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458802
No. 89884-7

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL AMES,

Appellant/Cross-Respondent,

v.

PIERCE COUNTY, By and Through, PIERCE COUNTY PROSECUTING ATTORNEY MARK LINDQUIST,

Respondent/Cross-Appellant.

REPLY BRIEF OF PIERCE COUNTY ON CROSS-APPEAL

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ORIGINAL

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A. INTRODUCTION

Appellant Michael Ames' reply/response brief is unconstrained by the Rules of Appellate Procedures as he blatantly misstates "facts" and litters his statement of the case with unsupported argument.

Ames' lawsuit against the County, in which he sought a writ of prohibition and declaratory relief under RCW 7.24, was baseless under well-developed principles of Washington law, particularly given the constitutional obligation of the Pierce County Prosecutor's Office ("Office") to disclose potential impeachment evidence ("PIE") about Ames to criminal defendants.

The trial court not only was entirely correct in dismissing Ames' petition under CR 12(b)(6), it should also have dismissed Ames' petition under the special motion to strike procedure of the Washington anti-SLAPP statute, RCW 4.24.525(4), where Ames' lawsuit sought to restrict the County's necessary communication with participants in the court system, *i.e.* criminal defendants and their counsel. Moreover, the trial court erred in revisiting its decision to award the County attorney fees because Ames' theory for recovery was frivolous under CR 11, and the County was entitled to fees and damages under RCW 4.24.525(6).

The County is entitled to its fees on appeal.

B. RESPONSE TO AMES' RESPONSE/REPLY FACTS

Far from offering a fair recitation of the facts and procedure in this case, *without argument*, RAP 10.3(a)(5), Ames and his counsel yet again defy the rules and submit a reply brief[1] that is replete with argument and factual misstatements generally without citation to the record. This Court should not countenance Ames' flagrant disregard of the rules; it should sanction him and/or his counsel. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238, *review denied,* 119 Wn.2d 1015 (1992) (attorneys sanctioned for submitting brief that contained no citations to record for factual statements and misstatements of the record).

The County does not intend to belabor all of the ways in which Ames and his counsel violate RAP 10.3(a)(5) by failing to cite to the record, and offering nothing more than argument in the restatement of the case. Suffice it to say that such passages are found in the reply brief at 4-5, 5, 6, 6 n.6, 7-8, 8, 8 n.8, 9, 10, 10 n.9. Similarly, the County will not respond to the ad hominem personal attacks on the Prosecutor and the Office, attacks that further support CR 11 sanctions for vexatious conduct by Ames and his counsel.

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[1] This Court struck Ames original "reply/response brief" on the County's RAP 10.7 motion. References herein are to Ames' reply brief. Despite this Court's ruling striking his first reply brief, Ames' reply brief is still not fully compliant with that ruling. For example, Ames refers to the *Yerger* case in his reply brief at 23, a matter that was stricken by the Court's ruling (App. M to Ames' former brief).

The County does wish to point out several of the most egregious misstatements of the record by Ames, however. First, Ames' discussion of what transpired before Judge Chushcoff in *George* is blatantly misleading. Ames attempts to claim there was "no hearing" in *George* on the Coopersmith Report. Reply br. at 3-4. That is *false*. Ames submitted additional materials at the Office's invitation and those materials were provided to the criminal defense attorney in *George*. CP 44, 1592. Ames' counsel participated at the *George* hearing where the Coopersmith Report was specifically addressed. CP 229. She agreed to its dissemination. CP 41, 241-42.

