 7-21). In the summary judgment briefing, substitute counsel for Mr. Lee stated: “This is an extraordinary writ for quo warranto, filed pursuant to chapter 7.56 RCW.” *Id.* (p. 4, *l.* 13).

The superior court granted the permanent injunction pursuant to the quo warranto statute, CP 294, and Msrs. Morrison and Jasman subsequently sought review in this Court. On review, counsel for Mr. Lee has acknowledged and confirmed the nature of the action as quo warranto. *See, e.g.,* Resp. Br., at 4 (stating “D. Angus Lee, the Grant County Prosecuting Attorney, filed a *quo warranto* action pursuant to RCW 7.56.010 and 7.56.020”). Oral argument was held on February 5, 2014, and the case has been submitted for decision.

In the meantime, Mr. Jasman filed a separate suit for declaratory judgment and alternative writs for certiorari and mandamus against Grant County and the Grant County Commissioners in their official capacities. The complaint alleges that Mr. Jasman is entitled to a defense of this action under RCW 4.96.041, and that the county commissioner’s reversal of their decision to authorize funds for his defense is arbitrary and capricious in light of their simultaneous authorization of funds to defend

Prosecutor Lee in connection with disciplinary charges filed by the Washington State Bar Association. A copy of the complaint is attached as **Exhibit 1**.

The County and the county commissioners are represented in the separate suit by Douglas W. Vanscoy, appointed by Mr. Lee as a special deputy of the Grant County Prosecutor's Office. A copy of the appointment and oath of Mr. Vanscoy is attached as **Exhibit 2**.

On behalf of the county and county commissioners, Mr. Vanscoy filed a motion for summary judgment seeking dismissal of Mr. Jasman's complaint. A copy of the motion is attached as **Exhibit 3**. A copy of their reply brief is attached as **Exhibit 4**.

One of the grounds urged in support of dismissal is that the quo warranto action filed by Mr. Lee is not, in fact, a quo warranto action. Specifically, the County and the county commissioners contend:

1. **Lee v. Jasman Was Not a Quo Warranto Action**

A traditional quo warranto proceeding involves contestants for an elective office. *Clarken v. Blomstrom*, 174 Wash. 612, 616 (1933) (“[Q]uo warranto is the remedy by which to determine the right or title to an office, while mandamus is the remedy to be employed to reacquire a position for an employee”); *State ex rel. Powell v. Fassett*, 69 Wash. 555, 558, 559 (1912) (“The respondents ... contend that quo warranto does not lie, because the appellant's position is a subordinate one, and not an office, within the meaning of the charter or the Code. Rem & Bal. § 1034 [*now*, RCW 7.56.010] ... The appellant would

probably not be an officer, as defined by the common law, but the clear intent of the charter [concerning classified service] is to afford him all the protection of an officer ...”). (Emphasis added.) At the time when Prosecutor Lee sued, Mr. Jasman was not serving as elected coroner, he was an employee of the Coroner’s Office, *i.e.*, a subordinate and not the holder of elective office.

Prosecutor Lee’s lawsuit against Mr. Jasman did not seek to oust Coroner Morrison from office, nor did it seek to remove Mr. Jasman from county employment. Rather, it requested:

5.3. For a preliminary and permanent mandatory and prohibitive injunction enjoining JASMAN from performing the duties of the Grant County Coroner or of a deputy coroner, including the completion and/or signing of death certificates issued in the County of Grant, State of Washington;

Ex. D5. Nor did Judge Hotchkiss order Morrison or Jasman ousted from either’s position. Rather, the Court enjoined Jasman from signing death certificates. *See* Ex. K3. Whatever the form of the complaint, its substance was not quo warranto but rather that of a pleading seeking declaratory and injunctive relief, and that was the nature of the relief that was ultimately granted. “A party’s characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls.” *Pepper v. J.J. Welcome Const. Co.*, 73 Wn.App. 523, 546, 871 P.2d 601, *rev. denied*, 124 Wn.2d 1029 (1994), *overruled on other grounds by Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306 (1997), *aff’d on other grounds*, 136 Wn.2d 946 (1998).

Accordingly, *Lee v. Jasman* was not a quo warranto action, and RCW 7.56 has no application here.

Exhibit 3, p. 12, *l.* 18-p. 13, *l.* 23 (as in original); *accord* Exhibit 4, p. 5, *ll.*

4-24.

The superior court has not ruled on the motion for summary judgment in Mr. Jasman's separate lawsuit, but rather entered a stay of proceedings pending a decision in this case. The stay was ordered during a telephone hearing on February 24, 2014, and has not yet been reduced to writing.

4. GROUND FOR RELIEF REQUESTED

"[A]ny party to an appeal may raise the issue of lack of subject matter jurisdiction at any time." RAP 2.5(a)(1). Here, the exercise of jurisdiction over this action brought by the Grant County Prosecutor in his official capacity is premised upon the quo warranto statute. However, in order to defend a separate suit seeking funds to defend this action, a special deputy prosecutor appointed by Mr. Lee, acting on behalf of the Grant County and the Grant County Commissioners in their official capacity, has urged that this action is not, in fact, a quo warranto action. If this is correct, then the Court does not have subject matter jurisdiction.

Moreover, the doctrine of judicial estoppel should preclude Mr. Lee from invoking subject matter jurisdiction under the quo warranto statute in this case. Judicial estoppel precludes a party from taking inconsistent positions in different legal proceedings. *See Johnson v. Si-Cor Inc.*, 107 Wn.App. 902, 906-09, 28 P.3d 832 (2001). The purpose of the doctrine is to protect the integrity of legal proceedings. *See id.*, 107 Wn.

App. at 908; *see also Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 163-64, 951 P.2d 817 (applying judicial estoppel on appeal), *rev. denied*, 136 Wn.2d 1015 (1998).

The court does not require strict privity in applying judicial estoppel. *See Johnson*, 107 Wn. App. at 907-08. Here, it should be sufficient that Grant County is the real party in interest both in this lawsuit, filed by the county prosecutor in his official capacity, and in the separate lawsuit filed by Mr. Jasman against the county and the county commissioners in their official capacities. *Cf. W.J. Lake & Co. v. King County*, 4 Wn.2d 651, 654, 104 P.2d 599 (1940) (finding action against county treasurer in official capacity was against the county for purposes of cost award); *Westerman v. Cary*, 125 Wn. 2d 277, 299, 892 P.2d 1067 (1994) (suggesting, without deciding, that county was the real party in interest in action against district court judges).


To apply judicial estoppel, it is not necessary for the county to obtain final judgment in its favor, or even an order from the court adopting its inconsistent positions. *See Johnson*, 107 Wn. App. at 908-09. It is sufficient if the party advancing inconsistent positions benefits in some way. *See id.* at 909. In this case, the county has benefitted by having this Court and the superior court below exercise subject matter jurisdiction, and by obtaining summary judgment and a permanent injunction. In the

separate lawsuit filed by Mr. Jasman, the county has benefitted by delaying and potentially avoiding having to pay Mr. Jasman's defense costs. To avoid undermining the integrity of these proceedings, the Court should apply judicial estoppel, find that it lacks subject matter jurisdiction over these proceedings, vacate the superior court's permanent injunction, and dismiss the action.

The Court should award attorney fees and costs to Msrs. Morrison and Jasman for the reasons argued in their appellate briefing. *See* App. Br., at 31-33; Reply Br., at 4-11. In addition, the Court should award attorney fees to Msrs. Morrison and Jasman for dissolving the permanent injunction entered by the superior court. *See All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 739, 998 P.2d 367 (2000) (regarding exception to American rule on attorney fees for obtaining dissolution of wrongfully issued injunction).

DATED this 10th day of March, 2014.

AHREND ALBRECHT PLLC
Attorneys for Appellants/
Cross-Respondents

By: 

George M. Ahrend, WSBA #25160
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000
(509) 464-6290 Facsimile

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 10, 2014, I served the document to which this is annexed as follows:

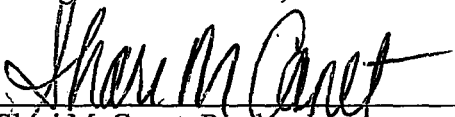
By email and First Class Mail, postage prepaid, as follows:

Ione S. George & Shelley Kneip
Kitsap County Prosecuting Attorney's Office
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Pamela B. Loginsky
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Derek Angus Lee & Dalton Lee Pence
Grant County Prosecutor's Office
P.O. Box 37
Ephrata, WA 98823
Email: dlee@co.grant.wa.us
Email: lpence@co.grant.wa.us

Signed at Ephrata, Washington on March 10, 2014.


Shari M. Canet, Paralegal

FILED

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KINDERLY A. ALLEN
GRANT COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

JERRY JASMAN,

Plaintiff,

vs.

GRANT COUNTY, WASHINGTON; THE
BOARD OF COUNTY COMMISSIONERS
FOR GRANT COUNTY, WASHINGTON;
AND RICHARD STEVENS, CAROLANN
SWARTZ AND CINDY CARTER, IN THEIR
OFFICIAL CAPACITIES AS COUNTY
COMMISSIONERS FOR GRANT COUNTY,
WASHINGTON,

Defendants.

No. 12-2-01681-6

COMPLAINT FOR DECLARATORY
JUDGMENT AND ALTERNATIVE
PETITIONS FOR WRITS OF
CERTIORARI AND/OR MANDAMUS

Plaintiff Jerry Jasman alleges:

SUBJECT MATTER JURISDICTION

1. This Complaint alleges a claim for declaratory judgment, or, in the alternative, petitions for writs of certiorari and/or mandamus, over which this Court has subject matter jurisdiction pursuant to RCW 2.08.010, 7.16.040, 7.16.160 and 7.24.010.

PARTIES AND PERSONAL JURISDICTION

2. Plaintiff Jerry Jasman is a citizen of Washington residing in Grant County. He is currently the Chief Investigator in the Grant County Coroner's office. He previously served in a dual capacity as Deputy Coroner and Chief Investigator.

3. Defendant Grant County is a political subdivision of the State of Washington.

4. Defendant Board of County Commissioners of Grant County is the authority of Grant County with responsibility to defend and indemnify county employees pursuant to RCW 4.96.041.

5. Defendant Richard Stevens is Grant County Commissioner for District 1 and Chair of the Board of County Commissioners. He is sued in his official capacity only.

6. Defendant Carolann Swartz is Grant County Commissioner for District 2. She is sued in her official capacity only.

7. Defendant Cindy Carter is Grant County Commissioner for District 3 and Vice-Chair of the Board of County Commissioners. She is sued in her official capacity only.

VENUE

8. Venue is proper in this Court pursuant to RCW 36.01.050 and other applicable law.

FACTS

9. D. Angus Lee, as Grant County Prosecutor, filed a quo warranto action in Grant County Superior Court against Jerry Jasman, alleging that a prior misdemeanor conviction for disorderly conduct disqualifies him from serving as Deputy Coroner or signing death certificates in his work for the Grant County Coroner's office.

10. The quo warranto action requests declaratory and injunctive relief, an award of fees and costs and "such other and further relief as the Court deems just and equitable." The complaint (also referred to as an "information") did not specifically request damages.

11. The quo warranto statute provides: "[w]hen judgment is rendered in favor of the plaintiff, he or she may, if he or she has not claimed his or her damages in the information,

1 have his or her action for the damages at any time within one year after judgment." RCW
2 7.56.090.

3 12. The elected Grant County Coroner submitted a request to the Board of County
4 Commissioners to defend and indemnify Mr. Jasman. The request specifically affirmed that
5 Mr. Jasman was acting within the scope of his employment and in good faith.

6 13. The Board of County Commissioners initially granted the request to defend and
7 indemnify Mr. Jasman for the quo warranto action.

8 14. However, the Board subsequently reversed its decision based on advice from the
9 Prosecutor's Office.

10 15. The court hearing the quo warranto action ruled that the prosecutor's
11 simultaneous prosecution of the action Mr. Jasman and his interference with the decision to
12 defend and indemnify Mr. Jasman was a conflict of interest that required his disqualification.

13 18. Following the disqualification order, the Coroner submitted another request to
14 the Board of County Commissioners to defend and indemnify Mr. Jasman for the quo warranto
15 action.

16 19. The Board denied the new request, based on advice from a special deputy
17 appointed by the disqualified prosecutor, on grounds that a quo warranto action is not an action
18 or proceeding for damages where damages have not been requested in the complaint or
19 information.

20 20. The Board subsequently denied a request from the coroner to reconsider its
21 decision on the new request.

22 21. Meanwhile, the court hearing the quo warranto action granted the coroner's
23 motion to intervene and a motion for appointment of a special prosecutor to represent the
24 coroner and Mr. Jasman is pending.

CLAIM FOR DECLARATORY JUDGMENT

22. This complaint involves "rights, status or legal relations ... affected by a statute" and requests "a declaration of rights, status or other legal relations thereunder," and is a proper subject for declaratory judgment pursuant to RCW 7.24.020.

23. Plaintiff seeks declaratory judgment that he is entitled to defense and indemnity for the quo warranto action pursuant to RCW 4.96.041.

ALTERNATIVE PETITION FOR WRIT OF CERTIORARI

24. Plaintiff is a person beneficially interested, and is entitled to request a writ of certiorari.

25. Defendants are parties to whom a writ of certiorari may be issued.

26. The decision of the Defendants to deny defense and indemnity to Jerry Jasman for the quo warranto action is arbitrary, capricious and contrary to law.

27. There is no appeal, nor is there any plain, speedy and adequate remedy at law.

28. A writ of certiorari should issue, the Court should review whether Defendants violated RCW 4.96.041, and order them to defend and indemnify Jerry Jasman for the quo warranto action.

