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No. 63876-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Russell Phillips, *Appellant/Cross Respondent*

v.

Valley Communications, *Respondent/Cross Appellant*

BRIEF OF RESPONDENT/CROSS-APPELLANT

Eileen Lawrence, WSBA# 11885
DAVIS GRIMM PAYNE & MARRA
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
Phone: (206) 447-0182
Fax: (206) 622-9927
Attorney for Respondent/Cross Appellant

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I. INTRODUCTION

A. What Appellant Phillips has (and has not) appealed.

This is an appeal of the dismissal of Phillip's second litigation of issues and claims already adjudicated in a prior case. Dismissal was based on the principles of res judicata and collateral estoppel, as well as the application of the statute of limitations. **CP-986-987**. This is not an appeal of the original case. It is not an appeal of the underlying issues in his original cause of action (King County Superior Court, Case No. 08-2-04291-0 KNT). The time for appealing the first case passed in 2008, long before the second litigation was filed. Allegations about underlying issues and any disagreements Phillips may have with the rulings in the first case are irrelevant to this appeal and cannot be litigated here.

Phillips' first case against Valley Com challenged Valley Com's handling of Phillips' multiple public record requests. During the litigation he continued to file public record requests--often for the same documents that were being litigated--and then moved the Court for sanctions based on Valley Com's responses. King County Superior Court Judge Yu held hearings on several occasions, reviewed the materials *in camera* and entered several final, appealable orders on withholdings, redactions, sanctions, penalties, and other motions. **CP-415-422, 688-689, 793-795,**

797, 839-843, 845-846, 847-848, 909 and 574-576. She entered her final decision in November 2008. Neither party appealed.

Several months later in April 2009, Phillips filed a second show cause motion (the present case), tying his arguments and requests for penalties back to the previously adjudicated requests and documents. Valley Com filed a response and motion to dismiss. **CP-524- 574.** King County Superior Court Judge White reviewed the briefing and held oral argument on the matter. Phillips admitted he could have appealed the original case but decided to file a new lawsuit instead. **RP-19-22.** Judge White properly dismissed the case, ruling that the matter was barred by *res judicata*, collateral estoppel, and the statute of limitations. **CP-986-988.**

Phillips appealed the order to dismiss. **CP-989-993.** He did not appeal any other decision, although Judge White entered several other orders, including an award of CR 11 sanctions against Phillips in November 2009. **CP-1145-1155.** The sanctions decision was never appealed. Valley Com asks this Court to affirm the trial court's dismissal of the case. It also requests costs, fees and expenses pursuant to RAP 14 and RAP 18.1 and RAP 18.9 for Phillips' bringing a frivolous appeal and failing to comply with the Rules of Appellate Procedure.

B. What Respondent Valley Com has appealed

Valley Com has cross-appealed a denial of injunctive relief. Along with its motion to dismiss the second litigation, Valley Com had requested a protective order to prevent Phillips from continuing to use the public disclosure laws to harass and annoy his former employer and his adversaries in litigation or to undermine vital governmental functions by needlessly using up scarce agency resources and increasing taxpayer costs. **CP-1068-1081; CP-1114-1118.** The requested protective order was designed to preserve the respect for judicial finality and the attendant peace of mind which should have been derived from the conclusion of the first litigation. The request was narrowly tailored to avoid infringing upon any right to access additional non-exempt documents under the Public Records Act. Judge White found merit in the agency's request. **RP-83.** Nevertheless, he denied the motion, indicating that he believed the Court did not have the legal authority under the Public Records Act to grant the specific type of relief requested. **CP-1094-1096; RP-61-62, 81-82.**

Valley Com believes current case law interpretation errs in limiting the statutory language of the injunctive relief section of the Public Records Act ("PRA") to a procedural method for enjoining already exempt documents. It seeks in good faith to modify or overturn this interpretation. Valley Com also believes that the Judge erred in believing that his

equitable and statutory authority to exert proper controls on litigation is unreasonably limited by the interpretation of the public records statute found in *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994). Should Valley Com prevail on its cross appeal, it hereby renews its request for a protective order prohibiting Phillips from requesting documents which have already been provided to him or are otherwise in his possession or which were the subject of this or his prior litigation filed against Valley Com, or from engaging in further litigation over the documents or the requests subject to his first two court actions.

II. ASSIGNMENT OF ERRORS FOR CROSS-APPEAL

A. Cross-appeal Assignments of Error

Cross Appeal Assignment of Error No.1. The Court erred when it denied Valley Com's request for injunctive relief after finding merit in the request.

Cross Appeal Assignment of Error No.2. The Court erred in limiting its authority to apply injunctive relief to a narrow interpretation of the Public Record Act under *PAWS*.

B. Issues Pertaining to Cross-Appeal Assignments of Error.

- 1) Did Judge White err in denying injunctive relief after finding the request had merit?