Ames continues to assert DPA Richmond's declaration somehow "confirms" his earlier testimony regarding the emails at issue was not "credible." Reply br. at 7-9. The County has already explained this matter in detail in its brief at 4-5. Ames not only fails to address that explanation, but he instead brazenly *misrepresents* Richmond's testimony.[2]

Ames also asserts that the Coopersmith Report did not indicate he was "dishonest." Reply br. at 10-11. That, of course, is not the point, as

[2] Ames states: "Richmond filed a new declaration conceding Ames was correct." Reply br. at 8. That is false. Richmond actually averred "Contrary to petitioner's repeated claims in the current case, I have never denied receiving the June 9, 2011 email. Instead, I stated that it was not given to me at the October 12, 2012 meeting." CP 1588. Richmond further stated: "Ames' claim that we discussed the referenced email exchange and that I told him it was 'exculpatory' as to him is absolutely untrue." CP 1589.

the County noted in its brief at 6, 29-30. Ames' wild allegations against the Office and the Sheriff's Department ("Department"), found by Coopersmith to be baseless, potentially affected his credibility and thus constituted a basis for treating the Report as PIE. *Id.* Further, the concluding pages of that Report reference Ames' claims, made during his interview with Coopersmith, that either the Office or the Department "may have engaged in improper conduct in connection with its handling of a criminal case against a defendant named Lynn Dalsing..." CP 484. Two deputy prosecutors assigned to the Dalsing case reviewed the transcripts of Coopersmith's interview of Ames, and each testified that "[d]uring the course of the interview, Ames made many false statements about his interactions with [prosecutors]." CP 1597, 1620. The disclosure of the Report as PIE was thus entirely appropriate.

Ames also continually confuses PIE with actual impeachment evidence. The Office did not characterize Ames as dishonest or represent that the evidence was proper impeachment, it merely disclosed, pursuant to settled constitutional requirements, information that a criminal defendant might attempt to offer as impeachment.[3]

[3] Throughout Ames' reply brief, he contends that the Office must basically weigh his concerns about PIE disclosure. That is entirely contrary to *Brady* and its progeny that a prosecutor must disclose *any potential* impeachment evidence to a criminal defendant as a matter of constitutional law.

Ames also seemingly attempts to claim that Department Internal Affairs ("IA") and/or his employment contract essentially precludes the Office's dissemination of PIE, or mandates additional due process. Reply br. at 5, 12-13, 17. *See also,* CP 1014, 1017. First, this is wrong in that he is owed no due process when it comes to PIE disclosures and, at most, he is provided an opportunity to provide additional information by County policy. CP 44. Ames availed himself of that opportunity. CP 1592. *Brady*[4] and its progeny have decided time and again that police officers' constitutional rights are not at issue but rather it is a criminal defendant's constitutional rights that are at issue, as the trial court recognized. CP 774. ("The rights of criminal defendants are central to the matter.") Second, if Ames wanted IA involved, then he should have so involved them. If IA is not involved, it is because he did not go to IA. Further, Ames has failed to articulate how a criminal defendant's right to PIE can be subjugated to an IA determination in any event. The Office had no duty to run its PIE decision through IA, nor did it have the ability to compel an independent law enforcement agency to initiate an IA investigation.[5]

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[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

[5] An IA investigation is irrelevant to a prosecutor's PIE decision. For example, a report questioning a witness' care in the laboratory and tendency to shade testimony in favor of the government constituted PIE even in the absence of any final IA administrative decision about the witness. *United States v. Olsen,* 704 F.3d 1172, 1181-82 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2711 (2014).

Ames attempts to claim WAPA's PIE policy mandates an IA investigation. Reply br. at 17. That is not accurate. *See* CP 46-52. If an IA proceeding found no PIE, then the Office might not need to disclose it -- though it would not be prevented from doing so if it still believed it had a duty to disclose. The prosecutor's PIE decision operates *independently* from IA investigations and may result in dissemination of information even if the officer is "cleared" by the IA procedures of the law enforcement agency. There was no IA determination here that Ames is truthful, however, and the Office had a duty to disclose.

This Court should disregard Ames' attempt to restate the facts here.

