NO. 46347-4-II

IN THE COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by and through Fearghal McCarthy, his father; and CORMAC MCCARTHY, a minor, by and through Fearghal McCarthy, his father,

Appellants,

vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL & HEALTH SERVICES, CHILDREN'S PROTECTIVE SERVICES,

Respondents.

BRIEF OF RESPONDENT CITY OF VANCOUVER

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I. INTRODUCTION

The present case arises out of an extended marital rift between Plaintiff/Appellant Fearghal McCarthy and his now ex-wife, Patricia.[1] Though family matters normally remain internal, the McCarthys dragged Defendant/Respondent City of Vancouver into their conflict. The claims asserted against the City hinge primarily on what, if anything, former prosecutor Jill Petty did between June 3, 2005—the date Patricia called 911 (on her own) to report (on her own) that Fearghal had abused their son the previous day—and January 31, 2006—the date Petty ceased her employment with the City. As demonstrated below, Petty's actions about which the McCarthys complain are properly categorized as either (1) filing charges against Fearghal, (2) not filing charges against Patricia, and (3) advising Patricia to report past criminal activity to the police. Each of these actions is either protected by absolute prosecutorial immunity or is nonactionable as a matter of law. As to the one and only other City action about which the McCarthys complain (which has not been waived), the record inconvertibly establishes that the trial court was within its discretion to deny reconsideration over its dismissal of the McCarthys' claim that the City was liable for Officer Tyson Taylor's failure to arrest Patricia for allegedly violating a no-contact order on November 29, 2007.

[1] For ease of reference and to avoid confusion by the repetitive use of the name "McCarthy," the appellants' first names will be used to distinguish them. No disrespect is intended.

Interspersed with their flawed effort to circumvent precedent and facts, the McCarthys ultimately ask the judiciary to treat deposition testimony—and in particular that testimony of a battered woman who revises her testimony after being threatened by her former spouse—as a take home examination that can be amended, altered, revised, and rewritten anytime a witness sees fit to do so. The civil rules do not allow such disregard for completing deposition testimony and neither did the trial court. This court should do the same.

The trial court's decisions below should be affirmed. Additionally, because the McCarthys' appeal has "so little merit that the chance of reversal is slim," the court should impose an award of reasonable attorneys' fees against Fearghal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999); *see also* RAP 18.9(a).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The City rejects the McCarthys' statements of the issues and presents the following in lieu thereof:

(1) Whether the McCarthys waived appellate review of any cause of action against the City other than (a) negligent investigation under chapter 26.44 RCW as it relates to Petty's actions, or (b) negligence as it relates to Officer Taylor's actions, because the McCarthys either abandoned those arguments below or have failed to properly argue such theories in their opening briefs.

(2) Whether a municipality employing a prosecutor is entitled to absolute immunity for claims arising out of charging decisions and communications with the complaining witness after charges were filed.

(3) Whether, even in the absence of prosecutorial immunity, the McCarthys' claims fail in light of RCW 4.24.595 and RCW 26.44.280, or independent of that immunity, because the City's prosecutor never investigated an alleged new crime, but rather encouraged the complaining witness to report past criminal activity to the police, and that reporting did not result in any independent displacement of McCarthy's children;

(4) Whether the trial court was within its discretion to deny reconsideration of the McCarthys' claims against the City as it relates to the actions of Officer Taylor's failure to arrest Patricia on November 29, 2007, when a superior court judge later that day authorized her actions.

(5) Whether the trial court was within its discretion to suppress the 17-page rewrite of Patricia McCarthy's deposition because the changes were signed more than 30 days after the reporter submitted the transcript to Patricia for review;

(6) Whether the trial court was within its discretion in imposing costs in favor of the City and against Fearghal.

(7) Whether this appeal is frivolous and warrants awarding the City its reasonable attorneys' fees incurred.

III. STATEMENT OF THE CASE

Before delving into the lengthy history of this litigation, it is important to stress the manner in which the record was developed below.

As discussed in Section IV.A, *infra*, many claims were not sufficiently argued at summary judgment and therefore were properly considered as abandoned, meaning this court need not consider them here. *Cf. West v. Gregoire*, 184 Wn. App. 164, ¶ 16 & n.4, 336 P.3d 110 (2014) ("as a general rule, we will not address abandoned issues on appeal"), *review denied*, 182 Wn.2d 1018 (2015). Additionally, insofar as the factual background of this case is concerned, it is imperative to remember that "the appellate court sits in the same position as the trial court" when reviewing an order on a motion for summary judgment. *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 394, ¶ 27, 254 P.3d 208 (2011). RAP 9.12 facilitates this protocol by requiring those documents called to the trial court's attention to be specifically delineated in the summary judgment order. *See Mithoug v. Apollo Radio*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (per curiam). To this end, the Supreme Court has held that the appellate court errs when it considers evidence not called to the trial court's attention before the summary judgment order was entered. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986) ("Court of Appeals erred in relying on [a] deposition" that was filed a month after trial court's summary judgment order).

The City was the first defendant to be granted summary judgment; in fact, it was granted that relief almost four years before the trial court (rightfully) dismissed Clark County and the State. *See* CP 1093-95, 2072-74. Thus, to properly consider the McCarthys' appeal against the *City*, only those Clerk's Papers and Exhibits filed prior to July 30, 2010, can be

considered. *Tunk*, 105 Wn.2d at 390. Thus, pages 1101-2074 of the Clerk's Papers are irrelevant to the appeal against the City and should not be relied on in any way for setting the factual backdrop of below.[2]

A. Factual background

Because most of the McCarthys' allegations focus on Fearghal's prosecution, some background of how domestic violence cases are handled in Clark County is necessary.

1. History of Domestic Violence Prosecution Center

Domestic violence cases are prosecuted in Clark County through the Domestic Violence Prosecution Center (DVPC), a collaborative organization created by an interlocal agreement executed in 2000 by the City of Vancouver and Clark County. CP 93. Both the City and County provide attorneys and staff to work in the DVPC. CP 96-97. Though working together, both the City and County "maintain[ed] their respective employer/employee relationship with individuals assigned to the Unit," meaning that City employees remained City employees and County employees remained County employees. CP 97.[3] Importantly, "the Clark County Prosecuting Attorney's Office ... retain[ed] ultimate responsibility for the management of all felony and potential felony matters." *Id.* This is consistent with state law. *See* RCW 36.27.020(6).

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[2] By way of example, the McCarthy children's brief attempts to inject facts from two declarations of Fearghal that were filed November 20, 2012, *see* CP 1789-97, and October 30, 2012, *see* CP 1327, 1428-29, to criticize Jill Petty, the assigned City Prosecutor. *See* Br. of C. & C. McCarthy at 14. Neither declaration was before the trial court when it granted summary judgment to the City, so they should not be cited here.

[3] Amendments made in 2004 did not affect the cited provisions. *See* CP 102-110.

2. Long before any City employee ever heard of the McCarthys, Patricia calls 911, reports domestic violence, causes Fearghal's arrest, and a no-contact order is issued.

On June 3, 2005, Patricia McCarthy called 911. Def.'s Ex. 1; *see also* CP 133-38.[4] In that call, she told the dispatcher that her "husband ha[d] been violent with us for the past year or so," and that the previous night, he [Fearghal] hit their (then) two-year old son "across the head" twice, causing the boy to fall off the chair and hit his head. CP 134. The 911 audio recording reveals Patricia to be crying hysterically while recounting the events from the preceding evening. Def.'s Ex. 1. No one, and particularly no one employed by the City of Vancouver, was with Patricia when she called 911. CP 138-39. Soon thereafter, Clark County Deputy Edward Kingrey responded and spoke to Patricia, at which point she "described to him the incident that had happened." CP 139. Deputy Kingrey spoke to both Patricia and Patricia's mother, who also advised that the couple's elder son, Conor, had told her that Fearghal had physically abused Patricia as well. CP 241. Deputy Kingrey then traveled to the McCarthy residence and spoke to Fearghal, who denied the abuse happened. CP 241. Fearghal claimed that Patricia's medication was

[4] The actual 911 audio is contained on a disc that is Exhibit 1, which was requested by the City to be transmitted to the appellate court pursuant to RAP 9.6. As reflected in the record, the Clark County Superior Court Clerk's Office refused to accept non-paper filings. *See* CP 112, 191, 2251. As such, the City offered both Exhibit 1 (the 911 call) and Exhibit 2 (a DVD of Fearghal's sentencing hearing at which Patricia testified) into evidence in open court on April 16, 2010, which the trial court admitted without objection. CP 2109-10. The McCarthys have not raised any argument in their opening briefs against the admission of these exhibits. Moreover, the McCarthys actually stipulated to their admissibility below. CP 2252-53, 2258. Pages 133-38 of the Clerk's Papers are a transcription of that 911 call.

making her "delusional." CP 241-42. Nevertheless, Kingrey arrested Fearghal for fourth degree assault-domestic violence and transported him to jail. CP 230-31, 242.

Shortly thereafter, Kingrey returned to the residence where Patricia was waiting with her father. *Id.* Kingrey then secured a *Smith* Affidavit[5] from Patricia in which she affirmed (in her own handwriting) that Fearghal had "wacked [sic] [Cormac] across the head" twice, forcing Cormac to fall. CP 192-195. Patricia testified that her statements in the *Smith* affidavit were accurate, and that she authored the statement without any pressure. CP 143.[6] Kingrey advised Patricia that a no-contact order would likely be issued, but Patricia "said she would take the children and stay with her parents for the time being." CP 242.