- 2) Did Judge White err in concluding he did not have authority to enjoin future requests for or future litigation over the same documents and issues?

III. COUNTER-STATEMENT OF THE CASE¹

A. Phillips files his first public record lawsuit

Beginning in December 2006, Appellant Russ Phillips began filing public records requests with his former employer, Respondent Valley Communications, a 9-1-1 call distribution center (“Valley Com”). **CP-612, ll.6; 27-33**. Some of these requests were extremely broad in nature, asking for “any and all” documents which merely referenced a particular person or incident. **CP-30**. These requests, and all subsequent requests, related in some manner to Phillips’ or his partner’s employment at Valley

¹ Valley Com strenuously disputes Phillips’ depiction of the facts. It asserts that it has fully complied with the law in responding to all of his numerous and duplicative public record requests. It denies all claims or implications of wrongdoing, either on its part or on the part of its attorneys or other agents. Page constraints limit a detailed refutation of his irrelevant and misleading allegations. A more accurate explanation of the facts and of the substantive arguments can be found at: **CP-150-152 and 524-571**.

Many sentences in Phillips’ statement of the case are unsupported by citations to the record. Phillips continues his attack on Valley Com’s legal counsel, personalizing arguments in pleadings or claiming that statements in exhibits submitted by him were made to the Court by Valley Com’s counsel *Appeal Brief p. 14-15, 24*. His allegations of misconduct were found to have no factual basis and should be disregarded. **CP -909, 574**. Courts will not consider on appeal statements not supported by the record. RAP 10.3(5). *Sherry v. Financial Indem. Co.* 160 Wn.2d 611, nt. 1, 160 P.3d 31 (2007). Phillips also cites to his prior declaration, **CP-185-269**, which the Court ruled contained inadmissible hearsay, opinion testimony, irrelevant and argumentative or conclusory statements and struck the inadmissible portions (except for the legal argument) from his declaration and from the pleadings. **RP 77-78**. Phillips did not appeal that order and cannot now rely on the struck portions to support his case. Finally, as to any issues decided by Judge Yu in Phillips’ first cause of action, he opted not to appeal these decisions and cannot re-litigate these issues here.

Com and the personnel files of management employees who Phillips challenged. **CP-575 ll.6, RP-22-24.** While these records requests were pending, Phillips began changing the scope of the requests. **CP-613-616, 629.** Over the next several months he filed more requests and follow up communication, to which Valley Com responded. **CP-27-33,34,36-37,629,38-40,43-44,41,45, 46-47, 48-49,373, 51,52-53,55,633,634,636,56-58,638,639-640.** Many duplicated his previous requests, although sometimes his requests were phrased differently. **CP-616.** Often his requests were for “clarification” of prior responses the agency provided, rather than for an identifiable record. **CP-616.²** Responsive documents often involved sensitive information, implicating, among other concerns, an employee’s right to privacy, attorney-client privilege, or security issues. **CP-612.** Valley Com made a good faith effort to respond to Phillips’ often confusing and consistently voluminous requests, spending considerable time and effort locating, retrieving, and reviewing potentially responsive documents **CP-575 ll. 7-8, CP-612-616, 624-625.**

In February 2008, Phillips filed a show cause motion in King County Superior Court, Case No.08-2-04291-0 KNT (the “2008 case”) against Valley Com. **CP-577-578.** Along with extraneous and

² For example, Phillips wanted to know what documents a witness who had signed an earlier declaration had been referring to. **CP-852-853; CP-664.** He made this request for essentially witness testimony, rather than an identifiable document, after that employee left Valley Com employment.

unsupported accusations about Valley Com and its agents, Phillips challenged Valley Com's responsiveness to his numerous public record requests. **CP-577-609, 1158-1171**³. Throughout the litigation which lasted until November 2008 and included several hearings and oral argument, he had many more opportunities to explain all bases for his complaint.⁴ **CP-298, 415, 527-532, 574-575, 1146 #4**. In response to an initial hearing to narrow and clarify what was at issue, Phillips provided pages of "clarification," which explicitly discussed each public record request he had made from December 2006 through August 2007. **CP-691-742**. In the following months, he submitted an additional declaration; further "clarification" of his cause of action; a motion for reconsideration and a motion to amend his complaint. **CP-744-763,765-791,799-825, 827-836**. Among his many objections, he complained about the lack of a withholding index instead of the narrative explanation of exemptions that Valley Com had relied on. **CP-746 ll.17, 746-748,768,773,776,804**. He challenged all withheld documents, including arguing the attorney-client privilege did not apply. **CP-744, ll.17, 727-728, 753 #5, 756 #2 and #3**. He specifically raised an objection about the amount of time it had taken

³ Valley Com has moved to supplement the record on appeal with pages 13-26 from Phillips's 2008 show cause motion, and with his proposed order from the 2009 case. For purposes of citing to these supplemental pages, Valley Com has used the next available clerk paper numbers. CP-1158-1171 refers in this brief to the missing pages 13-26 and CP-1172-1179 to the 2009 proposed order.