C. ARGUMENT

Given the confusing organization of Ames' reply/cross-respondent brief, it is necessary to restate his arguments in order to understand precisely what issues are addressed in it, and the scope of the County's reply brief on cross-review. First, Ames' reply/response brief completes the discussion of the propriety of the trial court's dismissal of Ames' complaint on CR 12(b)(6) grounds. Second, Ames has apparently conceded that he is not entitled to fees under RCW 4.24.525(6)(b).[6] Third,

[6] Although Ames noted vaguely in his opening brief at 48 an entitlement to an award of fees, the County responded in its brief at 46-50 that Ames failed to timely seek review of the trial court's decision to deny him fees. Ames *nowhere* responds in his reply/response to this argument, thereby conceding it. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

Ames responded to the County's cross-review arguments on the application of the anti-SLAPP statute and CR 11, issues to which the County will reply here. Finally, Ames denies that the County is entitled to its fees on appeal, a further issue to which the County will reply in this brief.

(1) The Trial Court Erred in Denying the County's Motion to Strike Ames' Petition under RCW 4.24.525(4)

Ames contends that the County does not qualify for relief under the anti-SLAPP statute or, alternatively, that the statute is inapplicable to him because it is unconstitutional. Reply br. at 30-40. In so doing, Ames cannot distinguish the authorities set forth in the County's brief at 38-50 and instead resorts to arguments rejected in *numerous* cases that Ames declines to appropriately distinguish.[7]

First, Ames begins his argument with a general policy statement regarding the anti-SLAPP statute, claiming it violates his free speech rights and those of his attorney, and decrying its "chilling effect on law enforcement and advocacy." Reply br. at 30-31. Ames fails to comprehend his own actions and the reason for the procedure in RCW

Ames repeats a general request for fees on appeal in his reply brief at 48, but, in the absence of any authority for such a request, and a separate section of his brief arguing the issue, this Court should deny the request. RAP 18.1(a); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998).

[7] The failure to address and distinguish controlling authority in a brief implicates RPC 3.3(a) relating to an attorney's obligation of candor with a tribunal.

4.24.525(4). *Ames,* not the County, filed the present action designed to prevent the Office from carrying out its constitutionally required duties. *Ames* sought to prevent the County, through the Office, from communicating with participants in the court system, *i.e.* criminal defendants and their counsel. RCW 4.24.525(4) was *intended* by the Legislature to chill or prevent the very kind of action brought by Ames. Laws of 2010, ch. 118, § 1: "The legislature finds and declares that: (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances; ... and (e) An expedited judicial review would avoid the potential for abuse in these cases." *See Spratt v. Toft*, 180 Wn. App. 620, 629-30, 324 P.3d 707 (2014) (statutory intent is to prevent the chilling of legitimate right to free speech).

Second, Ames fails to analyze the statutory language of RCW 4.24.525(4) providing that the County is subject to its protections. RCW 4.24.525(4) authorizes a "party" to file a special motion to strike any claim that is based on "an action involving public participation and petition" as defined in RCW 4.24.525(2). RCW 4.24.525(1)(c) defines a "moving party" as a "person" filing an RCW 4.24.525(4) motion. A person may be a corporation or "any other legal or commercial entity." RCW

4.24.525(1)(e). Obviously, the County is a municipal corporation and a "legal entity." RCW 36.01.010.

Indeed, as Ames acknowledges, reply br. at 34, the Court of Appeals has held that a government qualifies as a "moving party" and may bring a motion under RCW 4.24.525(4). *Henne v. City of Yakima*, 177 Wn. App. 583, 313 P.3d 1188 (2013), *review granted*, 179 Wn.2d 1022 (2014).[8] Unacknowledged by Ames, however, are persuasive California authorities[9] cited by the County in its opening brief at 39-40 that support the holding in *Henne*. Ames chooses not to address, for example, *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108 (1996) that holds a government speaker may bring the special motion to strike.

Moreover, the communication of PIE represents an action involving public participation and petition because PIE is a written statement or other document submitted in an judicial proceeding (RCW 4.24.525(2)(a)), or such a statement or document submitted in connection

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[8] In *Henne*, after a police officer sued the city for its alleged retaliatory use of internal investigations, the city filed a RCW 4.24.525(4) anti-SLAPP motion. The Court of Appeals concluded that the city was a legal entity within the meaning of RCW 4.24.525(1)(e) qualifying it as an entity eligible to file an anti-SLAPP motion. 177 Wn. App. at 589. The court implicitly concluded that the city's conduct of internal investigations implicated First Amendment-protected communications. *Id.* at 587. Unlike the present case, *Henne* did not involve judicial communications which fall squarely within RCW 4.24.525(2)(a, b).