ALTERNATIVE PETITION FOR WRIT OF MANDAMUS

29. Plaintiff is a person beneficially interested, and is entitled to request a writ of mandamus.

30. Defendants are parties to whom a writ of mandamus may be issued.

31. Defendants have a duty to provide for the defense and indemnity of Jerry Jasman for the quo warranto action pursuant to RCW 4.96.041, which is a duty that the law especially enjoins upon the County, the Board of County Commissioners and the individual Commissioners.

32. There is no plain, speedy and adequate remedy in the ordinary course of law.

33. A writ of mandamus should issue, directing Defendants to defend and indemnify Jerry Jasman for the quo warranto action.

RELIEF REQUESTED

Based on the foregoing allegations, Mr. Jasman respectfully asks the Court to grant the following relief:

A. Stay of these proceedings pending a decision on the motion for appointment of a special prosecutor in the quo warranto action.

B. Declaratory judgment as requested herein.

C. All necessary and proper relief based on the declaratory judgment requested herein pursuant to RCW 7.24.080.

D. An award of attorney fees and costs pursuant to RCW 7.24.100 and other applicable law.

E. In the alternative, writs of certiorari and/or mandamus as requested herein.

F. Any further relief the Court deems warranted under the circumstances.

DATED December 7, 2012.

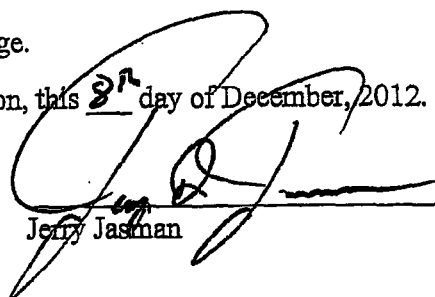
AHREND ALBRECHT PLLC
Attorneys for Plaintiff

By: George M. Ahrend
George M. Ahrend, WSBA #25160

VERIFICATION

I, JERRY JASMAN, declare under oath an penalty of perjury of the laws of the State of Washington that I am the Plaintiff herein, and that the factual allegations in this complaint are true and correct to the best of my knowledge.

Signed at Ephrata, Washington, this 2nd day of December, 2012.



Jerry Jasman

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

JERRY JASMAN,

Plaintiff,

vs.

GRANT COUNTY, WASHINGTON, et al.,

Defendants.

NO. 12-2-01681-6

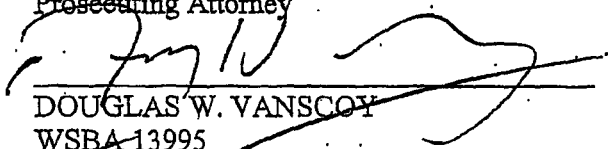
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Motion Date / Time: 6/14/13 at 1:30 p.m.

Defendants Grant County, Board of Commissioners for Grant County, Richard Stevens, Carolann Swartz, and Cindy Carter respectfully move the Court pursuant to CR 56 for summary judgment herein, and submit herewith a memorandum and exhibits in support of their motion.

DATED this 10th day of May, 2013.

MARK LINDQUIST
Prosecuting Attorney


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Chief Civil Deputy Prosecutor
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COPY

MEMORANDUM IN SUPPORTI. SUMMARY

In 2009 Grant County Coroner Jerry Jasman was charged with false imprisonment for repeatedly refusing to permit an employee to exit a county vehicle which Mr. Jasman was operating. The Attorney General's Office and Mr. Jasman ultimately entered into a plea agreement¹ which reduced the charge to disorderly conduct. The judgment and sentence included the express provision that "Defendant acknowledges the forfeiture of his right to hold public office, as provided in RCW 9.92.120." Ex. C6. Mr. Jasman promptly resigned as coroner, but then his successor, Coroner Craig Morrison, hired Jasman and purported to authorize him to sign death certificates. Grant County Prosecutor D. Angus Lee advised Coroner Morrison (Ex. E1) that Mr. Jasman could not legally sign such certificates, but Morrison and Jasman persisted. Prosecutor Lee then sued² Jasman on June 27, 2012, seeking an injunction prohibiting him from signing the certificates. On February 27, 2013, Judge John Hotchkiss issued such an injunction and also refused to appoint a special deputy prosecutor to represent Jasman (or Morrison as intervenor). Ex. K3. They have appealed.

On December 10, 2012, while Prosecutor Lee's earlier action was still pending, Mr. Jasman brought the present case against the Grant County Commissioners alleging their denial of Mr. Morrison's renewed request that Grant County defend and indemnify Mr. Jasman in the earlier action was a violation of RCW 4.96.041, which provides for defense and indemnification of in-the-scope local government employees who are sued in "an action

¹ See State's Sentencing Memorandum in *State v. Jerry D. Jasman*, Case No. 09-1-00329-0 (submitted herewith as Ex. B2) and Judgment and Sentence therein (Ex. C6). Under ER 201, the Court can take judicial notice of materials filed in that criminal case as well as in the earlier civil action filed by Prosecutor Lee. "Courts may take judicial notice of records from a different proceeding to establish the truth of the matters contained therein." *Welch Foods, Inc. v. Benton County*, 136 Wn.App. 314, 324, 148 P.3d.1092 (2006). See also *Swak v. Department of Labor & Industries*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952).

² Grant County Superior Court Case No. 12-2-00877-5.

1 or proceeding for damages." In his complaint Mr. Jasman asserts that because damages can
2 be available in quo warranto actions, RCW 4.96.041 entitles him to defense and indemnity at
3 public expense. The Commissioners assert to the contrary: Mr. Jasman is barred from re-
4 litigating the duty to defend issue because Judge Hotchkiss has held he is not entitled to rep-
5 resentation by a special deputy prosecutor. In the alternative, the Commissioners assert Pros-
6 ecutor Lee's earlier action was not truly in the nature of quo warranto, but was actually one for
7 declaratory judgment and injunctive relief and certainly not for damages. Moreover, even if
8 the earlier action may be properly characterized as quo warranto in nature, the Commissioners
9 assert that the damages provisions of the quo warranto statute by their terms apply only to ac-
10 tions brought by an individual plaintiff asserting a right to the office, not to actions brought by
11 prosecuting attorneys. Finally, they assert that in signing death certificates Mr. Jasman was
12 not performing or in good faith purporting to perform his official duties, because he was fully
13 aware of his 2009 conviction and his stipulation to the applicability of RCW 9.92.120, so that,
14 again, by its terms RCW 4.96.041 does not apply.
15

16 **II. STATEMENT OF THE CASE**

17 The complaint in this action challenges the refusal of the Grant County Board of
18 Commissioners to defend and indemnify plaintiff Jerry Jasman, an employee of Grant County
19 Coroner Craig Morrison, in the earlier-filed action brought by Prosecutor Lee:
20

21 23. Plaintiff seeks declaratory judgment that he is entitled to defense and in-
22 demnity for the quo warranto action pursuant to RCW 4.96.041.

23 ***

24 28. A writ of certiorari should issue, the Court should review whether Defend-
25 ants violated RCW 4.96.041, and order them to defend and indemnify Jerry
Jasman for the quo warranto action.

33. A writ of mandamus should issue, directing Defendants to defend and in-
demnify Jerry Jasman for the quo warranto action.

1 Complaint at 4. To analyze the present case properly, it is necessary to review the earlier one.

2 On July 27, 2012, Prosecutor Lee filed the earlier action against Mr. Jasman alleging
3 he had been signing death certificates unlawfully and seeking an injunction prohibiting such
4 conduct. In particular, the complaint, purportedly pled in quo warranto, alleged:

5 3.13 On or about June 29, 2012, JASMAN was charged with Unlawful Im-
6 prisonment in Grant County Superior Court Cause No. 09-1-00329-0, to wit:
7 "On or about the 26th day of June, 2009, in the County of Grant, State of Wash-
8 ington, the above-named Defendant did knowingly restrain another person"
9 JASMAN eventually pled guilty to Disorderly Conduct (RCW
10 9A.84.030(1)(a)) as set for in Grant County Superior Court Cause No. 09-1-
11 00329-0. The Judgment and Sentence entered in Grant County Cause No. 09-
12 1-00329-0 sets out, *inter alia*, "Defendant acknowledges the forfeiture of his
13 right to hold public office, as provided in RCW 9.92.120." See attached Judg-
14 ment and Sentence, Grant County Superior Court Cause No. 09-1-00329-0

15 3.14 As a result of the Judgment and Sentence entered in Grant County Super-
16 ior Court Cause No. 09-1-00329-0, JASMAN is precluded from serving as the
17 Grant County Coroner or as a Grant County Deputy Coroner.

18 The complaint (without exhibits) in that earlier action is submitted herewith as Ex. D.

19 In opposing a motion for preliminary injunction in the earlier case, Mr. Jasman assert-
20 ed (Ex. F7) that Lee had a conflict of interest in suing him after having advised the Board of
21 County Commissioners concerning Mr. Morrison's request that the county defend and indem-
22 nify Mr. Jasman. On October 15, 2012, Judge Hotchkiss agreed, entering a Decision on Con-
23 flict of Interest stating in part as follows:

24 Neither the County Commission nor the Prosecutor has any input as to who the
25 elected Coroner hires to fill the position. *Osborne v. Grant County*, 130
Wn.2d 615 (1996). This is not to say that the Coroner can authorize the em-
ployee to engage in illegal activities. That will be decided later. Further, as
indicated in *Osborne, supra*, the Grant County Prosecutor does have an obliga-
tion to advise the County Coroner and the County Commission. RCW
36.27.020(2). In this instance, the County Coroner went to the County Com-
mission and requested that the Commission provide legal counsel and funds for
the Coroner's employee. Although the County Commission approved the re-
quest of a County elected official, the Prosecutor then advised the County
Commission not to do so. This appears to the Court to be a conflict for the

1 Prosecutor, who has an obligation to advise the County Coroner, to choose in-
2 stead to advise the County Commission

3 As a result of the conflict, this Court believes that the Grant County prose-
4 cution must withdraw and seek the services of either the Attorney General, an-
5 other county's prosecuting attorney, or anyone else that does not have this con-
6 flict

7 Judge Hotchkiss' entire written decision is submitted herewith as Ex. G.

8 On November 21, 2012, Mr. Jasman filed in the earlier action a Memorandum in Sup-
9 port of Motion to Intervene and for Appointment of Special Prosecutor, Part III of which was
10 headed, "The Court should appoint a special prosecutor to defend Mr. Morrison and
11 Mr. Jasman" and which opened as follows:

12 RCW 36.27.030 provides in pertinent part: "[w]hen from illness or other
13 cause the prosecuting attorney is temporarily unable to perform his or her du-
14 ties, the court or judge may appoint some qualified person to discharge the du-
15 ties of such officer until the disability is removed." Under this statute, ap-
16 pointment of a special prosecutor is warranted when the elected county prose-
17 cutor has an ethical conflict of interest that prevents him or her from providing
18 representation. (Citations omitted.)

19 See Ex. I3. Nineteen days later, on December 10, 2012, Mr. Jasman filed the present action
20 against the Grant County Board of Commissioners, expressly requesting at page 5 that the
21 Court grant a "Stay of these proceedings pending a decision on the motion for appointment of
22 a special prosecutor in the quo warranto action." Thereafter, cross-motions for summary
23 judgment were argued in the earlier action on January 28, 2013 (*see* transcript submitted as
24 Ex. J), and on February 27, 2013, Judge Hotchkiss entered an Order Granting Plaintiff's Mo-
25 tion for Summary Judgment and Injunctive Relief; Denying Defendant's Motion for Summary
Judgment; and Denying Defendant's Motion for Appointment of Counsel. In particular, the
order stated:

1 4. Defendant Jerry Jasman and Intervenor Craig Morrison's Motion for Ap-
2 pointment of Special Prosecutor to defend Mr. Morrison and Mr. Jasman in
this lawsuit is DENIED; and

3 5. Defendant Jerry Jasman is hereby prohibited and enjoined from signing
4 death certificates issued in the County of Grant, State of Washington.

5 See Ex. K3. Mr. Jasman and Mr. Morrison filed a Notice of Appeal on March 18, 2013.

6 **III. ARGUMENT**

7 **A. MR. JASMAN IS BARRED FROM RAISING RCW 4.96.041 NOW BECAUSE**
8 **HE COULD HAVE DONE SO WHEN HE SOUGHT APPOINTMENT OF**
COUNSEL AT COUNTY EXPENSE IN THE EARLIER CASE

9 RCW 36.27.030 provides, in pertinent part, as follows:

10 When from illness or other cause the prosecuting attorney is temporarily una-
11 ble to perform his or her duties, the court or judge may appoint some qualified
12 person to discharge the duties of such officer in court until the disability is re-
moved. (Emphasis added.)

13 Mr. Jasman quoted and relied upon this statute in requesting appointment of a special DPA to
14 represent himself and Coroner Morrison in the action brought by Prosecutor Lee, see Ex. I3.

15 The statute was construed in *Osborn v. Grant County*, 130 Wn.2d 615, 624-5, 926 P.2d 911
16 (1996):

17 The second critical issue in this case involves whether McCormick, Dunn &
18 Black, P.S., was properly appointed as a special prosecutor for Osborn and
awarded attorney fees by the superior court. The court can appoint a special
19 prosecutor to represent a party only when two conditions are met. First, the
prosecutor must have the authority and the duty to represent that party in the
20 given matter. Second, some disability must prevent the prosecutor from ful-
filling that duty. *Westerman v. Cary*, 125 Wash.2d 277, 298, 885 P.2d 827,
21 892 P.2d 1067 (1994); RCW 36.27.030. See also *Hoppe v. King County*, 95
Wash.2d 332, 339-40, 622 P.2d 845 (1980). If the prosecutor has no duty or
22 authority to represent a party, the trial court cannot appoint special coun-
23 sel.