Evidence submitted by the McCarthys in opposition to summary judgment reveal that the next day (June 4), Cormac's grandmother took him to the doctor, who confirmed after examination that there was a "slight bruise on [the] side of [Cormac's] forehead," and that it was necessary to "call the Abuse Hotline." CP 433.

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[5] A *Smith* affidavit is a sworn statement by a domestic violence victim obtained by police officers to be used as substantive evidence to prove the accused's guilt if the victim later recants. *See State v. Smith*, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982). As the Court there recognized, "In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness." *Id.* at 861.

[6] As discussed *infra*, Patricia's "correction" sheet was properly suppressed by the trial court. But even if a court were to consider it, Patricia never corrected the testimony on page 62 of her deposition that she was not pressured at all to draft the *Smith* affidavit in any particular fashion. *Compare* CP 143 (deposition page 62) *with* CP 744 (omitting page 62 from any sort of "correction").

Two days later, on June 5, 2005, Clark County District Court Judge Vernon Schreiber reviewed Deputy Kingrey's report and found that probable cause existed to continue holding Fearghal in jail. CP 234-35. Fearghal was arraigned the following day (June 6), at which point Judge Schreiber entered a no-contact order that barred Fearghal from having any contact with Cormac. CP 245-46. That order remained in effect until March 20, 2006. CP 246.

Each and every one of the foregoing events occurred prior to any City employee having any contact of any kind with the McCarthys.

3. Petty, acting as a prosecutor, formally charges Fearghal, after which Patricia hires independent counsel and files for divorce.

Roughly one month after issuance of the no-contact order, Assistant City Attorney Jill Petty, who at the time was assigned to the DVPC, filed an amended information[7] that formally charged Fearghal with fourth degree assault/domestic violence for the June 2 incident. CP 248. As Petty would explain, cases were assigned not by any sort of selection process, but rather by the defendant's last name. CP 1000-01.

On August 9, 2005, just over one month after Petty charged Fearghal, Patricia filed for divorce and contemporaneously filed a declaration in support of her petition. CP 161-67, 196-212. In that declaration, CP 207-212, drafted by Patricia's family law attorney Marcine Miles and signed August 8, 2005, Patricia gave a detailed account

[7] The July 8 information was "amended" because the initial charging document was the citation drafted by Deputy Kingrey. *See* CP 230-31, 360.

that reaffirmed everything she wrote in her June 3 *Smith* affidavit. *Compare* CP 210-12 *with* CP 192-95. At her deposition four years later, Patricia reaffirmed under oath that she "agree[d]" with the allegations in her declaration as it related to the events from June 2, 2005. CP 166. Additionally, Patricia testified, "Nobody from the City pressured me to sign the [August 8] declaration," CP 167, and nobody from the City "advised [her] to sign the [August 8] declaration," CP 168. In other words, Patricia's August 8, 2005 declaration was—just like her *Smith* affidavit authored the day of the arrest—entirely voluntary. To be sure, Miles testified by declaration to the following, which is uncontradicted:

> Throughout my representation of Ms. McCarthy, I fully abided by my client's decisions concerning the objectives of representation as required by and in compliance with Washington Rule of Professional Conduct 1.2. Every decision or action taken in the dissolution action during my representation was made either independently by me within my implied authority under RPC 1.2(a), in consultation and agreement with Ms. McCarthy, or by Ms. McCarthy herself.

CP 497-98.

Between June 2 (date of the assault) and August 8 (the date she signed the declaration), Patricia had only "two to three" phone calls with Petty and one face-to-face meeting. CP 161-63. She testified:

> Q. ... During any of these phone conversations with Jill Petty, did she pressure you into doing anything that you didn't want to do?
>
> A. No.

CP 163-64. During the one face-to-face meeting in July 2005, Petty told Patricia that "dropping the no contact order was not a good idea, but [Petty] felt that I could handle myself, and it was my decision," emphasizing that Petty "didn't pressure me." CP 164. Billing records from Ms. Miles—Patricia's dissolution attorney—confirms that Miles never spoke to Petty at all during 2005, CP 956-75, and Miles never communicated with Petty in writing or by email. CP 808. And despite Patricia's about-face in a later deposition, she admitted that she was never present when Petty and Miles spoke. CP 1009. In essence, the record is devoid of any admissible evidence of any conversation in which Petty pushed Miles to do anything.

4. Patricia obtains documentation revealing that Fearghal violates a pending no-contact order, leading to Petty filing additional charges.

On August 12, 2005, three days after filing for divorce, Patricia reported to the police that Fearghal had violated the June 6, 2005, no-contact order three times the preceding two months. CP 71, 75. She testified that it was Miles, her divorce attorney, who "was urging" her to report the violations (not Petty). CP 93-94. Patricia traveled to the police department and provided VPD Officer Kortney Langston with not only another *Smith* affidavit detailing the violations (which she wrote in her own handwriting and without any pressure), but also documentation detailing how Fearghal had been present at the local fitness gym contemporaneously with Cormac. CP 77-88. Nothing in the Clerk's Papers suggests that this documentation was forged or that it fails to

accurately prove that Fearghal came into contact with Cormac in violation of the no-contact order. The Clerk's Papers do show that the entire investigation into these new crimes was done by Officer Langston alone, who took Patricia's report, *Smith* affidavit, and evidence, and forwarded the same to the DVPC for review. CP 75.

As a result of Langston's report, Petty filed new charges on November 10, 2005, against Fearghal for three violations of the June 6, 2005, no-contact order. CP 337-38.

5. Patricia reports that Fearghal engaged in witness tampering, resulting in felony charges being filed by the County, the case being transferred away from the City, and a conviction.

Two months passed and Patricia again went to speak to the police. CP 2234, 2238-40. This time, on October 18, 2005, VPD Detective Carole Boswell responded. CP 2234. On that date, Patricia presented Boswell with several pages that Patricia represented were handwritten by Fearghal. CP 2234, 2245-49. According to Patricia the document was "a very detailed list of things for [Patricia] to do in order to have the charges dropped." CP 2239. The handwritten pages specified that she should "delete all emails from me to Trish" and that she should "only call [him] using a calling card." CP 2245. The letter also referenced the other son, Conor, stating "Any statements that he makes that I hit Cormac or Mommy will be damning – or that he has been coached." *Id.* Boswell believed she had probable cause to believe Fearghal committed the crime of witness tampering, a felony. CP 2234-35; *see also* RCW 9A.72.120.

This led to felony charges, which under the DVPC Agreement and state law, could only be brought by the Clark County Prosecutors. CP 97, 360; RCW 36.27.020(6). The original assault charge from the June 2 incident was then consolidated into a new information filed in superior court on January 26, 2006, by County prosecutor Camara Banfield, in which witness tampering was also charged. CP 250-51.[8] At that point, jurisdiction over the prosecution for the June 2 assault fully transferred to the County, CP 97; RCW 36.27.020(6), leading to the dismissal of the district court case under which Fearghal had been prosecuted for the assault, CP 261-62. This resulted in another no-contact order being entered on February 21, 2006, limiting Fearghal's contact with both Patricia and Cormac. CP 256-57.

Petty resigned from the City on January 31, 2006. CP 360, 2223. A day earlier, she had her one and only conversation with Ms. Miles, which Miles described as "brief." CP 808-09. Miles further affirmed by declaration that Petty "adamantly refused to cooperate and assist with any part of the dissolution action." CP 497.[9]

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[8] The original information was amended days later because it erroneously charged Fearghal with assaulting Patricia on June 2, when in fact it was Cormac. *See* CP 250-54.

[9] Although Miles' declaration states the one conversation with Petty occurred "at or around the time the petition for dissolution was filed" in August 2005, CP 497, her billing records reveal the conversation occurred in late January 2006, CP 978. Miles testified that she signed the declaration without reviewing her billing records, but that the billing entries refreshed her memory as to when the one and only conversation occurred. *See* CP 953-54. Regardless, her testimony is unrebutted by any admissible evidence that she had one conversation with Petty, and Petty refused to provide any help.

At this point, Tonya Riddell, an employee of Clark County, took over the prosecution. CP 253-54, 266. Six months later, on August 1, 2006, Fearghal entered into an *Alford*[10] plea to a lesser charge, Disorderly Conduct. CP 266, 268-76. In his written statement on the guilty plea, Fearghal stated, "Although I do not believe that I am guilty of this crime, after reviewing the evidence I do believe that a jury could possible [sic] find that I was, and as a result, would like to take advantage of the plea offer in this case." CP 274. And though the charge was reduced to Disorderly Conduct, Patricia begged the Court at sentencing to have the record reflect that Fearghal "actually struck the child and there's a bruise on his head." Def.'s Ex. 2 at 43m.59s; *see also* CP 316-19.

6. The only other incident about which the McCarthys complain that involves a City employee is when Officer Tyson Taylor took no action against either Fearghal or Patricia.