[9] California cases are persuasive authorities for the interpretation of Washington's anti-SLAPP law. *Aronson v. Dog Eat Dog Films*, 738 F. Supp.2d 1104, 1110 (W.D. Wash. 2010).

with an issue under consideration in a judicial proceeding (RCW 4.24.525(2)(b)).

Ames hopes to evade the plain language of RCW 4.24.525 by citing to authorities that are readily distinguishable.[10] In *Segaline v. State, Dep't of Labor & Indus.*, 169 Wn.2d 467, 238 P.3d 1107 (2010), this Court interpreted the predecessor statute to RCW 4.24.525, a statute that did not define "person" in RCW 4.24.510. The Court concluded a government agency was not a person eligible to invoke the provisions of RCW 4.24.510 in reporting information to another government agency. In contrast, the definitions in RCW 4.24.525 are specific, contemplating a *broader definition* of a "person" than RCW 4.24.510, as the trial court noted. CP 745-46.

Ames also cites *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L.Ed.2d 689 (2006), a 42 U.S.C. § 1983 case, that addressed whether public employees making statements as part of their official duties are cloaked with First Amendment protections afforded citizens generally. Ames fails to articulate how *Garcetti* is relevant to the specific

[10] Ames also cites this Court to amicus briefing in *Henne*. Reply br. at 34-35. It is improper under this Court's decisions to incorporate by reference arguments contained in a party's own trial court or Court of Appeals briefing, *State v. Gamble*, 168 Wn.2d 161, 180-81, 225 P.3d 973 (2010) (Court of Appeals briefs, petition for review); *In re Guardianship of Lamb*, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011) (trial court briefs). It is obviously even more improper to reference *another party's* pleadings in *another* case.

definitions in RCW 4.24.525, as interpreted by *Henne* and California cases, authorities studiously ignored by Ames.

In sum, under the plain language[11] of RCW 4.24.525, the County was entitled to relief under that statute to defeat Ames' efforts to chill its judicially-related communications as to PIE pertaining to Ames.

Third, Ames also apparently contends that there is clear and convincing evidence that he will prevail on his claims, and in so doing he repeats his false assertions regarding DPA Richmond, and offers new falsehoods as to the Office's conduct. Reply br. at 31-32. This contention defies logic and ignores the facts here that Ames' claims for a writ of prohibition and declaratory relief were dismissed below, a decision that should be affirmed on appeal. Further, the trial court never stated or implied that Ames would prevail on his claims anywhere in its anti-SLAPP ruling. CP 739-51.

Fourth, apparently recognizing that he lacks a legitimate argument on the basis of the statutory language of RCW 4.24.525 and appropriate

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[11] The touchstone to this Court's statutory interpretation principles is effectuating the intent of the Legislature as expressed in the plain language of the statute it enacts. *State Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

authorities addressing it, Ames resorts to arguments that the statute is unconstitutional.[12]

Even if Ames' constitutional arguments were properly before this Court, they are baseless. Ames' argument that RCW 4.24.525 violates article I, § 10 of our Constitution, reply br. at 31-32, has specifically been *rejected* in *Spratt*, 180 Wn. App. at 633-36, and *Davis v. Cox*, 180 Wn. App. 514, 542-46, 325 P.3d 255 (2014).[13] Plainly, not all discovery restrictions violate article I, § 10. *In re Estate of Fitzgerald*, 172 Wn. App. 437, 449-50 n.8, 294 P.3d 720 (2012), *review denied*, 177 Wn.2d 1012 (2013) (upholding TEDRA discovery restrictions).