24 The Grant County Prosecutor concedes he was prevented from representing
25 Osborn because of her conflict with the position taken by the Board. This sat-
isfies the second condition for appointing a special prosecutor. However, the
prosecutor argues that the first condition is not met—the prosecutor claims he

1 has no duty to bring litigation on behalf of a county officer against the county.
2 (Emphasis added.)

3 As with the prosecutor in *Osborn*, there was no question in *Lee v. Jasman* that the Prosecuting
4 Attorney was prevented from representing Mr. Jasman; Prosecutor Lee was in fact suing
5 Jasman and therefore could not ethically represent him in the same litigation. RPC 1.7. The
6 second condition for appointing a special prosecutor was thus met here, as in *Osborn*.

7 In *Osborn*, 130 Wn.2d at 625-28, the Supreme Court went on to analyze prosecutors'
8 civil duties as set out in RCW Ch. 36.27 and held that although a prosecutor has the authority
9 and duty to provide legal advice to a county elected official, he or she has no authority to sue
10 the county on behalf of such an official. In analyzing the issue, 130 Wn.2d at 625, the Court
11 quoted its holding in *Hoppe v. King County*, 95 Wn.2d 332, 340, 622 P.2d 845 (1980): "While
12 RCW 36.27.020(2) does require the prosecuting attorney to '(be) legal adviser to all county ...
13 officers,' this is not a requirement that the prosecuting attorney appear for or represent a coun-
14 ty officer." (Emphasis added.)

15 As in *Osborn*, the rub in *Lee v. Jasman* was not in the second condition for appoint-
16 ment of a special deputy (disability) but in the first condition: whether Prosecutor Lee had the
17 authority and duty to represent Mr. Jasman in an action challenging the legality of his signing
18 death certificates. In urging the appointment, Mr. Jasman cited neither RCW 36.27.020 nor
19 RCW 4.96.041 nor any other statute providing Prosecutor Lee with the authority and duty to
20 represent a county employee in such a circumstance. As Judge Hotchkiss commented at the
21 close of the summary judgment hearing, "I don't know that anybody really briefed that, ..."
22 Ex. J45. It is crystal clear from *Osborn*, however, that a appointment of a special prosecutor
23 under RCW 36.27.030 involves two distinct elements: (1) disability and (2) authority/duty to
24 represent. Because Prosecutor Lee clearly had a conflict (disability) preventing his represen-
25

1 tation of Jasman in the action Lee had brought, Judge Hotchkiss' ruling had to be premised
2 upon the second element (no authority or duty).

3 Indeed, it is clear that Judge Hotchkiss found Mr. Jasman's signing of death certifi-
4 cates to be unlawful under the terms of the 2009 judgment and under RCW 9.92.120:

5 THE COURT: Well, as I indicated, I've read a lot of the briefing, both in the
6 prior hearings and in preparing for today's.

7 [p.41] It's pretty clear to this Court that Mr. Morrison, the elected County
8 Coroner, is attempting to ignore 9.92.120 and the fact that Mr. Jasman was
convicted of a crime wherein an employee was involved,

...

9 [p. 43] I don't doubt as a Deputy Coroner that Mr. Jasman, if he's author-
10 ized to do so, can stand in the shoes of Mr. Morrison, but I think because of
11 9.92.120, he probably is prohibited from doing so because when he stands in
the shoes of Mr. Morrison, then he becomes a public official.

12 So, under the circumstances, the Court is going to grant the Petitioner's motion
13 for summary judgment in [p. 44] this particular matter. The only matter before
14 the Court that the Court is considering is whether or not Mr. Jasman has the
15 ability to sign death certificates. The Court's not going to allow him to sign
16 death certificates

17 Tr. 1/28/13 hearing at 40-44 (Ex. J) (emphasis added). Judge Hotchkiss went on to address
18 the request for appointment of a special DPA:

19 MR. AHREND: Okay. And, then, the only other issue, you had reserved rul-
20 ing on appointment of myself as special counsel for the Defendant and
21 intervenor in this case.

22 THE COURT: I don't know that anybody really briefed that, but the reason
23 that I reserved ruling is for the outcome of this particular case, and as I think
24 the outcome in this particular case on the issue, which was the primary issue,
25 the death certificate (sic), is that the Coroner was doing something improper, I
would not grant that. [Parentheses in original; emphasis added.]

Tr. 1/28/13 hearing at 45-46 (Ex. J). This was entirely consistent with the issue left open in
his Decision on Conflict of Interest: "This is not to say that the Coroner can authorize the
employee to engage in illegal activities. That will be decided later." See Ex. G2.

1 Judge Hotchkiss correctly held that Prosecutor Lee had no duty to represent
2 Mr. Jasman, because in signing death certificates Jasman was violating the terms of the 2009
3 judgment and the provisions of RCW 9.92.120. The judgment included this handwritten an-
4 notation: "Defendant acknowledges the forfeiture of his right to hold public office, as provid-
5 ed in RCW 9.92.120." See Ex. C6. That statute provides in its entirety: "The conviction of a
6 public officer of any felony or malfeasance in office shall entail, in addition to such other
7 penalty as may be imposed, the forfeiture of his or her office, and shall disqualify him or her
8 from ever afterward holding any public office in this state." There is no statute or other au-
9 thority that requires a prosecuting attorney to defend county employees who insist upon en-
10 gaging in unlawful conduct.

11
12 Mr. Jasman is now for the first time claiming that RCW 4.96.041 (discussed in the
13 next section) requires the county to provide him a defense; he did not invoke that statute,
14 however, when seeking appointment of a special DPA in the earlier action, and he cannot now
15 raise it in this new lawsuit. At page 3 of their answer herein, the defendant County Commis-
16 sioners have affirmatively asserted that "Plaintiff's claims are barred by the doctrine(s) of col-
17 lateral estoppel and res judicata." The general term res judicata encompasses claim preclu-
18 sion, often itself called res judicata, and issue preclusion, also known as collateral estoppel.
19 *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Restructuring
20 the same claim in a subsequent action is barred by the doctrine of claim preclusion. *Hilltop*
21 *Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995) (citing
22 Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash.
23 L. Rev. 805, 812 (1985)). Further, claim preclusion prevents a plaintiff from filing the same
24 claim under a different theory. *Shoemaker, supra*, 109 Wn.2d at 507. Claim preclusion, by
25

1 its nature, applies to what has already been decided in addition to claims that should have
2 been raised. *Id.* In other words, claim preclusion applies to matters that were actually litiga-
3 ted and those that "could have been raised, and in the exercise of reasonable diligence should
4 have been raised, in the prior proceeding." *DeYoung v. Cenex, Ltd.*, 100 Wn.App. 885, 892, 1
5 P.3d 587 (2000) (quoting *Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App. 320, 328-29, 941 P.2d
6 1108 (1997)).

7
8 Courts apply the doctrine of claim preclusion for numerous policy reasons: (1) to
9 avoid the corrosive disrespect that follows if the same matter were twice litigated to incon-
10 sistent results; (2) preserving the courts against the burdens of repetitious litigation; (3) the
11 need to protect a victorious party against oppression by their adversary; and (4) to maintain
12 the conclusive effect of prior adjudication by providing a means to finally ending private dis-
13 putes. *Hilltop Terrace Homeowner's Ass'n, supra*, 126 Wn.2d at 30-31. All of these policy
14 considerations are implicated in this case and provide compelling grounds to reject the new
15 complaint because Judge Hotchkiss has already held that Mr. Jasman was acting unlawfully
16 and that no special DPA appointment is available.

17 While claim preclusion prevents a plaintiff from bringing the same claim under a dif-
18 ferent theory, issue preclusion prevents the relitigation of an issue that has already been liti-
19 gated and determined even where the plaintiff asserts a new and distinct claim. *Shoemaker*,
20 *supra*, 109 Wn.2d at 507. The elements of issue preclusion are: (1) identical issues; (2) a fi-
21 nal judgment on the merits; (3) the party against whom the plea is asserted must have been a
22 party to or in privity with a party to the prior adjudication; and (4) application of the doctrine
23 must not work an injustice on the party against whom the doctrine is to be applied. *Id.* These
24 elements are all present here: (1) **Identical issues:** As discussed above at pages 6-8, under
25

1 *Osborn and Hoppe* Judge Hotchkiss' denial of appointment of a special prosecutor necessarily
 2 included a determination that Prosecutor Lee had no authority or duty to represent a county
 3 employee in Mr. Jasman's circumstances. Judge Hotchkiss in fact held that it was unlawful
 4 for Mr. Jasman to sign death certificates in light of the 2009 judgment in the disorderly con-
 5 duct case and RCW 9.92.120. **(2) Final judgment on the merits:** Judge Hotchkiss' Febru-
 6 ary 27, 2013, order (Ex. K) resolves all outstanding issues in the earlier case, including the
 7 request for appointment of a special DPA. "A grant of summary judgment is a final judgment
 8 on the merits with the same preclusive effect as a full trial." *DeYoung v. Cenex, Ltd., supra*,
 9 100 Wn.App. at 892. The pendency of an appeal does not affect that final judgment (barring
 10 reversal). *See Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938); *NLRB v. Heyman*, 541 F.2d 796,
 11 800 (9th Cir. 1975). **(3) The party against whom the plea is asserted must have been a**
 12 **party to or in privity with a party to the prior adjudication:** Mr. Jasman was a party to
 13 the previous action. **(4) No injustice:** Mr. Jasman had a full and fair opportunity to litigate
 14 the issues in the prior case.

15
 16 Because Mr. Jasman raised the issue of representation at county expense in *Lee v.*
 17 *Jasman*, citing only RCW 36.27.030, he is precluded from raising the same issue again in a
 18 separate action citing a different statute, RCW 4.96.041. As noted above, claim preclusion
 19 applies to matters that were actually litigated and those that could have been raised, and in the
 20 exercise of reasonable diligence should have been raised, in the prior proceeding. Mr. Jasman
 21 could and should have raised the second statute in the earlier litigation, rather than filing a
 22 new lawsuit while cross-motions for summary judgment were pending in *Lee v. Jasman*.

23 Mr. Jasman even recognized the interlocking nature of the two lawsuits by pleading at page 5
 24 of the complaint in the present action that the Court should grant a "Stay of these proceedings
 25

1 pending a decision on the motion for appointment of a special prosecutor in the quo warranto
2 action." By this new lawsuit, Mr. Jasman is attempting to have two bites at the apple. He is
3 not entitled to split his theories in this fashion.

4 **B. RCW 4.96.041(1) DID NOT AUTHORIZE OR REQUIRE GRANT COUNTY**
5 **TO DEFEND AND INDEMNIFY MR. JASMAN IN THE ACTION BROUGHT**
6 **BY PROSECUTOR LEE**

7 Even if Mr. Jasman is permitted to raise RCW 4.96.041 for the first time in this separ-
8 ate action, the statute has no application to these facts. It provides as follows:

- 9 (1) Whenever an action or proceeding for damages is brought against any past
10 or present officer, employee, or volunteer of a local governmental entity of
11 this state, arising from acts or omissions while performing or in good faith
12 purporting to perform his or her official duties, such officer, employee, or
13 volunteer may request the local governmental entity to authorize the de-
14 fense of the action or proceeding at the expense of the local governmental
15 entity. (Emphasis added.)

16 According to the plain terms of the statute, it only applies to actions for damages, and then
17 only where the employee was performing or in good faith purporting to perform his official
18 duties. Neither element is present here. The threshold question is whether, although styled as
19 a quo warranto action, Prosecutor Lee's suit against Mr. Jasman was actually a declaratory
20 judgment action seeking injunctive relief.

21 **1. Lee v. Jasman Was Not a Quo Warranto Action**

22 A traditional quo warranto proceeding involves contestants for an elective office.
23 *Clarken v. Blomstrom*, 174 Wash. 612, 616 (1933) ("[Q]uo warranto is the remedy by which
24 to determine the right or title to an office, while mandamus is the remedy to be employed to
25 reacquire a position for an employee"); *State ex rel. Powell v. Fassett*, 69 Wash. 555, 558, 559
(1912) ("The respondents ... contend that quo warranto does not lie, because the appellant's
position is a subordinate one, and not an office, within the meaning of the charter or the Code.

1 Rem. & Bal. § 1034 [*now*, RCW 7.56.010] The appellant would probably not be an of-
 2 ficer, as defined by the common law, but the clear intent of the charter [concerning classified
 3 service] is to afford him all the protection of an officer ..."). (Emphasis added.) At the time
 4 when Prosecutor Lee sued, Mr. Jasman was not serving as elected coroner, he was an em-
 5 ployee of the Coroner's Office, *i.e.*, a subordinate and not the holder of elective office.

6 Prosecutor Lee's lawsuit against Mr. Jasman did not seek to oust Coroner Morrison
 7 from office, nor did it seek to remove Mr. Jasman from county employment. Rather, it re-
 8 quested:

9
 10 5.3. For a preliminary and permanent mandatory and prohibitive injunction
 11 enjoining JASMAN from performing the duties of the Grant County Coroner
 12 or of a deputy coroner, including the completion and/or signing of death certifi-
 13 cates issued in the County of Grant, State of Washington;

14 Ex. D5. Nor did Judge Hotchkiss order Morrison or Jasman ousted from either's position.
 15 Rather, the Court enjoined Jasman from signing death certificates. *See* Ex. K3. Whatever the
 16 form of the complaint, its substance was not quo warranto but rather that of a pleading seeking
 17 declaratory and injunctive relief, and that was the nature of the relief that was ultimately
 18 granted. "A party's characterization of the theory of recovery is not binding on the court. It is
 19 the nature of the claim that controls." *Pepper v. J.J. Welcome Const. Co.*, 73 Wn.App. 523,
 20 546, 871 P.2d 601, *rev. denied*, 124 Wn.2d 1029 (1994), *overruled on other grounds by Phil-*
 21 *lips v. King County*, 87 Wn.App. 468, 943 P.2d 306 (1997), *aff'd. on other grounds*, 136
 22 Wash.2d 946 (1998).