After Petty filed new charges in November 2005 for Fearghal's three no-contact order violations, no City employee did anything about which the McCarthys complained until November 29, 2007. *See* CP 8-9.[11] Notably by this date, Fearghal's ability to contact Cormac had been

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[10] An *Alford* plea is one in which the defendant "take[s] advantage of a plea agreement without acknowledging guilt." *State v. Zhao*, 157 Wn.2d 188, 191 n.2, 137 P.3d 835 (2006); *see also North Carolina v. Alford*, 400 U.S. 25, 36, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) *adopted in State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

[11] The second amended complaint does reference a January 11, 2006, interview conducted by Fearghal's criminal defense attorney that Petty attended, *see* CP 7, but there is no admissible evidence in the summary judgment record documenting this. The pleading also references a different City prosecutor, Aaron Ritchie, *see* CP 9, who dropped the three charges for Fearghal violating the June 6 no-contact order two months after Fearghal pled no contest to the disorderly conduct charges. *See* CP 343-45.

restored. CP 332, 347. On that day in November, Officer Taylor responded to a 911 call alleging that Patricia was violating a mutual restraining order that prohibited her from contacting Fearghal. CP 60-61, 63-65. Importantly, this restraining order applied only to adults, not children. CP 60-61. Patricia had arrived unexpectedly at a local hospital where Cormac was to undergo surgery. CP 64-65. Patricia attempted to tell Taylor that a judge had authorized her presence, but while Taylor was communicating with dispatch, Patricia left. CP 65. Later that day, Patricia obtained the order from the judge permitting her to be at the hospital. CP 355.[12] Prior that date, Taylor had never had any contact or knowledge of the McCarthys or their lengthy marital discord. CP 61.

The following year, and several months after the McCarthys initiated the underlying lawsuit, Patricia would sign a stipulated parenting plan prepared by Fearghal's divorce attorneys that recanted her allegations of Fearghal's crimes. CP 218-28. The document was also signed two months after her attorney had withdrawn and Patricia was representing herself, CP 357, and Patricia later wrote that she signed the document only "under duress," CP 857.

B. Procedural history

The McCarthys filed their complaint on August 1, 2008. CP 2178. They added Petty as a defendant the following January, CP 1-2, but Petty

[12] The order mentions the "MATTER ... c[a]me before the court" on November 29, 2007, and that the order was filed the same day, but the judge dated the order November 28, the preceding day. CP 355. The record is silent as to this discrepancy, but for purposes here, it is immaterial.

moved for summary judgment in August 2009 because the McCarthys had not properly complied with RCW 4.96.020 as it related to her. *See* CP 2210-21. Avoiding the hearing, the McCarthys agreed to dismiss Petty from the lawsuit so long as they could treat Petty as a party for discovery purposes and that all of her actions would be considered in the course and scope of her employment (which ended January 31, 2006). CP 2226-31.

1. City moves for summary judgment, which the trial court grants except for a limited continuance with regard to Petty's actions and whether they were non-prosecutorial.

The City moved for summary judgment on January 15, 2010. CP 22-58. In so doing, the City primarily argued prosecutorial immunity (which it had alleged as an affirmative defense, CP 2207), but also challenged the sufficiency of the McCarthys' evidence on their claims as to the officers' conduct, CP 47-56.[13] The McCarthys responded by focusing their efforts exclusively on Petty and whether she stepped outside her role as a prosecutor. CP 450-73. For the most part, the McCarthys sought a CR 56(f) continuance to pursue discovery on that argument. CP 455-60. In regards to their claims against the City for the officers' conduct, the McCarthys never once addressed the City's argument that there was no liability for the actions/non-actions of Officer Taylor, CP 450-73, and never asked in their CR 56(f) declaration to conduct any discovery as to related to him, CP 419-22.

[13] The City also sought dismissal based on Washington's anti-SLAPP statute, RCW 4.24.510. *See* CP 42-46. After the City moved on those grounds, the Supreme Court held that government entities cannot invoke RCW 4.24.510. *Segaline v. State*, 169 Wn.2d 467, 472-75, 238 P.3d 1107 (2010). The City does not renew that argument here.

The trial court heard oral argument on April 16, 2010, and orally concluded "with regard to the police officers ... there's nothing there to base liability on." I VRP 27. However, the trial court allowed the McCarthys to conduct discovery related to the prosecutorial immunity issue. I VRP 27-29. Subsequent thereto, the McCarthys attempted to introduce additional documentation, CP 627-48, but when the trial court memorialized its ruling in a written order, it struck that additional filing, ruling that it was "not considered for purposes of RAP 9.12," CP 2115. As to the CR 56(f) request, the trial court allowed the Plaintiff to "complete the depositions of Jill Petty and Marcine Miles for the purpose of discovering whether Ms. Petty engaged in any conduct that would not be protected by prosecutorial immunity and would create a genuine issue of material fact with regard to Plaintiffs' claims." CP 2114-15. The court ordered the parties to report on the status of the matter on June 4, 2010, CP 2115, which they did, CP 2261-63. At that point, the trial court established a briefing schedule for the parties to address "only those materials related to the actions of Ms. Petty." CP 2262.

2. Long after Patricia's first deposition is completed, she attempts to rewrite it, which Plaintiffs then submit as an attachment to a paralegal's declaration.

As referenced above, Patricia was deposed at length on September 28, 2009. Her deposition was used in support of the City's motion, which was filed in January 2010. *See* CP 121-228. Two months later, Patricia

was deposed four additional times (March 3-4 & 24-25, 2010), creating a total of five volumes of testimony. CP 864, 891, 894.

Two days before the Court's April 16 summary judgment hearing, the McCarthys filed excerpts from Patricia's third, fourth, and fifth depositions. CP 564-626. In those depositions, Patricia equivocated on whether Fearghal had struck Cormac on June 2, 2005. CP 600-01 ("Whether he struck the child or not, I don't know."). Patricia further alleged that she implied from speaking with Petty that she should "exaggerate," CP 613, though she admitted that Petty never used that term, CP 621, and never asked Patricia to lie, CP 620. What Patricia did allege is that Petty said something "along the lines of, you know, what else happened? What else can you think of? What else can you come up with? We need to get as much on this guy as we possibly can to protect you and to protect your children." CP 592. Patricia clarified that Petty told her, "if something happens, you know, this needs to be reported," referring to no-contact order violations. CP 593-94.

The court reporter elected to "submi[t]" the deposition to Patricia after each volume was created. CR 30(e); *see also* CP 864, 891, 894. The reporter advised Patricia each time (other than for the March 24-25 depositions, at which Patricia expressly waived her right to make changes, *see* CP 894) that the transcript was complete and that Patricia had 30 days to make any changes. CP 864, 891. Patricia testified at her third deposition that she had in fact received a copy of the first transcript in a timely manner, but refused to read it. CP 869-70. The McCarthys never

objected to this protocol for, namely "submitt[ing]" each volume to Patricia as the volume became available and advising her of the duty to read and sign each time. CR 30(e). Nor did they ever move to suppress any one of the court reporter's notices advising Patricia that she had 30 days from the notice to make any corrections.

Patricia received notice of the completion of her first deposition on October 7, 2009, CP 864, and notice of the completion of her second and third depositions on March 12, 2010, CP 891.[14] It was not until July 8, 2010—nine months after her first deposition transcript was completed—that the court reporter delivered to the City's counsel an "original correction sheet" for Patricia. CP 896. This "correction sheet" was, however, signed by Patricia on May 7, 2010, before notary public Robin Kraemer, and came with 17-page matrix of wholesale revisions to her testimony, primarily to the first deposition that had occurred the preceding September. CP 740-57, 818. Curiously, Patricia's signature appeared in black ink, but someone had used a blue pen (different than the one Ms. Kraemer had used for the notary signature) to strikethrough text and line numbers and write in the lower left corner "P 18 of 18". CP 757, 911.[15]

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[14] The notice for her second and third depositions were sent to Fearghal's attorney with instructions to "have the deponent read the deposition, note any additions or corrections on the enclosed signature page, sign where indicated, and have his/her signature notarized" and deliver the correction page to the reporter's "Vancouver office within 30 days of the date of this notice (March 12, 2010). CP 891.

[15] Because the Clerk's Papers are prepared in black and white, the City reproduces a color copy of the correction sheet as Appendix A to this brief.

3. Upon confirming the impropriety of Patricia's "correction" pages, the City moves to suppress.

Perplexed by the discrepancies in the dates, counsel for the City then contacted Ms. Kraemer, an employee of the court reporter, to inquire about the untimely changes. CP 818. The City then served a set of deposition upon written questions, *see* CR 31, on Ms. Kraemer, who then provided background as to how the "corrections" were actually made. CP 818, 898-928. At no time did the McCarthys ever move to suppress Ms. Kraemer's testimony. *Cf.* CR 32(d)(4).

Ms. Kraemer testified that when Patricia signed the "correction sheet," there was no "documentation suggesting changes in form or substance to any" part of her testimony. CP 904. Rather, it was not until sometime in early June 2010 that the 17 pages of "typewritten corrections" arrived at the court reporter's office by way of mail. CP 905-06. Ms. Kraemer further testified that no notary verified that Patricia actually authored the 17-page matrix, and there was nothing in the reporter's file reflecting that Patricia submitted a signed document that suggested she in fact authored the correction matrix. CP 906-07. Finally, Ms. Kraemer verified that Patricia had never supplied any changes to her deposition within 30 days of being notified that the transcript was complete. CP 908. Promptly after Ms. Kraemer answered the questions under CR 31, the City moved to suppress the correction pages under CR 32(d)(4). CP 929-43.

4. The McCarthys reduce their claims to only negligent investigation, and the Court fully dismisses the City and suppresses the "correction" pages of Patricia.

Unsurprisingly, the McCarthys filed the "correction" pages on July 19, 2010, with their supplemental brief on the issue of prosecutorial immunity, and did so as an attachment to the declaration of a paralegal for the attorney representing the Plaintiffs. CP 738-57. The only other documents filed to support their opposition were excerpts from the September 2009 deposition (in which she testified adverse to Fearghal) and the depositions of Miles and Petty. CP 738-812. In their briefing, the McCarthys focused their argument exclusively on whether the City was liable for Petty allegedly violating RCW 26.44.050, consequently abandoning all other causes of action. CP 726-36; *see also infra*.