Ames also contends that RCW 4.24.525 violates article II, § 37. Reply br. at 38-41. Ames attempts to distinguish *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996). *Thorne* was abrogated *on other grounds, by Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), a case addressing the jury's role in imposing an

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[12] Ames has not notified the Attorney General of his constitutional challenge to RCW 4.24.525 as required by RCW 7.24.110. The State, represented by the Attorney General, is a necessary party to any action challenging the constitutionality of a statute. The failure to notify the Attorney General of a constitutional challenge deprives this Court of jurisdiction to address Ames' argument. *Kendall v. Douglas, Grant, Lincoln and Okanogan Counties Public Hosp. Dist. No. 6*, 118 Wn.2d 1, 11-12, 820 P.2d 497 (1991); *Parr v. City of Seattle*, 197 Wash. 53, 56, 84 P.2d 375 (1938).

Moreover, the trial court ruled against Ames on this question. CP 746. Ames did not cross-appeal this question.

[13] Ames acknowledges these cases are contrary to his position, reply br. at 34, but his attempt to distinguish them, *id.* at 34-35, is unintelligible.

exceptional sentence, but its reasoning on article II, § 37 remains valid. Indeed, subsequent cases have repeatedly adopted the *Thorne* court's analysis of whether a statute is "complete in itself." *See, e.g., Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 245-52, 11 P.3d 762 (2000); *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 631, 62 P.3d 470 (2003); *Wash. Citizen Action v. Office of Insur. Comm'r*, 94 Wn. App. 64, 69, 971 P.2d 527, *review denied*, 138 Wn.2d 1004 (1999). Merely because the enactment incidentally affects other legislation on the same subject does not necessitate setting out each of those statutes in full. *Id.*

Ames often confuses the requirement of article II, § 37 that a legislative bill may not merely reference a statute in amending it, but must set forth the amended statutory section completely in the bill, with the requirement of article II, § 19 that a title of a bill must appropriately reflect its contents.

Simply put, as in *Thorne* regarding all criminal statutes affected by a three strikes law, in enacting RCW 4.24.525, the Legislature was not obligated to amend every statute providing for a cause of action, such as those providing for a writ of prohibition or declaratory relief, that might

conceivably be affected by RCW 4.24.525(4)'s special motion procedure.[14]

Ames' argument on the title to SB 6395, the bill introduced to enact RCW 4.24.525, appears to be that because no specific reference is made to RCW 7.24 or writs of prohibition, RCW 4.24.525 is unconstitutional. Reply br. at 38-41. Numerous cases have held that a title to a bill need not be an index, a recitation of the contents of every section of the bill. *Retired Public Employees Council of Wash.*, 148 Wn.2d at 628. General titles are permissible, and may cover all aspects of the legislation germane to the general subject stated in the title. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 655-56, 278 P.3d 632 (2012). The title to SB 6395 was more than sufficiently specific to allow the public and legislators to generally understand its contents. It did not need to reference declaratory actions, writs of prohibitions, or the penalties under RCW 4.24.525(6), as Ames seems to suggest.

Fifth, Ames contends that RCW 4.24.525(3) bars the County's action. Reply br. at 40. Ames again *ignores* authority cited by the County in its opening brief at 43-44, again thereby *conceding* its application. This

[14] Ames' citation of *City of Seattle v. Egan*, 179 Wn. App. 333, 317 P.3d 568 (2014) is simply mystifying. The Court of Appeals there held that RCW 4.24.525 did not apply because a PRA request did not meet any of the criteria for public participation set forth in RCW 4.24.525(2).

case does not pertain to a prosecutor bringing criminal charges, the reason for RCW 4.24.525(3), but rather relates to the communication of PIE materials, as the trial court correctly noted. CP 745.[15]

Finally, Ames asserts that the County was not entitled to appeal as of right in connection with the trial court's RCW 4.24.525 decision. Reply br. at 40-41. Ames' argument is frivolous. He contends RAP 2.2 is confined to enumerated decisions. He has *no answer* to the extensive authorities cited by the County in its brief at 47-48 that decisions on RCW 4.24.525(4) motions are reviewed as of right, and similarly has *no response* to the fact he *waived* this contention. County br. at 11 n.10.