23 Accordingly, *Lee v. Jasman* was not a quo warranto action, and RCW Ch. 7.56 has no
 24 application here.
 25

1 2. Lee v. Jasman Was Not an Action for Damages

2 In the alternative, even if the earlier-filed action by Prosecutor Lee is viewed as being
3 in truth a quo warranto action, the suggestion at paragraph 11 of Mr. Jasman's complaint that
4 the earlier case was somehow an action for damages is simply mistaken. Division 3 has held
5 the statute upon which Mr. Jasman bases this lawsuit does not require a defense in a judicial
6 qualifications proceeding because such is not a damages action:

7 Mr. Colby argues that the term "action" in RCW 4.96.041 applies to proceed-
8 ings initiated by the Commission. But when the statute and ordinance are read
9 as a whole, both RCW 4.96.041 and YCC 2.98.040 plainly apply only to an ac-
10 tion or proceeding for damages. A judicial disciplinary proceeding is not one
 for damages. See Const. art. IV, § 31(4).

11 *Colby v. Yakima County*, 133 Wn.App. 386, 391, 136 P.3d 131, 133 (2006). Similarly, a quo
12 warranto action brought by a prosecuting attorney is not an action for damages.

13 According to Division 3, "'Damages' are the monetary value of the injury or damage
14 proximately caused by the breach of alleged duty." *Huff v. Roach*, 125 Wn.App. 724, 729,
15 106 P.3d 268 (2005). An "action for damages," then, is one seeking monetary relief. A quo
16 warranto action, in contrast, is brought under RCW Title 7 "Special Proceedings and Actions"
17 and concerns at its core not monetary relief but what RCW 7.56.100 refers to as a "judgment
18 of ouster."

19 In his complaint against the Commissioners, Mr. Jasman allows as how Prosecutor
20 Lee's complaint in the earlier case did not "specifically" request damages, but Mr. Jasman
21 then invokes a single section of the chapter governing quo warranto, RCW Ch. 7.56:
22

23 10. The quo warranto action requests declaratory and injunctive relief, an
24 award of fees and costs and "such other and further relief as the Court deems
25 just and equitable." The complaint (also referred to as an "information") did
 not specifically request damages.

1 11. The quo warranto statute provides: "[w]hen judgment is rendered in favor
2 of the plaintiff, he or she may, if he or she has not claimed his or her damages
3 in the information, have his or her action for the damages at any time within
4 one year after judgment." RCW 7.56.090. (Emphasis added.)

5 Mr. Jasman correctly quotes the cited section, but his reliance upon it is misplaced, because it
6 ignores the fact there are two types of plaintiffs under the quo warranto statutory scheme: (1)
7 prosecuting attorneys and (2) private parties who claim entitlement to the public office. Thus:

8 **RCW 7.56.040. Information for usurping office--Requisites--Damages**

9 Whenever an information shall be filed against a person for usurping an office,
10 by the prosecuting attorney, he or she shall also set forth therein the name of
11 the person rightfully entitled to the office, with an averment of his or her right
12 thereto; and when filed by any other person he or she shall show his or her in-
13 terest in the matter, and he or she may claim the damages he or she has sus-
14 tained. (Emphasis added.)

15 The language following the semicolon is an independent clause that stands alone; the refer-
16 ence at the end to "the damages he or she has sustained" applies to the "any other person"
17 plaintiff, not to the prosecutor plaintiff. Under the rule of statutory construction "expressio
18 unius est exclusio alterius," *State v. Somerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988),
19 including "any other person" in the final clause excludes the prosecutor plaintiff. Thus, a
20 prosecutor as quo warranto plaintiff has no claim for damages, and the section relied upon by
21 Mr. Jasman, RCW 7.56.090, is addressing plaintiffs claiming entitlement to office, not prose-
22 cutors. "By statute the officer de jure may recover of the officer de facto the salary or fees of
23 an office paid to the latter." *Samuels v. Town of Harrington*, 43 Wash. 603, 606-607, 86 P.
24 1071 (1906) (citations omitted). A prosecutor, on the other hand, is not the "officer de jure"
25 and has no claim for damages.

Furthermore, review of Prosecutor Lee's earlier-filed complaint (Ex. D) demonstrates
that he did not file an action for damages. It is styled, "Quo Warranto Information and Com-

1 plaint re: 1. Entry of Order Ousting and/or Prohibiting Defendant from Exercising the Office
2 of Grant County Coroner or Deputy Coroner; and 2. Injunctive Relief." The prayer for relief
3 is as follows:

4 WHEREFORE, Plaintiff prays for the following relief:

5 5.1 For an order of this Court declaring that JASMAN has usurped, intruded
6 upon and/or unlawfully exercised the public office of Grant County Coroner or
7 deputy coroner;

8 5.2 For the entry of an order ousting, prohibiting and excluding JASMAN
9 from exercising the public office of Grant County Coroner or deputy coroner;

10 5.3. For a preliminary and permanent mandatory and prohibitive injunction
11 enjoining JASMAN from performing the duties of the Grant County Coroner
12 or of a deputy coroner, including the completion and/or signing of death certifi-
13 cates issued in the County of Grant, State of Washington;

14 5.4. For an award of actual attorneys fees and costs, and statutory fees and
15 costs pursuant to RCW 7.56.100 and/or to the fullest extent allowed by law;
16 and

17 5.5. For such other and further relief as the Court deems just and equitable.

18 Paragraph 5.4 sought an award of actual attorney fees, without citation to authority for such.

19 "Under the American rule compensation for attorney fees and costs may be awarded only if
20 authorized by contract, statute, or a recognized ground in equity." *In re Impoundment of*

21 *Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002). In any event, attorney fees are not

22 damages as defined in *Huff, supra*, 125 Wn.App. at 729: "Damages' are the monetary value
23 of the injury or damage proximately caused by the breach of alleged duty." Nor do court

24 costs constitute damages; RCW 4.84.110 concerning award of costs to prevailing parties de-

25 fines them as "certain sums for the prevailing party's expenses in the action, which allowances
are termed costs." (Emphasis added.)

1 Neither the parties nor the Court were misled about the earlier action being one for
2 damages. Mr. Jasman in particular was not confused on the point, because he opened his Sep-
3 tember 12, 2012, memorandum opposing motion for preliminary injunction with the state-
4 ment, "This case is about whether Jerry Jasman can sign death certificates." Ex. F1. No men-
5 tion was made there, or anywhere else in the briefing in the earlier case, of any request for
6 damages. Prosecutor Lee was clear on the point in his November 16, 2012, Reply on Motion
7 for Reconsideration:

8 It is helpful to note what this case is not about. It is not a criminal matter, sub-
9 ject to criminal rules of procedure. It is not a tort action, which would invoke
10 indemnification of a county employee under chapter RCW 4.96. It is an ex-
11 traordinary writ for quo warranto, filed pursuant to chapter 7.56 RCW. A quo
12 warranto is also the exclusive method of challenging someone improperly ex-
13 ercising public functions. (Citations omitted.)

14 Ex. H2. Similarly, Judge Hotchkiss stated as follows during the summary judgment hearing:

15 THE COURT: Well, actually, as I see it in reviewing your memorandum, it
16 does appear to the Court that the only relief, not only that, but also in the com-
17 plaint that Mr. Lee is requesting, is that his signing death certificates (sic).
18 [Parentheses in original.]

19 Tr. 1/28/13 hearing at 33 (Ex. J). When the order on summary judgment was entered, it did
20 not address damages. Instead, it provided that Mr. Jasman is "prohibited and enjoined from
21 signing death certificates" in Grant County. Ex. K3. In other words, the relief granted was an
22 injunction, not damages.

23 Thus, a quo warranto proceeding brought by a prosecuting attorney is not an action for
24 damages. The earlier action brought by Prosecutor Lee was not pled as an action for dam-
25 ages. It was not heard by the Court as an action for damages. It was not decided as an action
for damages. The earlier action, then, was not an action for damages, and accordingly RCW
4.96.041 by its terms does not require Grant County to defend and indemnify Mr. Jasman.

1 3. Mr. Jasman Was Not Performing or in Good Faith Purporting to Perform
2 His Official Duties When He Signed Death Certificates in Violation of the
3 2009 Judgment and RCW 9.92.120

4 Even if Prosecutor Lee's earlier action was one for damages, RCW 4.96.041 only ap-
5 plies where the litigation arose while an employee was "performing or in good faith purpor-
6 ting to perform his or her official duties." "Official duties" and "scope of employment" are in
7 effect synonymous; an argument to the contrary would constitute "a tortured reading of the
8 statute." *Hardesty v. Stenchever*, 82 Wn.App. 253, 261, 917 P.2d 577 (1996). Further:

9 Our Supreme Court has examined the issue of when an employee's conduct is
10 outside the scope of his employment and has promulgated the following rule:
11 "An employee's conduct will be outside the scope of employment if it 'is dif-
12 ferent in kind from that authorized, far beyond the authorized time or space
13 limits, or too little actuated by a purpose to serve the master.'" *Robel v.*
14 *Roundup Corp.*, 148 Wash.2d 35, 53, 59 P.3d 611 (2002) (citing Restatement
15 (Second) of Agency § 228(2) (1958)). "The proper inquiry is whether the em-
16 ployee was fulfilling his or her job functions at the time he or she engaged in
17 the injurious conduct." *Robel*, 148 Wash.2d at 53, 59 P.3d 611.

18 *Wright v. Terrell*, 135 Wn.App. 722, 736, 145 P.3d 1230 (2006), *rev'd on other grounds*, 162
19 Wn.2d 192 (2007).

20 As a matter of law, Mr. Jasman was clearly acting outside the scope of his official du-
21 ties when he signed death certificates, because Judge Hotchkiss has determined that such
22 signings were unlawful. That is the crux of the holding in the case filed by Prosecutor Lee.
23 *Cf. Kyreacos v. Smith*, 89 Wn.2d 425, 430, 572 P.2d 723 (1977) ("Commission of premedi-
24 tated murder by a policeman simply precludes any possibility that he was acting within the
25 scope and course of his employment"). The only question remaining is whether Mr. Jasman
 was nevertheless acting "in good faith purporting to perform his official duties." Mr. Jasman
 clearly knew about his own prior criminal conviction and the stipulated condition of the
 Judgment and Sentence which stated, "Defendant acknowledges the forfeiture of his right to

1 hold public office, as provided in RCW 9.92.120." Ex. C6. Mr. Jasman had in fact resigned
2 as the elected coroner in consequence of that criminal conviction; the suggestion that he hon-
3 estly believed he could nevertheless continue to perform the RCW 70.58.180 core function of
4 signing death certificates affronts logic and common sense. This is especially true when Cor-
5 oner Morrison was advised (*see* Ex. E at ¶4) by the Grant County Prosecutor's Office prior to
6 the fall of 2011 that Mr. Jasman could not lawfully sign death certificates.

7
8 RCW 4.96.041 is an important protection for municipal employees who are sued for
9 trying to do their jobs. It should not be construed, however, to encourage employees to pur-
10 sue a course of conduct which flies in the face of both their own legal disabilities and of the
11 advice of their municipal counsel. RCW 4.96.041 by its terms does not require Grant County
12 to defend and indemnify Mr. Jasman.

13 IV. CONCLUSION

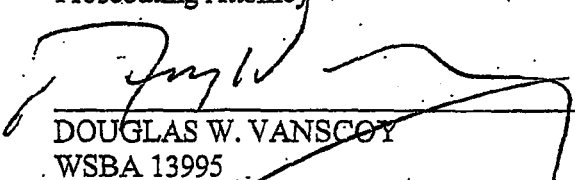
14 Although plaintiff Jasman is legally barred from holding the office of coroner, he and
15 Mr. Morrison were determined that Jasman continue to perform one of a coroner's core statu-
16 tory functions. Advice from the prosecutor's office did not sway them; enforcement required
17 a lawsuit and entry of a court order finding their conduct illegal. In the course of that litiga-
18 tion, Mr. Jasman asserted he was entitled to legal representation at county expense, citing one
19 statute. While that case was pending, Jasman filed this action claiming he was entitled to le-
20 gal representation at county expense in the earlier action, citing a different statute. Settled
21 legal doctrines prevent such claim-splitting. Furthermore, the statute Mr. Jasman now in-
22 vokes in this new lawsuit applies only to damages actions and did not require or permit Grant
23 County to fund his defense of the meritorious declaratory judgment and injunction action
24 brought by Prosecutor Lee. That lawsuit was not a true quo warranto action, and even if it
25

1 was, damages are only available by statute in quo warranto for an individual claiming entitle-
2 ment to the public office, not for a prosecutor plaintiff. Mr. Jasman and Mr. Morrison were
3 acting contrary to law, and Jasman was not entitled to counsel at taxpayer expense in the ear-
4 lier action which successfully challenged the very legality of his conduct as a county employ-
5 ee.

6 The Court should grant defendants Grant County, Board of Commissioners for Grant
7 County, Richard Stevens, Carolann Swartz, and Cindy Carter summary judgment herein.

8 DATED this 10th day of May, 2013.

9
10 MARK LINDQUIST
Prosecuting Attorney

11 
12 DOUGLAS W. VANSKOY
13 WSBA 13995
14 Chief Civil Deputy Prosecutor
955 Tacoma Avenue South, Suite 301
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FEB 23 2014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

JERRY JASMAN,

Plaintiff,

vs.

GRANT COUNTY, WASHINGTON, et al.,

Defendants.

NO. 12-2-01681-6

DEFENDANTS' REPLY ON MOTION FOR SUMMARY JUDGMENT

Motion Date / Time: 02-24-14 / 1:30 p.m.