The trial court heard oral argument on July 31, 2010, disagreed with McCarthys, and granted the remainder of the City's summary judgment motion. CP 1093-95. The Court also granted the City's motion to suppress Patricia's "correction" pages as a violation of CR 30 and 32, but instead elected to "accept[]" the matrix as a declaration from Patricia McCarthy. CP 1096-98. The Court also denied a motion for reconsideration of the earlier summary judgment order that dismissed the claims against the City for the actions of its officers. CP 1099-1100.

IV. ARGUMENT

Summary judgment exists to "avoid a useless trial when no genuine issue of material fact remains to be decided." *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312

(1998). It should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All reasonable inferences are drawn in the nonmoving party's favor; however, such inferences are drawn solely from evidence offered that would be admissible at trial. *White v State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Burmeister v. State Farm Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). Parties opposing summary judgment cannot rely on the allegations in their complaint, speculative assertions, conclusory statements, or inadmissible evidence to create a genuine factual issue for trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 122 (2003); *White*, 131 Wn.2d at 9. To this end, it is imperative to note that the lone facts pertinent to summary judgment—material facts—are those on which the outcome of the litigation depends. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Thus, factual disputes having no impact on the outcome of the litigation are irrelevant for purposes of summary judgment. *Id.* A trial court's summary judgment order is reviewed de novo. *Osborn v. Mason County*, 157 Wn.2d 18, 22, ¶ 5, 134 P.3d 197 (2006).

A. The McCarthys waived review of any claims against the City as they relate to the actions of Officer Langston and/or Detective Boswell, as well as any theory other than negligent investigation under chapter 26.44 RCW.

Before discussing the merits of the issues this court must resolve, it is helpful to analyze what issues the Court does *not* have to decide because of waiver. At the time the City moved for summary judgment, the

operative complaint alleged the City was liable under theories of (1) false imprisonment, (2) negligence, (3) negligent investigation, (4) reckless disregard, (5) Washington's Law Against Discrimination (WLAD), ch. 49.60 RCW, (6) malicious interference with parent-child relationship, (7) intentional infliction of emotional distress (outrage)[16], and (8) negligent infliction of emotional distress. CP 14-17. The McCarthys claimed the City was liable for the actions of not only Petty, but also of (a) Officer Langston for taking Patricia's report on August 12, 2005, of Fearghal's three no-contact order violations, (b) Detective Boswell for taking Patricia's October 18, 2005, report of witness tampering, and (c) Officer Taylor for responding to Patricia's alleged violation of the *adult* no-contact order on November 29, 2007. CP 5-9. The McCarthys have not argued at all in their opening briefs that summary judgment with respect to the Langston's or Boswell's actions should give rise to liability. Any claims relating to their actions have thus been waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

As for the remainder the McCarthys' claims, the procedural history reveals that the only claims that have not been abandoned are (1) negligent investigation under chapter 26.44 RCW vis-à-vis the actions of Petty, and (2) negligence for Officer Taylor not arresting Patricia on November 29, 2007. Additionally, as shown below, the dismissal of the McCarthys' claims vis-à-vis Taylor are reviewed under the heightened manifest abuse

[16] "'Outrage' and 'intentional infliction of emotional distress' are synonyms for the same tort." *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003).

of discretion standard because they were not sufficiently argued until *after* the McCarthys moved for reconsideration.

As this court reaffirmed last year, "[a] plaintiff abandons a claim asserted in a complaint by failing to address the claim in opposition pleadings, *present evidence to support the claim, or argue the claim in response to a summary judgment motion seeking dismissal of the entire complaint*." *West*, 184 Wn. App. at 113, ¶ 16 (emphasis added). When a plaintiff does abandon a theory, it is equally waived for purposes of appellate review. *Id.* at 113, ¶ 16 & n.4. When the City moved for summary judgment in January 2010, it argued (a) all of Petty's actions were subject to prosecutorial immunity, and (b) the false imprisonment claim was barred by the two-year statute of limitations, and (c) the McCarthys lacked evidence to support any other theory. CP 22-58. The McCarthys responded by seeking time for additional discovery under CR 56(f) as it related to whether Petty stepped outside her prosecutorial role. CP 455-60. The remainder of the response brief focused exclusively on whether the City was liable for *Petty*'s actions under theories of negligent investigation, WLAD, outrage, and malicious interference. CP 467-73. To be sure, the McCarthys' April 6, 2010, brief is devoid of any reference to the names "Langston," "Boswell," or "Taylor." *See* CP 450-74. And the evidence the McCarthys filed at that time in opposition to summary judgment focused exclusively on either Petty or individuals not employed by the City. *See* CP 363-99 (Decl. of G. Price (attorney)), CP 400-16

(Fearghal),[17] CP 417-47 (Decl. of T. Boothe (attorney)). The City identified this deficiency in rebuttal. CP 477-81. As such, it was no surprise that the trial court concluded at the hearing on April 16, 2010, that "[w]ith regard to the police officers ... there's nothing there to base liability on." 1 VRP 27; *see also* CP 2108.

It was not until after over a month after that ruling that the McCarthys attempted to supplement the record with a May 21, 2010, declaration of attorney Gregory Price, which attached four exhibits in an effort to salvage the claims against the City for the actions of Boswell and Taylor. *See* CP 627-48. The trial court rejected the McCarthys' attempt to file the untimely materials, CP 2115, a decision well within its discretion. *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987). Even if this court applied a de novo review to that decision to strike the Price declaration, *see Keck v. Collins*, 181 Wn. App. 67, 81-83, ¶¶24-26, 325 P.3d 306, *review granted*, 181 Wn.2d 1007 (2014),[18] the declaration set no foundation for Price's personal knowledge of the documents he attempted to authenticate, meaning the exhibits are inadmissible. *Burmeister*, 92 Wn. App. at 365-66 (reversing trial court,

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[17] The McCarthys did attach to Fearghal's declaration a copy of the October 24, 2008, parenting plan signed by both Patricia and Fearghal, CP 406-16, which alleges *ex post* that the allegations made to Officer Langston were false, *see* CP 412 (¶ 2.21). Patricia stated that she signed that plan "under duress." CP 857. In any event, the City filed the same parenting plan as an exhibit to Patricia's deposition in support of its summary judgment motion. *See* CP 218-28. Refiling a copy of a document does not create a "genuine issue" of fact as to what the document says or means. CR 56(c).

[18] The Supreme Court granted review in *Keck* to decide whether a trial court's order striking a summary judgment affidavit that is filed untimely is reviewed de novo or for abuse of discretion. *Keck*, 181 Wn.2d 1007.

holding it was error to consider document that attorney attempted to "certify" as accurate absent foundation for personal knowledge).[19] And finally, when the McCarthys brought forward their evidence obtained following the CR 56(f) continuance, their briefing focused *exclusively* on whether the City was liable under a chapter 26.44 RCW theory of *negligent investigation*. CP 726-36; I VRP 30-31.[20] No other theory was discussed, meaning they cannot be pursued now on appeal. *West*, 184 Wn. App. at 113, ¶ 16 & n.4. As for Taylor, the McCarthys failed to make any argument insofar as the City's liability for his actions until they moved for reconsideration. CP 701-04. And when they did so, they only argued negligence and WLAD. *Id.* But the only mention of WLAD in either of the McCarthys' opening brief is in connection with *Petty's* actions, a claim abandoned at the trial court. *See* Br. of F. McCarthy at 66-67.[21] In short, the McCarthys have waived any argument that the City is liable for Taylor violating WLAD. *Cowiche Canyon*, 118 Wn.2d at 809.

Therefore, as it relates to the McCarthys' claims against the City, the only causes of action subject to appellate review are: (1) whether the trial court properly granted summary judgment to the City on the

[19] Should the McCarthys attempt on reply to challenge the City's authentication of public records, it is worth noting that those exhibits were certified as authentic by the appropriate custodian. *See* CP 113-17. As such, they are self-authenticated. ER 902(d).

[20] For whatever reason, Volume I of the Verbatim Report of Proceedings identify attorney Gregory Price as giving argument for the "County" on pages 30-42. That argument was made by the *undersigned* on behalf of the *City*, which is evident given that the County had yet to file any motion for summary judgment. *See* CP 1101-18.

[21] The opening brief of Conor and Cormac does not mention WLAD at all.

McCarthys' claims grounded in chapter 26.44 RCW as it relates to Petty's actions, and (2) whether the trial court abused its discretion by denying reconsideration to the McCarthys on their claim of negligence against the City for Officer Taylor's failure to arrest Patricia on November 29, 2007. All other claims have been waived and need not be considered. *Cowiche Canyon*, 118 Wn.2d at 809; *West*, 184 Wn. App. at 113, ¶ 16 & n.4.

B. The Court should also refuse to consider the McCarthys' attempt to introduce a theory of "substantial factor" causation because that argument was never raised in the trial court.

"An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, ¶ 20, 182 P.3d 985 (2008). In *Sourakli* the plaintiff successfully opposed a motion for summary judgment by arguing the defendants were negligent on a theory grounded in a landowner's duty to persons who are foreseeably injured off-premises. *Id.* at 506-08, ¶¶ 13, 17. After discretionary review was granted, the plaintiff reversed course to argue that the defendants were liable under the rescue doctrine. *Id.* at 508, ¶ 19. This court refused to consider that argument, ultimately reversing the denial of summary judgment because the plaintiff's "case ... depends entirely on arguments not raised below." *Id.* at 509 ¶ 20; *accord Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996) (refusing to consider employee's argument that employer violated a statute neither raised nor argued below).