Nothing offered in Ames' reply/response should deter this Court from reversing the trial court's ruling on the County's anti-SLAPP motion.

(2) The Trial Court Abused Its Discretion in Reconsidering and Revising Its CR 11 Decision Involving Ames' Filing of a Frivolous Petition

Ames pays scant attention to the full array of reasons why his filing here was sanctionable, County br. at 50-63, focusing *solely* on the illogical contention that he could argue *both* that his petition was supported by existing Washington law and was a good faith argument for a *change* in Washington law on writs of prohibition and declaratory relief under RCW 7.24. Reply br. at 41-44. The trial court here properly

[15] Ames did not cross-appeal from the trial court's decision, foreclosing review of that issue.

concluded initially that Ames' petition was not supported by existing Washington law, as research by a reasonably competent attorney would have revealed his theories for recovery were baseless. CP 1198-1206.[16] The trial court, however, mistakenly reversed itself on Ames' belated contention, supported by improperly submitted declarations, that he was seeking a good faith extension or change in Washington law. CP 2269-76.[17]

Ames has *no answer* to the fact that his petition was not supported by existing Washington law on writs of prohibition or declaratory relief. County br. at 53-55.[18] He cannot demonstrate that the Office in *George* acted outside its jurisdiction in disclosing PIE as to Ames where the constitutional disclosure mandate in *Brady* is so powerful.[19] A writ of

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[16] RPC 3.1 makes clear that a lawyer shall not bring an action unless there is a basis in law and fact for doing so that is not frivolous. As part of that obligation, a lawyer has an obligation to carefully weigh and assess the legal arguments for the action. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 302-03, 868 P.2d 835 (1994) (Court indicated that failure to winnow arguments in 387-page petition with 430-page appendix indicated counsel had "thrown the chaff in with the wheat," ignoring the duty imposed by RPC 3.1).

[17] There is considerable irony in the fact that Ames' entire argument in his reply brief on his petition is aimed at the proposition that existing Washington law supports his view on writs of prohibition and declaratory relief. He does not address in any fashion how his petition represents a good faith extension or change in this Court's well-developed jurisprudence on writs of prohibition or declaratory relief.

[18] In failing to answer the argument, Ames *concedes* it. *State v. Ward,* 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

[19] This is particularly true where his counsel did not object to the release of the PIE in *George*.

prohibition was not available to him. Similarly, he cannot demonstrate that he had standing in a declaratory judgment action[20] to pursue the amorphous relief he requested that he be deemed truthful in all future cases. The trial court plainly understood and addressed these failures in its initial CR 11 ruling. CP 1198-1206.

But Ames' argument below to evade sanctions morphed into an argument that he was seeking a good faith extension or change in Washington law on writs of prohibition or declaratory relief. He was, and is, utterly imprecise on how Washington courts would abandon the focus on *jurisdiction* that is the basis for a writ of prohibition, particularly given the *broad* discretion afforded prosecutors on PIE disclosures. *Skagit County Public Hosp. Dist. No. 104 v. Skagit County Public Hosp. Dist. No. 1,* 177 Wn.2d 718, 722, 305 P.3d 1079 (2013) (writ of prohibition not available unless party acted without or in excess of jurisdiction); *Broam v. Bogan,* 320 F.3d 1023, 1030 (9th Cir. 2003) (prosecutor's absolute discretion on PIE). Similarly, he is equally unclear as to how Washington courts would "extend" or "change" the clear-cut standing and justiciability principles this Court has articulated forcefully in cases like *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). The only

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[20] Ames now tacitly concedes that his petition was procedurally defective in failing to name the State as the proper party, requesting that this Court, in effect, bail him out yet again for his failure to properly plead his action. Reply br. at 44-45.

argument offered by Ames was a "Hail Mary" argument, unanchored in any *legal* analysis, based on improperly submitted declarations.