I. STATEMENT OF THE CASE

The County relies upon the Statement of the Case supplied in the Memorandum in Support of its Motion for Summary Judgment. Any other facts that are necessary will be incorporated and referenced in the course of the argument.

II. ARGUMENT

A. MR. JASMAN IS NOT ENTITLED TO HAVE HIS DEFENSE PAID FOR BY THE COUNTY UNDER RCW 4.96.041 AS A MATTER OF LAW WHERE THAT STATUTE ONLY APPLIES TO ACTIONS OR PROCEEDINGS FOR DAMAGES AND NO DAMAGES WERE SOUGHT IN THE EARLIER PROCEEDING

Mr. Jasman's claims are all predicated upon an assertion that under RCW 4.96.041 he is entitled to have the County provide a defense to Prosecutor Lee's action at County expense.

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1 See Complaint ¶ 23, 28, and 31. However, Mr. Jasman's claims are without merit where he is
2 not entitled to relief under RCW 4.96.041 as a matter of law.

3 RCW 4.96.041(1) provides for a defense at the expense of a local government entity
4 only in actions or proceedings "for damages." RCW 4.96.04. [Emphasis added.] See also,
5 *Colby v. Yakima County*, 133 Wn. App. 386, 389-90, 136 P.3d 131 (2006). Prosecutor Lee's
6 action was for an order prohibiting Mr. Jasman from engaging in unlawful conduct. It did not
7 seek damages. See Exhibits Supporting Motion for Summary Judgment, Exhibit D, p. D5:

8 Accordingly, Mr. Jasman fails to satisfy the threshold requirement of RCW 4.96.041,
9 and is not entitled to relief as a matter of law so that the grant of summary judgment is proper.
10

11 In his response, Mr. Jasman claims that an action in *quo warranto* includes damages.
12 However, as explained in the motion for summary judgment (hereinafter MSJ), that argument
13 mischaracterizes the *quo warranto* statute as it applies to this case because the damages lan-
14 guage only pertains to actions brought by persons elected to office who have been deprived
15 that office, and are thereby damaged by the loss of compensation that goes therewith. See
16 MSJ, p. 15. Under a plain language reading of the statute, the damages language does not ap-
17 ply to actions by the prosecuting attorney because the damages language occurs after the
18 semi-colon in the portion relating to actions filed "by any other person" [i.e., other than the
19 prosecuting attorney]. See MSJ at 15; *State v. Superior Court of King County*, 167 Wash,
20 655, 9 P.2d 1087 (1932); *State v. McQuade*, 12 Wash. 554, 41 P. 897 (1895).
21

22 Mr. Jasman's response completely fails to address the County's argument on this issue.
23 See Response MSJ, p. 4. Mr. Jasman's position on this issue is unsupported by argument or
24 analysis, and in any case is completely lacking in merit. A ruling in the County's favor on this
25

1 issue alone is dispositive so that the County is entitled to summary judgment on this basis
2 alone.

3 **B. MR. JASMAN IS NOT ENTITLED TO HAVE HIS DEFENSE PAID FOR AT**
4 **COUNTY EXPENSE WHERE HE WAS NOT ACTING IN GOOD FAITH**

5 RCW 4.96.041 has a second threshold requirement before an employee of local gov-
6 ernment will be entitled to have local government provide a defense at the local government's
7 expense. That requirement is that the claim for damages arise from acts or omissions of the
8 employee while performing or in good faith purporting to perform his or her official duties.

9 *See* RCW 4.96.041(1).

10 Here, Mr. Jasman claims that he was acting in good faith because his employer, Grant
11 County Coroner Craig Morrison, submitted a "certification" that Mr. Jasman was acting in
12 good faith. Response at 5. This argument is without merit for two reasons.

13 First, RCW 4.96.041(2) requires the local legislative authority to make a finding that
14 the employee was acting in good faith before the employee is entitled to a defense at County
15 expense. Here, the Coroner wrote a letter to the Commissioners requesting that the County
16 provide a defense at County expense for Mr. Jasman, "...to the extent that he was acting with-
17 in the scope of his employment and in good faith...." *See* Declaration of George Ahrend re:
18 Defendant's Motion for Summary Judgment, Exhibit 1, p. 9 and Exhibit 2, p. 9. Factually,
19 this statement in a letter is not a "certification" that Mr. Jasman was acting in good faith. Ra-
20 ther, it was a sentence qualifying the degree to which he might be entitled to the support the
21 Coroner sought for him.
22

23 Second, as RCW 4.96.041(2) establishes, it is the local legislative authority that has to
24 find that Mr. Jasman was acting in good faith, not the Coroner. The Coroner cannot preempt
25 the finding of the Board of Commissioners by substituting his judgment for theirs. If that

1 were permissible, it would render that portion of RCW 4.96.041(2) a nullity by permitting the
2 Coroner to undertake the role assigned by statute to the legislative authority.

3 In this regard it is analogous to an officer's statement regarding informants in a proba-
4 ble cause declaration to a warrant. The officer cannot submit a conclusory statement that an
5 informant is reliable. Doing so deprives the magistrate of the authority to exercise the magis-
6 trate's independent judgment of the matter. Rather, the officer is required to supply the under-
7 lying facts from which the magistrate can independently assess the reliability of the inform-
8 ant, and if the officer fails to do so, the probable cause declaration is deficient and the warrant
9 is not legally valid. *See State v. Wilke*, 55 Wn. App. 470, 475-76, 778 P.2d 4054 (1989); *State*
10 *v. Cole*, 128 Wn.2d 262, 287-88, 906 P.2d 925 (1995).

11 Here, the actions of Mr. Jasman, were not in good faith as a matter of law where it is
12 undisputed that both the Coroner and Mr. Jasman were aware that the Coroner's legal advisor,
13 the Prosecuting attorney, concluded that Mr. Jasman was lawfully not entitled to sign death
14 certificates. *See Exhibits Supporting Defendant's Motion For Summary Judgment*, p. E1, ¶ 4.

15 It is also worth noting that RCW 4.96.041 requires the employee to request a defense
16 at County expense, but that here it was the Coroner, not Mr. Jasman, who did so. *See Decla-*
17 *ration of George Ahrend re: Defendant's Motion for Summary Judgment*, Exhibit 1, p. 9 and
18 Exhibit 2, p. 9.

19 In his letter, the Coroner did not "certify" that Mr. Jasman was acting in good faith,
20 but rather repeated the language of RCW 4.96.041 in recognition of the implicit limit on his
21 request. Moreover, even if the Coroner had certified that Mr. Jasman was acting in good
22 faith, such certification would be irrelevant as it is a nullity where the statute specifies that the
23 Board of Commissioners, not the Coroner, determines whether Mr. Jasman was acting in
24
25

1 good faith. Here Mr. Jasman could not have been as a matter of law because he was on notice
 2 from the Prosecuting attorney that he could not lawfully sign death certificates. For all these
 3 reasons, the Court should render summary judgment in the County's favor.

4 **C. FOR THE REASONS IDENTIFIED IN THE MOTION FOR SUMMARY**
 5 **JUDGMENT, THE COUNTY MAINTAINS THAT ACTION FOR "QUO**
 6 **WARRANTO" WAS IMPROPERLY DESIGNATED AS SUCH AND THAT**
 7 **PROSECUTOR LEE'S ACTION WAS IN FACT AN ACTION FOR INJUNCTIVE**
 8 **RELIEF, HOWEVER, IN EITHER CASE THE EFFECT ON THE MO-**
 9 **TION FOR SUMMARY JUDGMENT IS THE SAME WHERE THERE WAS**
 10 **NO CLAIM FOR DAMAGES**

11 The County relies on its argument in the Motion for summary judgment with regard to
 12 whether the "*quo warranto*" action was indeed an action for *quo warranto*, or whether it was
 13 mis-titled and was in fact an action for injunctive relief. Mr. Jasman's response does not
 14 meaningfully address the County's argument other than to emphasize that it was titled as an
 15 action in *quo warranto*. However, as the County argued in its motion, "[a] party's characteri-
 16 zation of the theory of recovery is not binding on the court[,] and therefore not determinative
 17 as to the nature of the action.

18 However, whether the action was one for *quo warranto*, or whether it is one for de-
 19 claratory and injunctive relief is of no consequence to the outcome of the County's Motion for
 20 summary judgment. This is because in either case, Prosecutor Lee's action did not involve a
 21 claim for damages.

22 Moreover, in his argument before the Court of Appeals, in rebuttal Mr. Jasman him-
 23 self specifically described the *quo warranto* by saying, "this is a weird *quo warranto* action,"
 24 because it is not against an elected official, but against an employee. See footnote 1 below for
 25 the hyperlink to the electronically recorded argument in this case, which is available from the

1 Washington Courts website. A lengthier transcription of this portion of the argument occurs
2 in section F below.

3 **D. THE COUNTY'S MOTION FOR SUMMARY JUDGMENT ADDRESSED**
4 **MR. JASMAN'S CLAIMS FOR WRIT OF CERTIORARI, AND WRIT OF**
5 **MANDAMUS WHERE THOSE CLAIMS WERE IDENTIFIED IN THE MO-**
6 **TION, AND BOTH ARE PREDICATED UPON MR. JASMAN BEING ENTI-**
7 **TLED TO A DEFENSE AT COUNTY EXPENSE UNDER RCW 4.96.041**

8 The response to the motion for summary judgment argues that the County fails to ad-
9 dress Mr. Jasman's alternative claims for writs of certiorari or mandamus. Response at 5.
10 That assertion misunderstands the argument in the County's motion.

11 Mr. Jasman's complaint asserts three claims: a claim for declaratory judgment, an al-
12 ternative petition for writ of certiorari, and an alternative petition for writ of mandamus.
13 Complaint at 6. Each of those claims seeks to have the County ordered to defend and indem-
14 nify Mr. Jasman for his defense in Prosecutor Lee's action against him. Complaint, ¶ 23, 28,
15 and 33. Moreover, each of those claims is predicated upon Mr. Jasman being entitled to a de-
16 fense at County expense in reliance upon RCW 4.96.041.

17 The County's motion for summary judgment did identify the three claims in its state-
18 ment of the case. MSJ at 3. The County provided extensive argument on why Mr. Jasman
19 was not entitled to relief under RCW 4.96.041. MSJ, section B, pp. 12-19. That argument
20 was made generally and not limited to any particular one of Mr. Jasman's three claims. See
21 MSJ, p. 12-19. Moreover, where all three of Mr. Jasman's claims are predicated upon him
22 being entitled to a defense at County expense under RCW 4.96.041, Mr. Jasman's two alterna-
23 tive claims also fail to the extent that he is not entitled to such. "[T]hree separate legal theo-
24 ries based upon one set of facts constitute one 'claim for relief' under CR 54(b)" *Pepper v. J.J.*
25 *Welcome Construction Co.*, 73 Wn. App. 523, 546, 871 P.2d 601 (1994) (quoting *Snyder v.*

1 State, 19 Wn. App. 631, 635, 577 P.2d 160 (1978)), review denied, 124 Wn.2d 1029 (1994),
 2 overruled on other grounds by *Phillips v. King County*, 87 Wn. App. 468, 943 P.2d 306
 3 (1997), aff'd on other grounds, 136 Wn.2d 946 (1998). The assertion of multiple legal theo-
 4 ries does not convert a single claim for relief on one set of facts into multiple claims. *Pepper*,
 5 73 Wn. App. at 546.

6 Accordingly, the County's motion for summary judgment properly encompasses all
 7 three of Mr. Jasman's claims and should be granted as to all three.

8
 9 **E. RES JUDICATA BARS MR. JASMAN FROM RAISING RCW 4.96.041 NOW
 10 WHERE HE COULD HAVE RAISED IT BEFORE, AND COLLATERAL ES-
 11 TOPPEL PRECLUDES HIS CLAIM IN THIS CASE WHERE IT IS BASED
 12 ON THE SAME FACTUAL ISSUES AS HIS CLAIM FOR A SPECIAL PROS-
 13 ECUTOR IN THE PRECEDING CASE, AND THAT CASE WAS DECIDED
 14 AGAINST HIM**

15 Once a judgment is entered, it has a preclusive effect; i.e., it operates as a resolution of
 16 the issues in the case so that the parties are precluded from re-litigating the issues resolved by
 17 the judgment. 14A Karl B. Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE, § 35:20 (2^d.
 18 ed. 2009). The preclusive effect of a judgment takes two forms. "*Res judicata*" precludes re-
 19 litigating the same claim or cause of action, as well as any other claim or cause of action that
 20 could have been raised in the original proceeding, even if it was not. 14A Tegland, § 35:20,
 21 35:24, p. 522. "Collateral estoppel" prevents re-litigation of a particular issue in a later pro-
 22 ceeding even though the later proceeding involves a different claim or cause of action. 14A
 23 Tegland, 35:32. "Collateral estoppels bars relitigation of material, essential or ultimate facts."
 24 14A Tegland, § 35:32, p. 550.

25 For either *res judicata* or collateral estoppel to take effect, there must generally be a
 final determination on the merits. 14A Tegland, § 35:23, p. 514. Preclusive effect attaches to
 summary judgments. 14A Tegland, § 35:23; p. 515. Importantly, here, for preclusions pur-

1 poses, a judgment will be final notwithstanding the fact that an appeal of the judgment has
2 been taken. 14A Teglund, § 35:23, p. 518.

3 1. Res Judicata Bars Mr. Jasman's Claim in This Case Where He Could
4 Have Raised it in the Prior Case

5 For *res judicata* to preclude further litigation, the first and second proceeding must be
6 the same in four respects: 1) subject matter; 2) claim or cause of action; (3) persons and par-
7 ties; and 4) the quality of the persons for or against whom the claim is made. 14A Teglund, §
8 35:24, p. 521. However, these four requirements for identity are not as restrictive as they
9 may appear at first blush. A party seeking relief may not avoid the effect of *res judicata* by
10 re-filing the same claim based upon a different theory of the case. 14A Teglund, § 35:24, p.
11 523-24.