The McCarthys acknowledge that a claim of negligent investigation under chapter 26.44 RCW fails as a matter of law absent proof the alleged violation of that statute results in a "harmful placement decision." *Roberson v. Perez*, 156 Wn.2d 33, 44-47, 123 P.3d 844 (2005); *see also infra* Part IV.C.3. Noting that there were multiple independent acts that separated Fearghal from Cormac, the McCarthys now argue the actions by State, County, and City employees, though perhaps not enough individually to prove causation of a "harmful placement decision," must be viewed collectively under a "substantial factor" theory of causation. *See* Op. Br. of F. McCarthy at 3 (issue *i*), 52-53, 61, 64; Op. Br. of C. & C. McCarthy at 45-46. This "whole is greater than the sum of its parts" argument was never raised once in any of the McCarthys' briefs at the trial court. *See* CP 450-74, 693-704, 726-37. Under *Sourakli* and *Sneed*, that argument should not be considered for the first time here.

Now that the framework for this appeal is established, it becomes clear that the dismissal of the City should be affirmed.

C. Prosecutorial immunity shields the City from any liability for the actions of Jill Petty.

As they did at the trial court, the McCarthys direct the majority of their attack on the City by challenging the actions and inactions of Jill Petty, the prosecutor who handled Fearghal's prosecution until the criminal matter was transferred to Clark County because of the witness tampering charge, which was a felony. The McCarthys claim that Petty's actions amount to a violation of chapter 26.44 RCW, consequently

rendering the City liable in negligence. For the same reasons adopted by the trial court, their claims fail to overcome prosecutorial immunity.

Whether absolute immunity applies is a "question of law" that "may be established on a motion for summary judgment." *Hannum v. Friedt*, 88 Wn. App. 881, 886, 947 P.2d 760 (1997) (citations omitted). The McCarthys take a different view, citing page 585 of *Gilliam v. Department of Social & Health Services*, 89 Wn. App. 569, 950 P.2d 20 (1998), for the proposition that whether Petty—and consequently the City—are immune is a question of fact for the jury. Br. of F. McCarthy at 62 & Br. of C. & C. McCarthy at 40. The McCarthys misread *Gilliam*. That portion of the opinion was discussing whether the tort of negligent supervision should be dismissed as superfluous if a defendant-employer concedes that the employee acting within the scope of employment. *Gilliam*, 89 Wn. App. at 585; *see also LaPlant v. Snohomish County*, 162 Wn. App. 476, 480-81, ¶¶ 11-12, 271 P.3d 254 (2011). The portion of *Gilliam* that *does* characterize the question of whether absolute immunity applies said exactly what every other case to analyze the issue has said: that it is a "question of law." *Gilliam*, 89 Wn. App. at 578. And as the Supreme Court has made clear, "[q]uestions of law are for the court, not the jury, to resolve." *State v. Miller*, 156 Wn.2d 23, 31, ¶ 20, 123 P.3d 827 (2005) (citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)); *see also Osborn*, 157 Wn.2d at 22-23, ¶ 6 (criticizing Court of Appeals for deferring legal question to jury). Consequently, the

McCarthys' desire to push the prosecutorial immunity question on to the jury must be rejected.

1. Washington has never retreated from the rule that a prosecutor and her employer are immune from acts associated with initiating, maintaining, and pursuing the government's case.

It has long been the law in Washington that absolute immunity bars liability for any "matter[] ... among those generally committed by the law to the control or supervision of the office and are not palpably beyond authority of the office." *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935). This principle, which extends to decisions to charge or not charge, has been reaffirmed for decades. *Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966); *Mitchelle v. Steele*, 39 Wn.2d 473, 474, 236 P.2d 349 (1951); *Schmitt v. Langenour*, 162 Wn. App. 397, 406-08, ¶¶ 19-23, 256 P.3d 1235 (2011). The justification for this absolute rule "is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property." *Anderson*, 181 Wash. at 331. It therefore comes as no surprise that time and time again, courts ranging from the United States Supreme Court, to our Supreme Court, to the Court of Appeals have consistently ordered dismissal of claims subject to the immunity bar. *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Creelman*, 67 Wn.2d at 884; *Mitchelle*, 39 Wn.2d at 474; *Schmitt*, 162 Wn. App. at 406-08, ¶¶ 19-23. And in Washington, the

government entity that employs the prosecuting attorney shares the same immunity as the individual. *Creelman*, 67 Wn.2d at 885.[22] Thus, to the extent Petty would be individually immune, the City is as well. *Id.*

The law is clear that there is never any liability for a prosecutor's charging decision, regardless of whether malice or evil intent motivated the decision. *Creelman*, 67 Wn.2d at 885; *Anderson*, 181 Wash. at 331. And federal law—which Washington "closely follow[s]" for purposes of prosecutorial immunity, *see Schmitt*, 162 Wn. App. at 407, ¶ 20—extends that same absolute immunity to a prosecutor's (a) "failure to investigate the accusations against a defendant before filing charges," *Broam v. Bogan*, 320 F.3d 1023, 1029 (9th Cir. 2003); (b) "gathering [of] additional evidence after probable cause is established," *id.* at 1030; (c) refusal to take steps to exonerate a defendant who has already been charged (such as dropping charges), *Cousins v. Lockyer*, 568 F.3d 1063, 1068-69 (9th Cir. 2009); (d) "decision not to prosecute" an alleged crime, *Roe v. City & County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997); or (e) "conferring with potential witnesses for the purpose of determining whether to initiate proceedings," *Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir. 1984). Because the "[a]nalysis of a prosecutor's absolute immunity from suit under state law claims tracks common law immunity

[22] At the time *Creelman* was decided, the question of whether a prosecuting attorney was an employee of the county or state was unanswered. *See Creelman*, 67 Wn.2d at 883. Division One of this court has since determined that the prosecutor acts on behalf of the State in such situations. *Whatcom County v. State*, 99 Wn. App. 237, 242, 993 P.2d 273 (2000). That issue of law is not germane in this case, and the primary point of law for which *Creelman* is cited remains good law.

analysis under 42 U.S.C. § 1983," *Musso-Escude v. Edwards*, 101 Wn. App. 560, 567-68, 4 P.3d 151 (2000), the foregoing federal cases must guide this court's analysis insofar as whether Petty, and consequently the City, are entitled to prosecutorial immunity.

Regardless of whether the McCarthys' "evidence" supporting their claims can even be considered, *cf. infra*, their complaints are all identical to those both federal and Washington courts have rejected under the immunity doctrine. The McCarthys claim Petty never should have charged Fearghal for either the June 2, 2005, assault of Cormac, or the three no-contact order violations that occurred later. As a matter of law, those charging decisions are protected by absolute immunity. *Creelman*, 67 Wn.2d at 884.

Second, despite Fearghal's claim that Petty was obligated to charge Patricia under state law for violating other no-contact orders, *see* Br. of F. McCarthy at 64-65,[23] absolute immunity shields her decisions to *not* charge because the discretion to do so is vested in the office of the prosecutor. *Id.*; *see also Roe*, 109 F.3d at 583; *Harrington v. Almy*, 977 F.2d 37, 40 (1st Cir. 1992); *Oliver v. Collins*, 904 F.2d 278, 280-81 (5th Cir. 1990); *Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989). This is especially true for any alleged felony that Patricia supposedly committed; the record and law conclusively establish that neither Petty nor anyone

[23] Notably, Fearghal fails to point to a single alleged violation that took place prior to Petty's resignation on January 31, 2006. Fearghal fails to explain how—even in the absence of immunity—Petty should be liable for charging a crime on behalf of a municipality for which she no longer works.

employed by the City was authorized to file felony criminal charges. RCW 36.27.020(6); CP 97. The McCarthys never offered any evidence to rebut the allocation of duties in the interlocal agreement, meaning that fact—and all others that they failed to rebut in opposition to summary judgment—are to be taken as "established." *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989).

2. Prosecutorial immunity applies to investigative acts when done in preparation for presenting the government's case, which includes witness interviews or directing that a complaining witness go file a police report.

Undeterred by decades of common law, the McCarthys nevertheless contend that prosecutorial immunity does not shield the City and Petty for two reasons. First, Fearghal alone claims that RCW 10.99.060 "imposes duties on prosecutors" that gave rise to liability, somehow statutorily superseding the prosecutorial immunity doctrine. Br. of F. McCarthy at 64. Second, all McCarthys claim that Petty's acts were "investigatory" and therefore not entitled to the protections of absolute prosecutorial immunity. Br. of F. McCarthy at 62-63; Br. of C. & C. McCarthy at 39-41. Both arguments are without merit.