Ames now contends that consideration of these declarations was within the trial court's discretion. Reply br. at 45-46. Even if this was the proper standard of review, and it is not,[21] the trial court's admission of declarations submitted contrary to court rule and its own order would constitute an abuse of discretion. *Ames does not anywhere deny that he submitted the declarations in violation of the trial court's own order and the court rules.* The declarations were not based on the witnesses' personal knowledge and were simply legal opinions in most instances. County br. at 65-67. Now, as below, Ames cannot offer a good faith reason why he or his counsel could not have timely acquired and submitted his belated supporting declarations. *Id.* at 64-65.[22]

Finally, on the sole argument on the merits that he chooses to offer, Ames ignores the Seventh and Eleventh Circuit CR 11 decisions cited in

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[21] Ames cites to *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) and baldly asserts, yet again without any legal analysis, that the admissibility of declarations submitted in connection with a dispositive motion is reviewed for an abuse of discretion. Reply br. at 45. *Folsom* holds the standard of review is *de novo* for consideration of declarations associated with a summary judgment decision. *Id.* at 663. The issue of sanctions was resolved below in motions proceedings akin to summary judgment.

[22] Improperly supporting his appellate argument, Ames yet again relies on an inadmissible hearsay newspaper article, as if it were properly part of the record. The trial court erred in considering that article as it was hearsay and inadmissible. County br. at 66 n.56. He also offers, with zero record support, his rank "suspicion" concerning the motive of an attorney who withdrew his declaration. Reply br. at 46 n.19.

the County's brief at 56 that highlight the utter illogic in contending simultaneously that a position is supported by *existing law* and simultaneously by an extension or change in existing law. Those Circuits require an attorney defending a CR 11 allegation to indicate the basis upon which the attorney is doing so, whether the arguments are supported by *existing law* or a good faith extension or *change in the law*. Ames continues to conflate his reasons why his "arguments" are not frivolous.

Ames mischaracterizes the Ninth Circuit's decision in *Golden Eagle Distribution Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986). The Ninth Circuit indicated a lawyer need not identify which prong of CR 11 applied in a case where the district court found that the attorney had a good faith argument for an extension of the law. *Id.* at 1539. The district court imposed sanctions because the lawyer did not identify precisely the CR 11 basis on which he claimed his arguments were non-frivolous. But the Ninth Circuit did not condone slipshod practice where an attorney claims that his/her position is supported both by existing law and a change in the law:

> In even a close case, we think it extremely unlikely that a judge, who has already decided that the law is not as a lawyer argued it, will also decide that the loser's position was warranted by existing law. Attorneys who adopt an aggressive posture risk more than the loss of the motion if the district court decides that their argument is for an extension of the law which it declines to make. What is at

> stake is often not merely the monetary sanction but the lawyer's reputation.

Id. at 1540. Here, of course, Ames' position on writs of prohibition and declaratory relief is supported neither by existing law nor a good faith change in it.

In sum, the trial court's initial CR 11 ruling got it right. Ames' petition was not supported by existing Washington law on writs of prohibition and declaratory judgment actions under RCW 7.24. Ames still has not shown how his petition was proper. The trial court, however, got it wrong when it concluded that Ames had articulated a good faith basis for a change or extension of Washington law so as to avoid CR 11 sanctions. Ames still has not documented how the Office lacked *jurisdiction* so as to justify a writ of prohibition, or how he had standing to pursue the broad relief he seeks in a declaratory action.[23]

This Court should reverse the trial court's sanctions ruling.[24]

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[23] As the County noted in its brief at 61-63, Ames' conduct was also sanctionable because it was part of his vexatious conduct toward the Office and the Department. Ames fails to address this alternate basis for CR 11 sanctions in his reply brief. This argument is supported by this Court's recent opinion in *In Re Disciplinary Proceeding Against Jones*, ___ Wn.2d ___, 338 P.3d 842 (2014) in which the Court disbarred an attorney for, among other actions, filing repeated and vexatious motions and actions that were frivolous. *See also, In re Disciplinary Proceeding Against Sanai*, 177 Wn.2d 743, 302 P.3d 864 (2013) (same).