12 The test for whether a claim or cause of action is the same has not always been con-
13 sistently applied, however, one test the court has applied is whether: 1) rights or interests es-
14 tablished in the prior judgment would be destroyed or impaired by prosecution of the second
15 action; 2) whether substantially the same evidence is presented in the two actions; 3) whether
16 the two suits involve infringement of the same right; and 4) whether the two suits arise out of
17 the same transactional nucleus of facts. 14A Teglund, § 35:26, p. 527-28. Moreover, *res ju-*
18 *dicata* bars not only claims that the court considered in the first proceeding, but also claims
19 that could have been considered. 14A Teglund, § 35:26.

20 Here, Mr. Jasman's argument against *res judicata* is that his claim in this case is
21 against the County Board of Commissioners, while the opposing party in the first case in-
22 volved Mr. D. Angus Lee, the Grant County Prosecuting Attorney. This argument is mis-
23 placed for two reasons.
24
25

1 First, *res judicata* extends to all parties in privity with those in either action. 14A
2 Tegland, § 35:27, p. 534. Second, under the facts of this case, it amounts to the same thing.
3 Whether he is seeking appointment of a Special Prosecutor under RCW 35.27.030, or for the
4 County to provide for his defense under RCW 4.96.041, under the facts of this case he is in
5 truth seeking the same thing under either statute: to have Grant Count pay his legal expenses.

6 Mr. Jasman also claims that in the first matter he couldn't have pursued having the
7 Board of Commissioners authorize his defense at public expense because they weren't party to
8 the suit. Response, p. 3. But where the cost of a Special Prosecutor wasn't going to be borne
9 by Mr. Lee personally, but by the County, Mr. Jasman should have joined the Board of Com-
10 missioners as a necessary and indispensable party, in which case he could have pursued his
11 claim to be provided a defense at County expense under RCW 4.96.041. Where he didn't, the
12 denial of the appointment of a Special Prosecutor is preclusive to the claim he could have
13 raised but failed to.
14

15 It is worth noting that Mr. Jasman continues to seek the appointment of a Special
16 Prosecutor on appeal. See Declaration of George M. Ahrend re: Defendant's Motion for
17 Summary Judgment, filed 08-14-13, Exhibit 8, p. 2, 4, 40-42 (containing a copy of the brief of
18 appellants Jerry Jasman and Craig Morrison in *Lee v. Jasman*, No. 31519-3-III, brief pages ii,
19 iv, 31-32).
20

21 For these reasons, *res judicata* precludes Mr. Jasman's claims in this action to have the
22 County provide for his defense at County expense.

23 // // // //

24 // // // //

25 // // // //

2. Collateral Estoppel Precludes Mr. Jasman's Action in This Case Where He Made a Request for the Appointment of a Special Prosecutor in the Prior Case and That Request Was Based Upon the Same Facts Upon Which This Case Is Based

In order to establish collateral estoppel, a party must establish that: 1) the issue decided in the prior action was identical to the issue presented in the second action; 2) that the prior action ended in a final judgment on the merits; 3) that the party to be estopped was a party or in-privity with a party in the prior action; 4) application of the doctrine would not work an injustice. 14A Teglund, § 35:32, p. 550. These requirements boil down to a party having a full and fair *opportunity* to litigate the issue in the earlier proceeding. 14A Teglund, § 35:32, p. 550.

Here, first, the issue (as opposed to the specific claim asserted) is the same: whether or not the County is obligated to pay for Mr. Jasman's legal expenses. Second, the prior action ended on a judgment on the merits where the trial court entered an order on summary judgment that denied Mr. Jasman's request for appointment of a Special Prosecutor. *See* Exhibits Supporting Defendant's Motion for Summary Judgment, p. K3, ¶ 4. Third, Jasman is a party in both cases. Moreover, he is also a party in privity with Mr. Morrison where Mr. Morrison came into the case as an intervenor on Mr. Jasman's behalf and they are both represented by the same counsel. Instructive on this is the oral argument from the appeal, particularly the rebuttal.¹ Fourth, the application of the doctrine would not work an injustice here where, for the reasons articulated at the beginning of this reply, Mr. Jasman does not satisfy the requirements of RCW 4.96.041 as a matter of law, so that he is not entitled to have a defense provided at County expense.

¹ See, http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a03&docketDate=20140205. [Click on No. 315193 to cause the argument to play.]

1 F. THERE IS NO LEGITIMATE REASON FOR A STAY OF THE MOTION
2 FOR SUMMARY JUDGMENT

3 The response reasserts his request for a stay of proceedings pending the appeal be-
4 cause the appeal may render these proceedings moot. Response, p. 1. That argument is in-
5 consistent and contrary to Mr. Jasman's argument that *res judicata* and collateral estoppel do
6 not apply to this case because the first action, now on appeal, was fundamentally different.
7 To the extent that preclusion does not apply, the appeal in the other case would not moot this
8 action, in which case there is no reason for a stay. On the other hand, to the extent that
9 Mr. Jasman continues to assert that the appeal may moot this action, the preclusion argument
10 asserted by the County applies, in which case there is no reason to stay the proceedings be-
11 cause they are without merit where they are precluded.

12 It is worth noting that the inherent inconsistency of Jasman's argument on this issue
13 only further demonstrates that the underlying issue in both matters is whether Mr. Jasman is
14 entitled to have his defense paid for by the County. Further illustration of this issue is provid-
15 ed by Mr. Jasman's brief to the Court of Appeals, particularly when considered in conjunction
16 with his arguments in rebuttal before the Court of Appeals. There, he argued as follows:
17

18 THE COURT: And I do have a question for Mr. Ahrend – Is both Mr.
19 Jasman and Mr. Morrison seeking attorneys' fees to be paid by the county in
20 this case?

21 MR. AHREND: To the extent that they are inseparable. We believe
22 that the right to appointment of special counsel would probably be limited to
23 Mr. Morrison.

24 THE COURT: O.K. You are not claiming that a special prosecutor
25 needs to be hired to represent Mr. Jasman. Is that correct?

MR. AHREND: Correct with a caveat, and the caveat is this is a weird
quo warranto action. Normally a quo warranto action is brought against an
elected official because there is no other way to remove them. With an em-
ployee, they can be fired or their duties can be curtailed, and so because this is
a strange quo warranto action, the issues of Mr. Jasman's ability to serve and
Mr. Morrison's ability to run as office are very much intertwined. So that's the

1 caveat, but in the abstract theoretical, hypothetical, answer to the question, Mr.
2 Jasman would not be entitled to attorneys' fee to defend a quo warranto action.

3 Oral argument in *Lee v. Jasman*, No. 31519-3-III. See footnote 1 *supra* for the hyperlink to
4 the recording of the argument on the court's website. This argument demonstrates that while
5 in general the appointment of a Special Prosecutor would only entitle Mr. Morrison to attor-
6 neys fees, here, Mr. Jasman is in fact seeking reimbursement of attorneys fees via the ap-
7 pointment of a Special Prosecutor because of his caveat that "this is a weird quo warranto ac-
8 tion."

9 In any case, a stay pending the appeal is not warranted where Jasman is not entitled to
10 have the County provide for his defense at County expense because he has failed to, and as a
11 matter of law cannot, establish a valid claim under RCW 4.96.041. Accordingly, there is no
12 legitimate reason for granting a stay in this matter; and the Court should rule on the County's
13 motion for summary judgment.

14 **III. CONCLUSION**

15 Summary judgment is proper. Mr. Jasman fails to meet the threshold requirements to
16 entitle him to have the County provide for his defense at County expense under RCW
17 4.96.041. Mr. Lee's action against Mr. Jasman was not a claim for damages, nor was
18 Mr. Jasman acting in good faith when he undertook the actions Mr. Lee sought to enjoin.

19 The County's argument regarding Mr. Jasman's ineligibility to have his defense pro-
20 vided at County expense under RCW 4.96.041 applies equally to Mr. Jasman's alternative
21 claims for a writ of certiorari and writ of mandamus.

22 Finally, Mr. Jasman's claims are precluded by *res judicata* and collateral estoppel
23 where the court in the first action denied his motion for appointment of a Special Prosecutor.
24
25

1 Mr. Jasman's claims were precluded as a matter of law. They are also without merit as
2 a matter of law. For both these reasons, the Court should grant summary judgment in favor of
3 the County.

4 DATED this 19th day of February, 2014.

5 MARK LINDQUIST
6 Prosecuting Attorney


7 
8 for DOUGLAS W. VANSKOY WSBA # 30925

9 WSBA 13995
10 Chief Civil Deputy Prosecutor
11 955 Tacoma Avenue South, Suite 301
12 Tacoma, WA 98402-2160
13 Ph: 253-798-6504 / Fax: 253-798-6713

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that a true copy of the foregoing DEFENDANTS' REPLY ON
16 MOTION FOR SUMMARY JUDGMENT was delivered this 19th day of February, 2014,
17 electronically and to the US Postal Service, postage prepaid, with appropriate instruction to
18 forward the same to counsel for Plaintiff as follows:

19 George M. Ahrend
20 AHREND ALBRECHT PLLC
21 16 Basin Street SW
22 Ephrata, WA 98823.
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24 
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MAR 21 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. III

D. ANGUS LEE, Grant County Prosecuting
Attorney, by and through the Office of the
Grant County Prosecuting Attorney

Respondent/Cross-Appellant,

vs.

JERRY JASMAN, a single person,

Appellant/Cross-Respondent,

and

CRAIG MORRISON,

Appellant/Cross-Respondent.

NO. 31519-3-III

RESPONSE TO
MOTION TO VACATE
AND DISMISS

I. IDENTITY OF THE RESPONDING PARTY

The respondent, D. Angus Lee, by and through his attorney, Pamela B. Loginsky, Grant County Special Deputy Prosecuting Attorney, ask this Court for the relief designated in Part II of this motion.

II. RELIEF REQUESTED

Prosecutor Lee respectfully requests that this Court promptly deny Jerry Jasman and Intervenor Coroner Morrison's motions to dismiss and requests for attorney fees and costs.

Prosecutor Lee respectfully requests an award of attorney fees for responding to this frivolous motion which has apparently been filed in the hopes of delaying this Court's ruling until after the filing deadline for coroner candidates.¹

III. ISSUE PRESENTED

1. Whether Exhibits 1 through 4 of the motion to dismiss must be disregarded by this Court?
2. Whether an allegedly inconsistent position, made by someone not in privity with Prosecutor Lee, subsequent to Prosecutor Lee's filing and prosecuting the instant quo warranto action, provides a legal or factual basis for the equitable doctrine of judicial estoppel?
3. Whether Prosecutor Lee should receive an award of attorney fees for responding to this frivolous motion to dismiss?

IV. FACTS RELEVANT TO THIS RESPONSE

On January 27, 2012, Prosecutor Lee initiated a quo warranto action against Jerry Jasman. *See* CP 1-39. Prosecutor Lee filed the action in the Grant County Superior Court, which had jurisdiction pursuant to RCW 7.56.010 and .020 and Wash. Const. art. 4, § 6. *See also* RCW 2.08.010. Prosecutor Lee requested the court to declare that Jasman was unlawfully exercising the public office of a Grant

¹As noted by Judge Hotchkiss when he granted Prosecutor Lee's request for an order barring Jasman from signing death certificates, it is up to the voters to decide what, if any response is appropriate for Coroner Morrison's sanctioning of Jasman's unlawful conduct. *See* VRP (Jan. 28, 2013) at 16. The last day upon which an opponent could file for the position of Grant County Coroner is May 16, 2014. *See* 2014 Elections Calendar (available on the Grant County Official web site at https://wei.sos.wa.gov/county/grant/en/CurrentElection/Documents/2014_elections_calendar.pdf (last visited Mar. 17, 2014)).

County deputy coroner and to enter an injunction prohibiting Jasman from completing or signing death certificates issued in Grant County. CP 7.

Jasman filed an answer to Prosecutor Lee's complaint. In the answer, Jasman admitted that the Grant County Superior Court possessed subject matter jurisdiction. CP 108 at ¶ 1.1. Jasman's answer included a counterclaim seeking "declaratory judgment pursuant to RCW 7.24.010 and .050." CP 115 at ¶ 14.1. Jasman also requested the appointment of a specific attorney to represent him in the quo warranto action. CP 115 at ¶ 15.1 C.

Prosecutor Lee resisted Jasman's request for a publicly funded attorney on many grounds, including the fact that the quo warranto action did not fall within the ambit of RCW 4.96.041 because there was no possibility of money damages. *See, e.g.*, CP 225 at fn. 6. Subsequent to Prosecutor Lee filing his memorandum in opposition to the appointment of publicly funded counsel for Jasman, the superior court disqualified Prosecutor Lee from representing himself in the quo warranto action and from advising the County Commissioners regarding Jasman's request for funds for an attorney.

Prosecutor Lee appointed special deputy prosecuting attorneys from the Kitsap County Prosecuting Attorney's Office to represent him in the quo warranto matter and a special deputy prosecuting attorney from the Pierce County Prosecuting Attorney's Office to represent the County Commissioners. *See* CP 237 (letter from Pierce County Chief Civil Deputy Douglas Vanscoy to the Grant County Board of

County Commissioners stating that “On October 30, 2012, Prosecuting Attorney D. Angus Lee appointed the undersigned as a special prosecutor to advise the Board concerning this issue); CP 222 (“Plaintiff Angus Lee, by and through Ione George, Chief Deputy Prosecutor for Kitsap County, and special deputy prosecutor”). While the special deputy prosecuting attorney who advised the County Commissioners noted that Prosecutor Lee’s action “may be more in the nature of one for declaratory and injunctive relief than one sounding strictly in quo warranto,” he noted that Jasman was not entitled to a defense in the case “because he is not being sued for damages.” CP 238.