First, the McCarthys never raised RCW 10.99.060 as an independent basis for the City's liability vis-à-vis Petty when they opposed the City's motion for summary judgment at the trial court. CP 450-74, 726-37. Although they raised the statute in their motion for reconsideration, they did so only in connection with the City's alleged liability for *Officer Taylor's* actions. *See* CP 693-704. In short, the

McCarthys never argued to the trial court that *Petty* (or any other prosecutor) violated RCW 10.99.060 and that the City should be liable as a result. The McCarthys cannot raise that statute vis-à-vis Petty for the first time on appeal. *Sourakli*, 144 Wn. App. at 509, ¶ 20.[24]

The argument that is properly before the court is whether the City is liable for Petty allegedly violating chapter 26.44 RCW. First, "neither RCW 26.44 nor [case law] restricts prosecutorial immunity." *Rodriguez v. Perez*, 99 Wn. App. 439, 450, 994 P.2d 874 (2000), *appeal after remand sub nom., Roberson v. Perez*, 119 Wn. App. 928, 933-34, 83 P.3d 1026 (2004) (reversing jury verdict in favor of plaintiffs and ordering dismissal), *aff'd*, 156 Wn.2d 33, 44-48, 123 P.3d 844 (2005). The McCarthys point to *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), as authority that a prosecutor sheds her immunity when she performs acts outside the advocacy role. Br. of F. McCarthy at 62-63; Br. of C. & C. McCarthy at 39. Certainly that is true, but *Buckley* must be considered in context. The Court distinguished the

[24] Even if the court did consider that argument, nothing in RCW 10.99.060 abrogates prosecutorial immunity. Fearghal's contention is the identical to the pleas consistently rejected by the Supreme Court in the context of 42 U.S.C. § 1983. Although that statute imposes liability on "[e]very person," who violates another's constitutional rights, absolute immunity still exists for legislators, *Tenney v. Brandhove*, 341 U.S. 367, 379, 71 S. Ct 783, 95 L. Ed. 1019 (1951), judges, *Pierson v Ray*, 386 U.S. 547, 554-55, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), and for purposes relevant here, prosecutors, *Imbler*, 424 U.S. at 417-19. More fundamentally, RCW 10.99.060 simply requires a prosecutor to provide information to a victim if charges are not to be filed. But Fearghal fails to point to anywhere in the record that shows (a) Patricia committed an act of domestic violence *before Petty undisputedly resigned on January 31, 2006* (*see* CP 360), that (b) Petty declined to prosecute and (c) failed to follow the requirements of RCW 10 99.060. As such, even assuming a prosecutor's violation of RCW 10.99.060 both gave rise to a cause of action and statutorily superseded prosecutorial immunity, it is irrelevant under the governing summary judgment record here.

acts of "evaluating evidence and interviewing witnesses [in] prepar[ation] for trial," which are wholly shielded by immunity, and "searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested." *Buckley*, 509 U.S. at 273, *quoted in Rodriguez*, 99 Wn. App. 450. *Buckley* reaffirmed *Imbler* in that prosecutorial immunity is not limited to what a prosecutor does in the courtroom:

> Petitioner argues that *Imbler*'s protection for a prosecutor's conduct "in initiating a prosecution and in presenting the State's case," 424 U.S. at 431, extends only to the act of initiation itself and to conduct occurring in the courtroom. *This extreme position is plainly foreclosed by our opinion in* Imbler *itself.* We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity. *Id.*, at 431, n. 33. We noted in particular that *an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity* because it was "fairly within [the prosecutor's] function as an advocate." *Id.*, at 430, n. 32.

Buckley, 509 U.S. at 272-73 (quoting *Imbler*, 424 U.S. at 430-31 & nn. 32-33) (emphasis added). As such, *Buckley* overturned a dismissal on the pleadings because the prosecutor's alleged conduct of fabricating evidence occurred long before there was probable cause to arrest and while police were still investigating the crime, which meant the prosecutor was acting identically to that of a police officer at the time. *Id.* at 275. In other words, "the functions of prosecutors and detectives [we]re the same" under those alleged facts. *Id.* at 276.

The present case is completely different. Undisputed evidence here shows that all of the following occurred *before* Petty did anything with respect to the McCarthys: (a) Patricia called 911, (b) Patricia authored (on her own) a *Smith* affidavit detailing Fearghal's abuse of both her and their infant, and (c) a sitting judge independently found probable cause existed and prohibited Fearghal from contacting Cormac. There can be no argument that Petty or any other *City* employee caused Patricia to call 911, caused Patricia to author (her version) of the events of June 2, 2005, and/or caused Judge Schreiber to find probable cause and enter a no-contact order. And even Patricia had fully recanted days later, the *Smith* affidavit alone was sufficient evidence to convict Fearghal. *Smith*, 97 Wn.2d at 861-63.

The McCarthys' attempt to characterize Petty's actions as it relates to the June 2, 2005, assault charge as "investigative" in nature is foreclosed by the Ninth Circuit's decision in *Demery*, 735 F.2d 1139. There, just like McCarthy does here, the plaintiff argued that a prosecutor "induced witnesses to testify falsely ... while [the prosecutor] was conferring with the witnesses for the purpose of determining whether to bring charges." *Id.* The Ninth Circuit had little difficulty concluding absolute immunity applied, relying on other federal cases that extended immunity to allegations that prosecutors falsified line-up reports and induced perjury. *Demery*, 735 F.2d at 1144 (citing, *inter alia*, *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978)). This court recently followed *Demery* to extend absolute immunity to a prosecutor who

directed a police officer to reinterview a complaining witness, reaffirming that "certain investigative acts, when undertaken in direct preparation for judicial proceedings[,] are subject to absolute immunity." *Schmitt*, 162 Wn. App. at 407, ¶¶ 21. In sum, evaluating evidence, initiating prosecution, and presenting the government's case (i.e., deciding whether and how to go forward) all are advocatory duties protected by absolute immunity. *Musso-Escude*, 101 Wn. App. at 573.

Further supporting the application of absolute immunity here is *Imbler*, the seminal Supreme Court case. There, a man (Imbler) spent a decade in prison for murder, but was released after evidence surfaced that exonerated him. 424 U.S. at 411-15. As quoted by the Court, "The gravamen of his complaint against [the prosecutor] was that he had 'with intent, and on other occasions with negligence' *allowed* [a key witness,] Costello *to give false testimony as found by the District Court*, and that the fingerprint expert's suppression of evidence was 'chargeable under federal law' to Pachtman." *Id.* at 416 (emphasis added). The Court held that the prosecutor was absolutely immune from those allegations. *Id.* at 422-31.

The McCarthys claim that Petty induced Patricia to give false testimony to support the prosecution for the June 2 assault, going so far as alleging that Petty threatened Patricia to not recant. Even if that were true (which it is not), those actions are protected by absolute immunity because they were done in support of pursuing the charges for the assault. *Imbler*, 424 U.S. at 422-31; *Schmitt*, 162 Wn. App. at 407-08, ¶¶ 21-23. In sum, Ms. Petty's actions in regard to the alleged June 2, 2005, assault were at

most "an out-of-court 'effort to control the presentation of [a] witness' testimony,'" to which absolute immunity applies. *Buckley*, 509 U.S. at 272-73 (quoting *Imbler*, 424 U.S. at 430 n. 32).

3. At most, the McCarthys' evidence shows Petty telling Patricia to report a crime that already happened, which neither exposes the City to liability nor undermines its immunity.

The only remaining event to which Petty is even alleged to be associated is Patricia's reporting of three no-contact order violations to Officer Langston on August 12, 2005, and the reporting of witness tampering to Detective Boswell on October 18, 2005. Aside from the lack of factual basis to support the claim that Petty unlawfully "directed" Patricia to report witness tampering, "courts have not recognized a general tort claim for negligent investigation," and that "[t]he negligent investigation cause of action *against DSHS is a narrow exception that is based on, and limited to, the statutory duty*" imposed by RCW 26.44.050, and the remedies the statute was designed to promote. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) (emphasis added). Witness tampering, *see* RCW 9A.72.120, has nothing to do with the duty to report "abuse or neglect" under RCW 26.44.050,[25] a phrase defined by RCW 26.44.020(1). Accordingly, there is no duty to

[25] RCW 26.44.050 provides in relevant part:

> Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court....

reasonably investigate an allegation of witness tampering, *M.W.*, 149 Wn.2d at 601, meaning the McCarthys' claims cannot rest on Petty's "investigation" or lack thereof in regards to that crime.

The only remaining "act" allegedly involving Petty is Patricia's August 12, 2005, report of the three no-contact order violations. To properly understand why this argument is flawed, it is necessary to discuss how Washington law has developed in regard to causes of action based on RCW 26.44.050. At the outset, it is worth noting that in 2012, the legislature enacted Engrossed Substitute Senate Bill 6555, which expressly "limited" all liability otherwise originating in chapter 26.44 RCW, LAWS OF 2012, ch. 259 § 14, *codified at* RCW 26.44.280, to "act[s] or omission[s] constitut[ing] gross negligence" with respect to "emergent placement investigations of child abuse or neglect," RCW 4.24.595. This court should give RCW 4.24.595 retroactive effect, which would functionally bar the McCarthys' negligent investigation claim because the City has immunity. *Cf. Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981) (amendments are given retroactive effect when they are remedial in nature and retroactive application would further purpose).

But in the event the court does not give retroactive effect to RCW 4.24.595, the Supreme Court if a RCW 26.44.050 cause of action may be maintained against a local law enforcement agency, the same essential element required to sustain a claim against DSHS would be likewise be required, namely that there be proof of causation between the law enforcement action and a "harmful placement decision." *Roberson*, 156

Wn.2d at 48, ¶ 38. A "harmful placement decision" is one where the child has been placed in an abusive home, has been removed from a nonabusive home, or has been left in an abusive home. *Id.* at 45, ¶ 30 (following *M.W.*, 149 Wn.2d at 591). For example, *M.W.* dismissed a negligent investigation claim against DSHS because the only damages alleged were emotional distress. *M.W.*, 149 Wn.2d at 601-02. And *Roberson* affirmed the dismissal of a lawsuit because the plaintiff had preemptively removed the children from the home "through their [own] voluntary acts," rejecting any "constructive placement" argument. *Roberson*, 156 Wn.2d at 47-48.