[24] Ames asserts, in passing, that since 2005, the availability of CR 11 sanctions "diminished substantially" due to the addition of the good faith extension or change in the law aspect of the rule. Reply br. at 43-44. This *naked* claim without citation of authority should be disregarded. RAP 10.3(a)(6) (requiring citation of authority in argument); *Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). It is *nowhere*

(3) The County Is Entitled to Its Fees on Appeal

Ames gives scant attention in his reply/response to the County's entitlement to fees on appeal. Reply br. at 46-47. Ames does not in any way distinguish the authorities set forth in the County's opening brief at 67-69.

Ames thus *concedes* that if the County is correct regarding its anti-SLAPP arguments, it is entitled to its fees on appeal pursuant to RCW 4.24.525(6)(a). *Bevan v. Meyers,* ___ Wn. App. ___, 334 P.3d 39, 45-46 (2014).

With regard to his frivolous appeal, Ames also does not in any way distinguish the authorities pertaining to a frivolous appeal under RAP 18.9(a). Here, for the reasons articulated *supra*, Ames' appeal of the CR 12(b)(6) issue fails the test set forth in the *Streater v. White,* 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). Ames' petition had no chance of success under well-developed principles for writs of prohibition and declaratory actions. Moreover, Ames used his petition as a blunt weapon for his vexatious purposes against the Office and the Department.

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supported in the official comments to the rule change. Rather, the purpose of the change was to conform Washington's CR 11 to Fed. R. Civ. P. 11. Karl B. Tegland, 3A *Wash. Practice*, at 262. Ames' conduct was sanctionable under the state or federal rule.

Finally, Ames has filed a motion to strike a portion of the County's appendix in its brief. Reply br. at 47. This motion is yet another example of Ames' frivolous conduct on appeal. First, the chart in the appendix to which Ames refers is a compilation of Ames' misstatements of "fact," with the County's citations to the record, refuting them. The chart was for the Court's convenience.

More critically, the County specifically filed a motion for an overlength brief. In that motion, the County specifically sought the Court's permission to submit an overlength brief "plus appendices" (including the chart about which Ames complains). The Court granted the motion. This satisfied RAP 10.3(a)(8).

The County is entitled to an award of fees on appeal.

D. CONCLUSION

Nothing presented in Ames' reply/response should dissuade this Court from concluding that his petition regarding the Office's decision to provide PIE materials to defense counsel in *George* and other cases was baseless given the broad constitutional obligation of the Office to provide such materials to criminal defendants and their counsel. The trial court correctly dismissed his petition under CR 12(b)(6).

The Court should also have granted the County's RCW 4.24.525(4) motion to strike, and should have awarded it the statutory penalties and

fees under RCW 4.24.525(6). Finally, the trial court was initially correct in determining that Ames' petition was frivolous under CR 11 and abused its discretion in reconsidering that decision.

This Court should affirm the trial court's dismissal of Ames' complaint. It should remand the case to the trial court for entry of RCW 4.24.525(6) penalties, and/or sanctions under CR 11. Costs on appeal, including reasonable attorney fees, should be awarded to the County.

DATED this 2d day of January, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of Reply Brief of Pierce County on Cross-Appeal in Supreme Court Cause No. 89884-7 to the following:

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Original Emailed for filing with:

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

DATED: January 2nd, 2015, at Seattle, Washington.

Matt J. Albers

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick

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Subject: Michael Ames v. Pierce County, Supreme Court Cause #89884-7

Good afternoon,

Attached please find the following document for filing with the Court:

Document to be filed: Reply Brief of Pierce County on Cross-Appeal
Case Name: Michael Ames v. Pierce County
Case Cause Number: 89884-7
Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973
Contact information: Matt J. Albers, (206) 574-6661, matt@tal-fitzlaw.com

If you have any questions, please feel free to contact me. Thank you!

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