Prosecutor Lee ultimately prevailed on summary judgment in the quo warranto action, with the entry of an injunction on February 23, 2013. CP 292. Jasman and Intervener Coroner Morrison filed a timely notice of appeal to this Court.² This Court heard oral argument in Jasman’s appeal on February 5, 2014.

On March 10, 2014, Jasman and Intervener Coroner Morrison filed a “Motion to Vacate and Dismiss Based on Judicial Estoppel and Lack of Subject Matter Jurisdiction.” This motion is supported by four uncertified, extra-record documents. The motion identifies no authority by which this Court can consider the four uncertified, extra-record documents.

²The timely notice of appeal invoked this Court’s jurisdiction. *See generally* RAP 6.1. This matters falls within this Court’s subject matter jurisdiction. *See generally* Const. art. 4, § 30(2) and RCW 2.06.030.

The first uncertified, extra-record document is a complaint for declaratory judgment filed by Jasman against Grant County and the Grant County Board of County Commissioners. The document acknowledges that “D. Angus Lee, as Grant County Prosecutor, filed a quo warranto action in Grant County Superior Court against Jerry Jasman.” Ex. 1, at page 2 ¶ 9. The complaint seeks the appointment of an attorney to represent Jasman in the quo warranto action.

The second uncertified, extra-record document is Douglas Vanscoy’s appointment as a special Grant County Deputy Prosecuting Attorney. The appointment is limited to Mr. Vanscoy representing the County Commissioners with respect to Jasman’s request for public funds for counsel in the quo warranto action. Ex. 2.

The third uncertified, extra-record document is Mr. Vanscoy’s motion for summary judgment in Jasman’s action against the County Commissioners. This document was filed nearly three months after Judge Hotchkiss granted Prosecutor Lee’s requested quo warranto order. See Ex. 3. In the motion for summary judgment, the County Commissioners note that Prosecutor Lee’s action was not a “traditional” quo warranto action, classifying it as “a declaratory judgment action seeking injunctive relief.” See Ex. 3 at page 12. Regardless of the characterization, the County Commissioners argued that Jasman was not entitled to counsel pursuant to RCW 4.96.041 because Prosecutor Lee’s action was not one for damages. See Ex. 3 at 14. The Commissioners maintained this same position – that regardless of its name – the action in *Lee v. Jasman* did not include a request for damages. See Ex.

4 at page 5.

The State files this timely response to Jasman and Intervener Coroner Morrison's frivolous motion to dismiss.

V. ARGUMENT

A. Exhibits 1 Through 4 of the Motion to Dismiss Are Not Properly Before This Court.

The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial court proceedings. *State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986). Matters referred to in a brief but not included in the record cannot be considered on appeal. *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977). When a party refers to matters in a brief that are not included in the record, the error should be brought to the appellate court's attention in a responsive pleading. *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n. 2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004 (2012) ("So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.").

Exhibits 1-4 to Jasman's motion to vacate and dismiss are all documents from a separate and distinct civil matter. None of these uncertified documents³ appear in

³The Washington Supreme Court explicitly condemned the "loose practice" of submitting uncertified or unauthenticated photocopies of apparent or purported court records. *See In re Personal Restraint of Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001), *overruled on other grounds by In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). Counsel have been on notice since 2001, that "all parties appearing before the courts of this State are

the trial court record of this case. All of these documents must be disregarded by this Court in ruling upon the merits of this appeal and upon the merits of Jasman's motion to dismiss.

This Court cannot take judicial notice of the documents from *Jasman v. Grant County, et. al.*, Grant County Superior Court Cause No. 12-2-01681-6. See generally *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 97-99, 117 P.3d 1117 (2005) (refusing to consider documents from a related proceedings where the party that asked the appellate court to consider the documents did not address RAP 9.11); *In re the Adoption of B.T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties); *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 762 P.2d 1141 (1988) (RAP 9.11 motion to admit insurance policy endorsement into appellate record denied because it was inequitable to excuse the insurance company's failure to offer the evidence earlier).

While a party may supplement the record on appeal with additional evidence pursuant to RAP 9.11(a), the remedy is extremely limited. Jasman and Intervener Coroner Morrison have made no attempt to satisfy even one, much less all six of the RAP 9.11(a) criteria. See, e.g., *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990) (all six criteria must be satisfied before an appellate court will accept any

required to follow the statutes and rules relating to authentication of documents." *Connick*, 144 Wn.2d at 458.

additional evidence). Jasman and Morrison's silence regarding RAP 9.11 is reasonable, since the rule was intended to be rarely applied. *See generally* 3 L. Orland and K. Tegland, Wash. Prac., *Rules Practice*, Committee Comment to RAP 9.11 at 210 (4th ed. 1991) (RAP 9.11 corresponds to California Appellate Rule 23 but was intended to be stricter than California's rule). Any attempt Jasman and Morrison may undertake to satisfy the requirements of RAP 9.11 in their reply to Prosecutor Lee's response, must be rejected as untimely. *See Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 151, 231 P.3d 840, *review denied*, 170 Wn.2d 1011 (2010) (rejecting a RAP 9.11 motion that accompanied a reply brief as untimely).

B. Jasman's Assertion of Judicial Estoppel is Neither Factually Nor Legally Supported.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). The doctrine of judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability. *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008) (citing *Ryan Operations GP v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996) ("[Judicial estoppel] is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims [and] is not a sword to be wielded by adversaries unless such tactics are necessary to 'secure substantial equity.'" (quoting *Gleason v.*

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United States, 458 F.2d 171, 175 (3d Cir. 1972))). There are two primary purposes behind the doctrine: (1) preservation of respect for judicial proceedings; and (2) avoidance of inconsistency, duplicity, and waste of time. *Arkinson*, 160 Wn.2d at 538.

Though not exhaustive, three central questions guide a trial court's determination of whether to apply judicial estoppel:

(1) whether the party's later position is “clearly inconsistent with its earlier position,” (2) whether acceptance of the later inconsistent position “would create the perception that either the first or the second court was misled,” and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Arkinson, 160 Wn.2d at 538-39 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001))

Here, Prosecutor Lee has taken a single position throughout his dealings with Jasman. Specifically, Prosecutor Lee is pursuing a quo warranto action⁴ against Jasman for the purpose of obtaining an injunction barring Jasman from completing death certificates. Prosecutor Lee has maintained this legal and factual position in the original complaint, in the response to Jasman's request for counsel, in his summary judgment pleadings, and in his brief of respondent.

Jasman and Intervener Coroner Morrison's motion asks this Court to ignore Prosecutor Lee's consistent position in favor of the Grant County Board of County

⁴Prosecutor Lee concedes that this matter is not a “traditional” quo warranto action. The Washington Supreme Court's decision in *Osborn v. Grant County*, 130 Wn.2d 615, 926 P.2d 911 (1996), however, leaves no other avenue for addressing an employee's illegal exercise of authority. A-58

Commissioner's *subsequent* position in a matter to which Prosecutor Lee is not a party. Jasman's request turns the doctrine of judicial estoppel on its ear. Assuming judicial estoppel could apply to two different actors who are not in privity to each other,⁵ the doctrine would preclude the Grant County Board of County Commissioners from taking a position contrary to Prosecutor Lee's position, as Prosecutor Lee's position was asserted first.

The doctrine of judicial estoppel, moreover, requires the second position to be clearly inconsistent with the prior position. The doctrine does not hamstring a litigant from advancing a particular position when the position is not clearly inconsistent with a prior position. *Ingram v. Thompson*, 141 Wn. App. 287, 293, 169 P.3d 832 (2007). To give rise to an estoppel, the positions must be not merely different, but so inconsistent that one necessarily excludes the other. *DeVeny v. Hadaller*, 139 Wn. App. 605, 622-23, 161 P.3d 1059 (2007).

Here, both Prosecutor Lee and the Grant County Commissioners have taken the consistent position that Prosecutor Lee's action against Jasman did not involve a request for damages. *See, e.g.*, CP 225 at fn. 6; Brief of Respondent, at 20; Motion to Dismiss, Ex. 3 at page 14 and Ex. 4 at page 5. This consistent factual and legal position by both Prosecutor Lee and the Grant County Commissioners supports their argument that Jasman is not entitled to a publicly funded defense pursuant to RCW 4.96.041 in *Lee v. Jasman*.

⁵Judicial estoppel does not prevent the bankruptcy trustee from bringing a victim's claim after the victim fails to disclose the claim as an asset in bankruptcy. *See, e.g., Miller v. Campbell, supra.*

C. Prosecutor Lee Should Receive an Award of Attorney Fees for Responding to this Frivolous Motion

Prosecutor Lee seeks, on two grounds, an attorney fee award as terms for a frivolous motion. The first basis, CR 11, which the appellate courts have repeatedly applied to appeals,⁶ provides in part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

A party or an attorney or both may be assessed litigation expenses, including reasonable attorney fees, for a CR 11 violation. *See Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986). Here, Jasman has requested that this Court apply the doctrine of judicial estoppel to vacate Prosecutor Lee's initial legal and factual allegations in favor of a non-party's subsequent characterization of Prosecutor Lee's position. No case law supports this topsy-turvy application of the doctrine of judicial estoppel.

⁶*See, e.g., Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 580-81, 754 P.2d 1243, review denied, 111 Wn.2d 1025 (1988).

Prosecutor Lee's second asserted basis for an attorney fee award is RAP 18.9(a). RAP18.9(a), authorizes this Court to impose sanctions against a party who brings an appeal for the purpose of delay or who files a frivolous appeal. An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there was no reasonable possibility of reversal. *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). Here, Jasman and Intervener Coroner Morrison have filed their motion to vacate solely to delay this Court's resolution of their appeal.

Finally, Jasman justifies his untimely motion to dismiss by claiming the motion falls within RAP 2.5(a)(1)'s "lack of subject matter jurisdiction." *See* Motion to Vacate and Dismiss at 6. Jasman and Intervener Coroner Morrison's motion, however, contains no explanation or argument in support of their contention that this Court lacks the power to render a decision in the instant matter. *See, e.g., In re Marriage of Buecking*, 179 Wn.2d 438, 447-48, 316 P.3d 999 (2013) (subject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case). This Court clearly has the power to hear and determine this case, just as the superior court had the power to hear and determine this case. *See generally* Wash. Const. art. 4, §§ 6 and 30(2); RCW 7.56.010 and .020; RCW 2.08.010; RCW 2.06.030.

VI. CONCLUSION

Prosecutor Lee respectfully requests that this Court deny Jasman and Intervener Coroner Morrison's frivolous motion to vacate and dismiss. Prosecutor

Lee respectfully requests that this Court award actual attorney fees for responding to this frivolous motion.

DATED March 18, 2014.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky". The signature is written in a cursive style with a long horizontal flourish extending to the right.

PAMELA B. LOGINSKY
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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

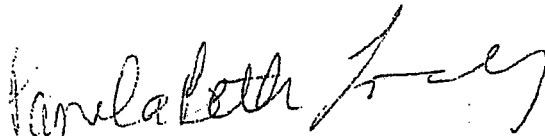
On March 18, 2014, I deposited in the mails of the United States of America, postage prepaid, an envelop containing a copy of the document that bears this proof of service addressed to:

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Signed under the penalty of perjury under the laws of the state of Washington
this 18th day of March, 2014, at Olympia, Washington.



Pamela B. Loginsky, WSBA 18096

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

D. ANGUS LEE, Grant County)
Prosecuting Attorney, by and) NO. 315193
through the Office of the Grant)
County Prosecuting Attorney,) Grant County Cause
) No. 12-2-00877-5
)
Respondent/Cross-Appellant,) COMBINED REPLY IN SUPPORT OF
) MOTION TO VACATE AND DISMISS
v.) AND RESPONSE TO MOTION FOR
) SANCTIONS
JERRY JASMAN, a single person,)
)
Appellant/Cross-Respondent,)
)
And)
)
CRAIG MORRISON,)
)
Appellant/Cross-Respondent.)
_____)

I. IDENTITY OF MOVING/RESPONDING PARTIES

Appellants Craig Morrison and Jerry Jasman submit this reply in support of their motion to vacate and dismiss based on judicial estoppel and lack of subject matter jurisdiction. They further respond to the motion for sanctions included in the response to their motion submitted on behalf of Respondent D. Angus Lee.

II. RELIEF REQUESTED

Mssrs. Morrison and Jasman ask the Court to grant their motion in its entirety, and to deny Prosecutor Lee's motion for sanctions.

III. REPLY/RESPONSE FACTS

A. Reply regarding facts relevant to motion to vacate and dismiss.

There appears to be no dispute regarding the following facts pertaining to the motion filed by Mssrs. Morrison and Jasman:

1. The Court's subject matter jurisdiction of this action is premised upon the quo warranto statute. *See* Resp. to Mot. to Vacate & Dismiss, at 2 (citing quo warranto statute, RCW 7.56.010 & .020, and Wash. Const. Art. 4, § 6, which confers "power to issue writs of ... quo warranto" upon superior courts).