The McCarthys rely exclusively on the 17-page "correction sheet" for Patricia's deposition to support the claim that Petty stepped outside her role. *See* Br. of F. McCarthy at 20 (citing CP 746, 754). Even if the court considers the improperly submitted "correction sheet," which it should not, *see infra* Part IV.D, it still does not aid the McCarthys. The "corrections sheet" asserts that Patricia "told [Petty] that I had bumped into Fearghal at Ballys," after which Petty told Patricia to inform the police. CP 746. Notably, this is exactly how Officer Langston recalled the incident. CP 75. Regardless of *who* told Patricia to talk to the police, **nothing** in the "corrections sheet" contradicts Patricia's deposition testimony that the three-page *Smith* affidavit she authored in front of Officer Langston detailing the violations was (a) in her handwriting, (b) written without anyone else present, (c) signed by her under penalty of perjury, and (d) *entirely true*. CP 168-71, 213-15; *see also* CP 746-47 (leaving unchanged the pages of Patricia's deposition attesting to the

foregoing). In essence, the specific act by Petty in regards to the no-contact order allegations about which plaintiffs complain is Petty telling Patricia to report *to the police* a crime *that had already happened.* No case supports the proposition that directing a person to report a crime to the police gives rise to liability. Though the plaintiffs now claim Patricia was somehow strong-armed into reporting this crime against her will, the fact remains (as unaltered by the "corrections sheet") that (1) a no-contact order barred Fearghal from coming within 500 feet of Cormac, (2) Fearghal actually came within 500 feet of Cormac three times. Whether Patricia or Cormac consented to Fearghal's contact, or whether Patricia "baited" Fearghal is irrelevant, as consent not a defense to violating a no-contact order. *State v. Shuffelen*, 150 Wn. App. 244, 258-59, ¶¶ 33-34, 208 P.3d 1167 (2009). At most, there was credible evidence that Fearghal violated the court order, Petty told Patricia to report the incident to the police, but was enthusiastic about doing so. The McCarthys' negligence claim under chapter 26.44 RCW fails absent proof Petty violated RCW 26.44.050, but that statute only obligated Petty to ensure that an allegation that Fearghal violated a child abuse no-contact order was investigated. It is undisputed the City *did* investigate this allegation by obtaining a *Smith* affidavit written entirely in Patricia's own handwriting. CP 213-15. Petty (and the City) cannot be deemed to have violated RCW 26.44.050 by taking the exact course of action the statute required.

Even if Petty telling Patricia to report violations did violate RCW 26.44.050, nothing in the record sufficiently establishes that such an action

caused a "harmful placement decision." *M.W.*, 149 Wn.2d at 591. By the time the alleged encounter with Petty had occurred, Patricia had already unilaterally removed the children from Fearghal, CP 242, and independent from any action by a City employee, the court had issued a no-contact order prohibiting contact with Cormac. CP 245-46. Assuming a no-contact order is a "placement decision" envisioned by *M.W.* and *Roberson*, the charges resulting from the three alleged no-contact order violations investigated by Officer Langston resulting in a no-contact order that imposed no additional conditions other than what other existing orders already did. *Compare* CP 340-41 *with* CP 245-46, 256-57, 259. The order stemming from Langston's investigation terminated on October 6, 2006. CP 347, long before the post-conviction no-contact order stemming from the *Alford* plea was rescinded on April 6, 2007, CP 332. In sum, any "placement decision" created by the no-contact order investigation and charges did not "plac[e] [Cormac] in an abusive home, remov[e] [Cormac] from a nonabusive home, or fail[] to remove [Cormac] from an abusive home." *M.W.*, 149 Wn.2d at 591. Because there is no admissible evidence that anything Petty did in relation to the three no-contact order violations caused that type of harm, the McCarthys' negligent investigation claim premised on RCW 26.44.050 fails. *Id.*

And because Cormac's and Conor's claims hinge on proof that "a parent [was] tortiously injured by" the City, *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140, 691 P.2d 190 (1984), their claims fail too.

The trial court should be affirmed.

D. The trial court was within its discretion to deny reconsideration of the McCarthys attempt to resurrect their claim against the City for Officer Taylor's actions.

Orders denying reconsideration are reviewed for manifest abuse of discretion. *Sligar v. Odell*, 156 Wn. App. 720, 734, ¶ 40, 233 P.3d 914 (2010). An order denying reconsideration must be affirmed unless the trial court's decision "is manifestly unreasonable or based on untenable grounds." *Id.* As such, though raising an argument for the first time in a motion for reconsideration is sufficient to preserve an argument for appeal, *State v. Ledenko*, 87 Wn. App. 39, 42 n.2, 940 P.2d 290 (1997), it alters this court's standard of review from de novo, *see Osborn*, 157 Wn.2d at 22, ¶ 5) to the more deferential manifest abuse of discretion. *Sligar*, 156 Wn. App. at 734, ¶ 40.

When presented with a motion for reconsideration, the court should only consider the specific bases under CR 59(a) cited by the movant. CR 59(b) ("A motion . . . for reconsideration shall identify the specific reasons in fact and law *as to each ground on which the motion is based.*") (emphasis added); *see also Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 537-38, 998 P.2d 856 (2000) (discussing only CR 59(a)(2) because the parties that sought CR 59 relief there "rel[ied] on only one of the nine listed grounds"); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, ¶ 37, 183 P.3d 283 (2008) (same).

In their motion for reconsideration, the McCarthys cited only CR 59(a)(9). CP 700-01. This subsection permits reconsideration upon a showing "[t]hat substantial justice has not been done." CR 59(a)(9).

Courts are often reluctant to grant reconsideration on such grounds "because of the other broad grounds afforded under this rule." *Jaeger v. Cleaver Constr. Co.*, 148 Wn. App. 698, 717-18, ¶ 58, 201 P.3d 1028 (2009); *see also Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964) (same). The McCarthys fail to show that the trial court abused its discretion when it denied reconsideration.

"CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, ¶ 12, 122 P.3d 729 (2005). The McCarthys offer no explanation why they waited until reconsideration to argue that (a) Officer Taylor violated chapter 10.99 RCW on November 29, 2007, or (b) that the City should be liable as a result. In short, the McCarthys cannot justifiably argue that "substantial justice was not done" when the McCarthys fail to mention Officer Taylor at all until after summary judgment is entered dismissing all claims as they relate to that same individual. To be sure, the first mention of Officer Taylor during oral argument was on July 30, 2010, I VRP 55, long after the trial court had granted summary judgment for the actions of the officers. CP 2108, 2114. Strikingly, what the McCarthys attempted to do at the July 30, 2010, hearing was ask the Court to "[h]old off ruling dispositively as to Mrs. Petty, Officer Boswell and Officer Taylor – Tyson Taylor *until the State and City – the State and County file their Motions for Summary Judgment.*" I VRP 56 (emphasis added). In essence, the McCarthys' reconsideration efforts were reduced to a request to

indefinitely postpone granting summary judgment to one defendant (the City) until the remaining defendants elected to seek dispositive relief. No authority supports that view.

Even if this court were willing to entertain the McCarthys' arguments vis-à-vis Officer Taylor, it still should reject them. Even if Officer Taylor was statutorily obligated to arrest Patricia at the hospital on November 29, 2007, it is undisputed that later that day, she obtained an order specifically authorizing her presence at the hospital. CP 355. The McCarthys may point to an order entered a year later that vacated the November 29, 2007, order as evidence showing that Patricia defrauded the trial court. *See* CP 642-43.[26] Yet that was not determined until long after Taylor encountered the McCarthys. Moreover, the summary judgment record before the trial court is devoid of any evidence (aside from pure speculation) that Taylor's failure to arrest Patricia on November 29, 2007, caused any harm to Fearghal. The absence of any element to a negligence claim bars liability, *Swanson v. Brigham*, 18 Wn. App. 647, 651-52, 571 P.2d 217 (1977), and the McCarthys "may not rely on speculation or on argumentative assertions that unresolved factual issues remain," *White*, 131 Wn.2d at 9. Nor can the McCarthys rely on the court to supply facts where there are none. *Lujan v. Nat'l Wildlife Found.*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (courts do not "'presume' the

[26] As referenced *supra* Part IV.A, this declaration was properly stricken by the Court as untimely. In any event, there was no foundation for Gregory Price, Fearghal's civil attorney, to authenticate the document, so it was inadmissible in any event.

missing facts" necessary to sustain a cause of action). In sum, even assuming Officer Taylor breached RCW 10.99.030, the McCarthys failed on this summary judgment record to offer sufficient evidence to meet the remaining elements of negligence. In any event, their claim that "substantial justice was not done" has no merit, CR 59(a)(9), and that was the only grounds for reconsideration argued.

E. The trial court was within its discretion to suppress Patricia's correction pages, which should be stricken even if the Court applies a de novo review.

A trial court's order as it relates to accepting or rejecting deposition testimony under CR 32 is reviewed for abuse of discretion. *Hammond v. Braden*, 16 Wn. App. 773, 776, 559 P.2d 1357 (1977). Here, there was ample basis to conclude that the "correction" pages were nothing more than a deliberate attempt to mislead the court. *See* Appx. A.