2. Prosecutor Lee, who is the former lawyer and current plaintiff in this quo warranto action, appointed a special deputy prosecuting attorney to defend a separate suit filed by Mr. Jasman against Grant County and the Grant County Commissioners in their official capacities, seeking defense and indemnity of this action. *See* Resp. to Mot. to Vacate & Dismiss, at 3-4 (noting appointment of Mr. Vanscoy, citing CP 237-38).¹

¹ In his response brief, Prosecutor Lee takes potshots regarding the merits of his separate lawsuit, presumably in the hope that this Court will prejudge the merits of the other

3. In the separate lawsuit, Prosecutor Lee's special deputy prosecutor has repeatedly argued that this action is not, in fact, a quo warranto action. *See* Mot. to Vacate & Dismiss, at 4-5 (quoting argument).²

B. Response to factual allegations made in support of sanctions motion.

Prosecutor Lee states that Mssrs. Morrison and Jasman filed their motion "in the hopes of delaying this Court's ruling until after the filing deadline for coroner candidates," Resp. to Mot. to Vacate & Dismiss, at 2,

lawsuit in the course of ruling on the pending motion. Specifically, Prosecutor Lee argues that Mr. Jasman is not entitled to defense or indemnity under RCW 4.96.041—which requires defense and indemnity "[w]henver an action or proceeding for damages is brought against any ... employee ... of a local government entity"—because he has not requested damages. *See, e.g.,* Resp. to Mot. to Vacate & Dismiss, at 3 & 5-6. Prosecutor Lee's argument is incorrect because the nature of a quo warranto action includes the prospect of damages, *see* RCW 7.56.040, which may be requested at any time within one year after judgment, *see* RCW 7.56.090. The fact that Prosecutor Lee did not happen to request damages in this case at the outset does not change the nature of the action.

Prosecutor Lee does not address the alternate basis for Mr. Jasman's entitlement to defense and indemnity in this action; namely, the arbitrary and capricious nature of the decision by the Grant County Commissioners to reverse their original decision to defend Mr. Jasman in light of their simultaneous authorization of funds to defend Prosecutor Lee in connection with disciplinary charges filed by the Washington State Bar Association. *See* Mot. to Vacate & Dismiss, at 3-4.

While the separate suit for defense and indemnity is independent of the request for appointment of a special prosecutor to defend this action pursuant to RCW 36.27.030 and the request for attorney fees and costs incurred in dissolving the permanent injunction entered by the superior court, *see All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 739, 998 P.2d 367 (2000), a favorable decision for Mssrs. Morrison and Jasman on either of these issues has the potential to render the separate suit moot in whole or in part. For this reason, the superior court has stayed proceedings in the separate suit pending a decision in this case.

² Although Prosecutor Lee appears to question whether documents filed by Mr. Vanscoy in the separate lawsuit are properly authenticated or considered in this matter, he does not contest the substance of those documents. To address objections regarding authenticity, certified copies of the documents are submitted with this reply. *See* ER 902(d). The question of whether these documents are properly considered is addressed below.

“solely to delay this Court’s resolution of their appeal,” *id.* at 12. These calumnies are unsupported by anything in the record. The motion based on judicial estoppel was raised in a timely fashion after the basis for the motion surfaced in the separate lawsuit filed by Mr. Jasman.

IV. REPLY/RESPONSE ARGUMENT

A. Reply argument.

Prosecutor Lee does not address the substance of his special deputy prosecutor’s argument that this is not, in fact, a quo warranto action. *See* Mot. to Vacate & Dismiss, at 4-5 (quoting argument). Prosecutor Lee does not dispute that the issue of subject matter jurisdiction can be raised at any time under RAP 2.5(a)(1). To the extent that the argument made by the special deputy prosecutor is correct, the Court lacks subject matter jurisdiction.

Apart from whether the argument is correct, however, the argument should judicially estop Prosecutor Lee from invoking this Court’s jurisdiction under the quo warranto statute here.³ In response to

³ Prosecutor Lee points out that Mssrs. Morrison and Jasman admitted the allegations of his complaint regarding subject matter jurisdiction. *See* Resp. to Mot. to Vacate & Dismiss, at 3. The implicit but unstated argument, that Mssrs. Morrison and Jasman should be judicially estopped from contesting subject matter jurisdiction, is incorrect because judicial estoppel can never enlarge upon the court’s subject matter jurisdiction; it can only defeat subject matter jurisdiction. *See, e.g., Liquilux Gas Corp. v. Martin Gas Sales, Inc.*, 771 F. Supp. 502, 506 n.5 (D. Puerto Rico 1991) (indicating application of judicial estoppel would defeat subject matter jurisdiction, but finding it unnecessary to reach the issue); *Techno-TM, LLC v. Fireaway, Inc.*, 928 F. Supp. 2d 694, 698-99 (S.D. N.Y. 2013) (applying judicial estoppel to defeat subject matter jurisdiction).

the claim of judicial estoppel, Prosecutor Lee argues that the material that forms the basis for the claim is not properly considered by the Court, and that the elements of judicial estoppel are not satisfied. He is wrong on both counts.

1. The materials that form the basis for the claim of judicial estoppel are properly considered by the Court.

The Court may consider the fact that Prosecutor Lee appointed the special deputy prosecutor along with the arguments made by the special deputy prosecutor in the separate suit filed by Mr. Jasman. The fact of the appointment is attested in the record in this case, as pointed out by Prosecutor Lee in his response brief. *See* Resp. to Mot. to Vacate & Dismiss, at 3-4 (citing CP 237-38). The pleadings filed in the separate lawsuit may be considered for the first time on appeal because they relate to a motion to dismiss for lack of subject matter jurisdiction. *See Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009) (holding documents from separate lawsuit bearing on subject matter jurisdiction properly considered under RAP 1.2(c) and 9.11(a)), *rev. denied*, 167 Wn. 2d 1017 (2010); *see also Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 951 P.2d 817 (applying judicial estoppel based on statements in oral argument and opening brief in separate appeal), *rev. denied*, 136 Wn. 2d 1015 (1998).

Prosecutor Lee argues that the Court may not take judicial notice of the pleadings filed by his special deputy prosecutor in the separate suit filed by Mr. Jasman. *See* Resp. to Mot. to Vacate & Dismiss, at 7 (citing *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn. 2d 89, 97-99, 117 P.3d 1117 (2005); *In re Adoption of B.T.*, 150 Wn. 2d 409, 414-16, 78 P.3d 634 (2003)). It is not necessary for the court to take judicial notice, *see Spokane Airports* and *Mastro, supra*, but the cases on which Prosecutor Lee relies are distinguishable in any event because they involve requests to take judicial notice of the truth or falsity of disputed facts. *See Spokane Research*, 155 Wn.2d at 97-99 (declining to take judicial notice of superior court judgment, findings, conclusions and memorandum opinion); *B.T.*, 150 Wn. 2d at 414-15 (declining to take judicial notice of superior court findings and conclusions). “Care should be taken ... to distinguish between consulting the record of another case to determine whether it *contains* something, and consulting the record of another case to determine whether disputed facts were or were not found to be true.” 5 Wash. Prac., Evidence Law & Practice § 201.9 (5th ed.) (ellipses added; italics in original). It would be appropriate to take judicial notice in this case because Mssrs. Morrison and Jasman are simply relying on what Prosecutor Lee’s special deputy prosecutor said, not what the superior court found to be true in the separate suit.

Furthermore, the Court should take judicial notice as necessary for Mssrs. Morrison and Jasman to present their judicial estoppel argument based on events occurring after the appeal in this case was filed. In analogous cases involving the defense of res judicata, the courts have taken judicial notice of court records from other cases where necessary to establish the defense. *See, e.g., In re Coday*, 156 Wn. 2d 485, 501 n.3, 130 P.3d 809, *cert. denied*, 549 U.S. 976 (2006); *Reagh v. Hamilton*, 194 Wash. 449, 455, 78 P.2d 555 (1938); *Wilkes v. Davies*, 8 Wash. 112, 122, 35 Pac. 611 (1894). To the extent it is necessary to take judicial notice, the same approach should be followed here.

Prosecutor Lee next argues that Mssrs. Morrison and Jasman must satisfy the requirements of RAP 9.11(a), which lists the criteria for consideration of “additional evidence on the merits of the case[.]” However, the issue of subject matter jurisdiction is separate from the merits of the case. *See Angelo Property Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012) (noting “[l]ack of subject matter jurisdiction renders a trial court powerless to decide the merits of the case”); *Buecking v. Buecking*, 179 Wn.2d 438, 455 n.5, 316 P.3d 999 (2013) (distinguishing subject matter jurisdiction from power to render judgment on the merits); *see also Spokane Airports*, 149 Wn. App. at 936-37 (indicating the court may waive the requirements of RAP 9.11 to consider evidence bearing on

subject matter jurisdiction). If RAP 9.11(a) were strictly interpreted as applying to an issue of subject matter jurisdiction, the rule would undermine the provision of RAP 2.5(a)(1) allowing this issue to be raised for the first time on appeal.

2. The elements of judicial estoppel are satisfied in this case.

In responding to the substance of the claim of judicial estoppel by Mssrs. Morrison and Jasman, Prosecutor Lee does not appear to contest that Grant County is the real party in interest, both in this case and in the separate lawsuit filed by Mr. Jasman against the county and county commissioners in their official capacities.⁴ Prosecutor Lee acknowledges that both cases are defended by special deputy prosecuting attorneys he appointed. *See* Resp. to Mot. to Vacate & Dismiss, at 3-4. For these and/or other reasons, his argument seems to be premised on the assumption that the requirement of privity is either satisfied or not required to apply judicial estoppel in this case. *See* Resp. to Mot. to Vacate & Dismiss, at 10

⁴ Contrast *Miller v. Campbell*, 164 Wn.2d 529, 542-43, 192 P.3d 352 (2008), and *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 541, 160 P.3d 13 (2007), cited by Prosecutor Lee, where the Court declined to apply judicial estoppel based on actions of a debtor in bankruptcy because the bankruptcy trustee rather than the debtor was the real party in interest.

& n.5 (“[a]ssuming judicial estoppel could apply to two different actors who are not in privity to each other ...”).⁵

Prosecutor Lee instead focuses on the timing and the (in)consistency of positions in this case and the separate lawsuit filed by Mr. Jasman. With respect to timing, he argues that judicial estoppel “would preclude the Grant County Board of County Commissioners from taking a position contrary to Prosecutor Lee’s position, as Prosecutor Lee’s position was asserted first.” Resp. to Mot. to Dismiss & Vacate, at 10. This argument is unsupported by any authority that would require such fine parsing of the sequence of events. As Prosecutor Lee recognizes, the purpose of judicial estoppel is to protect the legitimacy and integrity of the court system, and this concern is present regardless of the precise timing of the conduct requiring application of the doctrine. *See Mastro*, 90 Wn. App. at 163-64 & nn.1-2 (seeming to rely on later statements during oral argument to judicially estop party from making inconsistent argument in earlier-decided appeal).

Just as importantly, Prosecutor Lee’s argument is inapplicable because this action and the separate lawsuit filed by Mr. Jasman are both

⁵ Prosecutor Lee does not address authority cited by Msrs. Morrison and Jasman that judicial estoppel “may be applied even if the two actions involve different parties.” *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 907-08, 28 P.3d 832 (2001) (cited in Mot. to Vacate & Dismiss, at 7, for the proposition that “[t]he court does not require strict privity in applying judicial estoppel”).

ongoing. While it is true that Prosecutor Lee invoked subject matter jurisdiction under the quo warranto statute in this case first, before his special deputy prosecutor argued that it is not, in fact, a quo warranto action in the separate lawsuit filed by Mr. Jasman, the county has benefitted in both actions by being able to simultaneously maintain these inconsistent positions. *See* Mot. to Vacate & Dismiss, at 7-8.

With respect to inconsistency of positions, Prosecutor Lee essentially ignores the conflict between his invocation of subject matter jurisdiction under the quo warranto statute and his special deputy prosecutor's argument that this is not, in fact, a quo warranto action, which is the crux of the motion filed by Mssrs. Morrison and Jasman. It is difficult to imagine a more direct conflict. For his part, Prosecutor Lee offers a red-herring argument that "both [he] and the Grant County Commissioners have taken the consistent position that Prosecutor Lee's action against Jasman did not involve a request for damages," an issue that is completely beside the point. *See* Resp. to Mot. to Vacate & Dismiss, at 10 (brackets added).

The Court should judicially estop Prosecutor Lee from invoking subject matter jurisdiction under the quo warranto statute in this case, vacate the injunction entered by the superior court, and award attorney

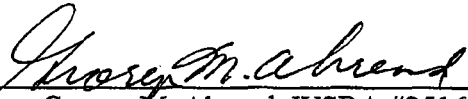
fees and costs as requested in the motion filed by Mssrs. Morrison and Jasman.

B. Response to argument regarding sanctions.

Prosecutor Lee seeks sanctions under CR 11 and RAP 18.9(a). He does not identify a single factual claim in the motion filed on behalf of Mssrs. Morrison and Jasman that is false or even subject to dispute. He appears to be arguing that the motion is not well grounded in law, based on what he describes as a “topsy turvy application of the doctrine of judicial estoppel.” *See* Resp. to Mot. to Vacate & Dismiss, at 11. However, he identifies no authority, let alone controlling authority, indicating that the motion is meritless, let alone frivolous. Application of the doctrine of judicial estoppel on appeal is supported by *Mastro, supra*, which was cited in the original motion but has not been addressed by Prosecutor Lee. The elements of judicial estoppel discussed and applied in the original motion and this reply are delineated in *Johnson, supra*, which was also cited in the original motion but has not been addressed by Prosecutor Lee. The Court should deny Prosecutor Lee’s request for sanctions at the same time that it grants the motion filed on behalf of Mssrs. Morrison and Jasman.

DATED this 26th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On March 26, 2014, I served the document to which this is annexed as follows:

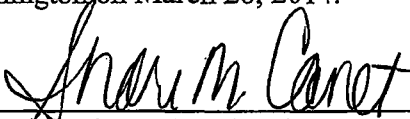
By email and First Class Mail, postage prepaid, as follows:

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Signed at Ephrata, Washington, on March 26, 2014.



Shari M. Canet, Paralegal