For reasons expressed above, whether the court accepts or rejects her "correction sheets" does not matter for purposes of the City. But the McCarthys devote a large amount of their briefs to challenging the manner in which the court reporting firm completed the transcripts for Patricia's deposition. *See* Br. of F. McCarthy at 30-32, 74-77; Br. of C. & C. McCarthy at 46-47. CR 30(e) requires a "deposition [to] be submitted to the witness for examination" after it is "fully transcribed." CR 30(e). At that point, the witness is afforded an opportunity to make "[a]ny changes in form or substance" to the testimony, "with a statement of the reasons given by the witness for making them." *Id.* At that point, the deposition is "signed by the witness." *Id.* However, "[i]f the deposition is not signed

by the witness within 30 days of its submission to the witness," the ability to change any portion of the transcript is deemed waived. *Id.* Here, the reporter elected to "submit[]" the deposition to Patricia when each volume was completed. *Id.* The McCarthys contend that the court reporter mistakenly "submi[tted]" the deposition to Patricia too early, *id.*, and that it would have been more appropriate to wait until all five depositions were completed before doing so. *Cf.* Br. of C. & C. McCarthy at 47 (arguing Patricia "had 30 [days] from the time she received the last transcripts").

Had the McCarthys truly objected to "the manner in which ... the deposition [wa]s prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by" the court reporter—such as noticing Patricia each time a volume of the deposition was completed—they needed to bring "a motion to suppress the deposition ... with reasonable promptness after such defect is, or with due diligence might have been, ascertained." CR 32(d)(4). They did not do so, so any objection now is waived. *Accord Easterday v. S. Columbia Basin Irr. Dist.*, 49 Wn. App. 746, 750-51, 745 P.2d 1322 (1987).[27] More fundamentally, even if the entire process was treated as "one" deposition, Patricia affirmatively waived her right to read and sign the transcript at the conclusion of the last deposition. CP 894. By failing to challenge the notice that deemed Patricia to have waived signature, the McCarthys cannot attempt to rewrite

[27] This waiver also applies to any objection insofar as how Ms. Kraemer's CR 31 deposition was returned. CR 32(d)(4).

the record now. CR 32(d)(4). The trial court was within its discretion to strike the correction pages, and its decision to do so should be upheld.

F. The trial court acted within its discretion by imposing costs on McCarthy.

Fearghal argues in cursory fashion and without citation to authority that $827.05 of the $1,095.39 in costs awarded to the City by the trial court was error. Br. of F. McCarthy at 67. Review of a trial court's award of costs is for abuse of discretion. *Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 490, 910 P.2d 486 (1996). Also, the failure to offer authority in support of an argument generally constitutes waiver. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1996). The court should consider this argument waived because Fearghal failed to adequately argue it. *Id.*

But even if it does not, the trial court's decision on costs was properly entered, particularly on an abuse of discretion standard. On that standard of review, a trial court's order can be reversed "only when no reasonable person would have decided the same way." *State v. Thomas*, 150 Wn.2d 821, 869, 83 P.3d 970 (2004). Fearghal argues that the City was awarded $827.05 in excess of what RCW 4.84.010(7) allows. Br. of F. McCarthy at 67. That statute allows "the following expense[]" to be awarded to the prevailing party:

> To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis

> for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010(7). Fearghal does not challenge the City's prevailing party status. And though Fearghal does not specifically so identify in his opening brief, the costs he challenges are the transcripts for (1) Patricia's 6/3/2005 911 call ($15.75), (2) Fearghal's 8/1/2006 sentencing hearing ($105.30), (3) Patricia's depositions ($672), (4) Marcine Miles' deposition ($20), and (5) Jill Petty's deposition ($14). *See* CP 2133-34.

It appears that Fearghal suggests the depositions were unnecessary because the City prevailed on prosecutorial immunity. But Washington courts have consistently held that that transcriptions reviewed by a trial court in connection with a summary judgment motion are taxable. *Herried v. Pierce Cnty. Pub. Transp. Ben. Auth. Corp.*, 90 Wn. App. 468, 476, 957 P.2d 767 (1998); *see also Spurrell v. Bloch*, 40 Wn. App. 854, 871, 701 P.2d 529 (1985); *Gearheart v. Shelton*, 23 Wn. App. 292, 297, 595 P.2d 67 (1979). Patricia's depositions were used to not only support the City's summary judgment on prosecutorial immunity, but on the McCarthys' claims against the officers. CP 112, 120-228, 500-37, 944-1010. Additionally, the depositions were used after the McCarthys' sought and received more time under CR 56(f) to conduct *that very discovery* to defeat prosecutorial immunity. *Cf.* CP 2114-15. The trial court was within its discretion to award the deposition costs.

As for the other transcripts, RCW 4.84.010 also allows

> Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining *reports and records*, which are admitted into

> evidence at trial or in mandatory arbitration in superior or district court, *including but not limited to* medical records, tax records, personnel records, insurance reports, employment and wage records, *police reports*, school records, bank records, and *legal files*

RCW 4.84.010(5) (emphasis added). Certainly a 911 call and a court hearing are legal files and/or reports of police activity. The trial court was within its discretion to award these expenses.

In sum, the trial court's award of costs should be affirmed.

G. As it relates to the City, this appeal is frivolous and McCarthy should be compelled to pay reasonable attorneys' fees incurred as a result.

RAP 18.9(a) permits the appellate court to award attorneys' fees to a respondent as sanctions when the appellant files a frivolous appeal. *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004). "An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim." *Kearney*, 95 Wn. App. at 417. The McCarthys' appeal against the City meets this standard and warrants an award of reasonable attorneys' fees.[28]

The law of prosecutorial immunity has been settled for decades, as well as the appellate court's refusal to reverse when the sole basis asserted for the denial of reconsideration is CR 59(a)(9). Despite this, Fearghal continued to argue that the City never should have charged him with a

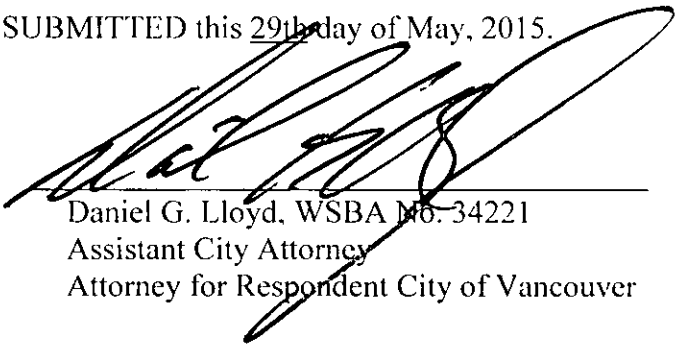
[28] Although the City is represented by in-house counsel, it is still appropriate to use a lodestar method. *Metro. Mortg. & Sec. Co., Inc. v. Becker*, 64 Wn. App. 626, 632 & n.2, 825 P.2d 360 (1992) (awarding attorney fees to in-house counsel); *Scott Galvanizing, Inc. v. NW Enviroservices, Inc.*, 63 Wn. App. 802, 814-15, 822 P.2d 345 (1992) (awarding fees for in-house counsel), *rev'd on other grounds*, 120 Wn.2d 573, 844 P.2d 428 (1993); *W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 475, 694 P.2d 1101 (1985) (awarding attorney fees to Kennewick city attorney).

crime, but instead should have charged Patricia. As it relates to the City, his appeal presents no debatable issues. With respect to the City, his appeal is frivolous and the court should sanction him accordingly in a lodestar amount of the City's reasonable attorneys' fees incurred.

V. CONCLUSION

"It is well documented that victims of domestic violence sometimes recant or refuse to cooperate after filing complaints against their assailants." Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 707 n. 68 (2003). In fact, studies have shown that 80 to 90 percent of domestic violence victims recant in some form or another. *Id.* at 709 n.76 (citation omitted). That Patricia is one of the majority who elected to recant, renew, and then recant her allegations of abuse is not a basis for disregarding the longstanding and well settled rule of prosecutorial immunity. And because there is no basis for overturning any of the trial court's other decisions, this court should affirm the trial court in its entirety as to the City, award the City its costs, and award the City its reasonable attorneys' fees.

RESPECTFULLY SUBMITTED this 29th day of May, 2015.



Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Respondent City of Vancouver

CERTIFICATE OF FILING/SERVICE

I certify that on May 29, 2015, I filed pursuant to RAP 18.6 the original and one legible, clean, and reproducible copy of the foregoing BRIEF OF RESPONDENT CITY OF VANCOUVER (with Appendix A thereto) by sending via U.S. mail, first class, postage prepaid, to the Court of Appeals at the following address: Washington Court of Appeals, Division II, 950 Broadway, Ste. 300, MS TB-06, Tacoma, WA 98402.

I further certify that on May 29, 2015, I served via U.S. mail first class, postage prepaid, a copy of the same on all pro se parties and counsel of record at their last known address as listed below:

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DATED on May 29, 2015.

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Respondent City of Vancouver

APPENDIX A

COLOR COPY OF PATRICIA "CORRECTION" SHEET

PATRICIA M. McCARTHY

I have read the transcript of the deposition taken on March 3, 2010, at Vancouver, Washington, and make the following additions or corrections:

PAGE LINE CORRECTION AND REASON FOR CORRECTION

ROBIN L KRAEMER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES DEC. 01, 2012

Patricia M McCarthy
PATRICIA M. McCARTHY

Subscribed and sworn to before me this 7TH day of May, 2010.

Robin Kraemer
Notary Public for the State of Washington
residing at La Center
My Commission Expires: 12/2012

Re: McCarthy v. County of Clark, et al.
Clark Superior Court No. 08-2-04895-4
JS