⁴ A more detailed summary of the timeline of the prior litigation can be found at **CP-527-532**.

Valley Com to locate, compile, review and redact the hundreds of records he had requested. **CP-1166, 163, 713, 746,761,803**. He also argued that an agency could not state that documents were already in his possession but must continuously search for and produce the same documents over and over again, even if those documents had already been produced or reasonably believed those documents to be in his possession (i.e., they had been filed by Phillips in the court action). **CP-597, 859**.

Valley Com provided Judge Yu with 1728 Bates-stamped pages of documents for her *in camera* review. **CP-617**. This document submission consisted primarily of copies of the documents that had been provided to Phillips in response to his many requests. Valley Com also included copies of the withheld documents believed to be exempt, originals of documents that had been released in redacted form, a few documents that had been reviewed but found to be non-responsive or which Phillips had later clarified he was no longer interested in, and miscellaneous administrative documents relating to each request search. **CP-616 –617**. The Court made an initial ruling on the exempt documents in May 2008, finding most to have been properly withheld, but requiring release of nine documents. **CP-415-422**. The Court later modified this order to allow redaction of some of the documents ordered released. **CP-793-795**. Valley Com promptly complied with the order. **CP-617, 642**. The Court

also approved Valley Com's redaction of other documents, finding "redactions were undertaken in good faith and not intended to obstruct access to public records. After reviewing hundreds of pages and undertaking numerous efforts to understand the multitude of requests made by Mr. Phillips, the court does not find that Valley Communications has responded in bad faith." **CP-688-689.**

During the litigation, Phillips continued to file public record and "clarification" requests. **CP-60, 64-65, 850, 852-853, 89-90, 93-94, 855.** His requests encompassed the same documents that were still subject to the pending litigation, including several which had been specifically addressed in the Court's order. **CP-617-618, 64-65, 68-82.** Because of their broad wording, his requests also covered pleadings and correspondence that had been exchanged between the parties during the 2008 litigation and in prior employment security litigation. **CP-618, 64-65, 68-82.** As with many of his communications, it was not always clear whether Phillips was initiating a new request or following up on an old one, seeking documents or information, or simply criticizing the value of the responses he had already received. **CP-625.** Valley Com responded to each communication, estimating a probable response time, identifying the basis for any withholding, providing any non-exempt document it located that appeared to be responsive or identifying whether the document had

been previously provided or was otherwise in his possession, citing to Bates numbers or other identifying information. **CP-61-62, 67, 68-82, 91, 86-87, 98-99, 100, 617-620.** Valley Com provided Phillips with an opportunity for input and asked him to notify Valley Com if he believed any document had been overlooked or mistakenly identified as being in his possession. **CP-70.** When Phillips requested “the opportunity to inspect every document that Valley Com is claiming to have provided me through public disclosure” in his August 24/25 request, however, Valley Com sought judicial relief from this purely duplicative and burdensome request. **CP-93, 120-138.** Valley Com informed Phillips that it was seeking a protective order and in setting its anticipated response date, it included time for the Court to first rule on its motion plus time for any appeal. **CP-99.** Following denial of the motion and within the specified timeframe, Valley Com gave Phillips copies and another opportunity to re-review all the documents he had previously received. **CP-619-621.** Phillips did not object to Valley Com’s time estimate, although he could have done so in his response to Valley Com’s motion. **CP 917-919.** All of his requests through September 2, 2008 were brought to the Court’s attention in Valley Com’s motion for injunctive relief. **CP-121-126.**

The later requests were again addressed in Phillips motion for sanctions filed in September 2008, when Phillips challenged Valley Com’s

responses to the public record/information requests he had filed during the litigation. In particular his March 18, 2008, June 20, 2008, July 30, 2008 and August 6, 2008 requests were at issue. **CP-871, 873, 875, 882, 885.** Phillips again argued he should have been given more notebooks of bates-stamped documents and indexes provided to the court for Judge Yu's *in camera* review. Judge Yu had specifically ruled that the documents and any index of exempt documents created for her review would only be provided to her and not to Phillips, since many of the documents provided to her were exempt from disclosure or partially exempt. Phillips later obtained the index of exempt documents despite the Judge's ruling by requesting this from the Clerk of the Court. **CP-859-860, 922, RP-49-51, CP-282-289.** He specifically quarreled with Valley Com's use of "in your possession" to identify records that had already been provided to him. **CP-859.** He also used his motion to continue his false accusations about Valley Com and its agents, and would later incorporate portions of his motion for sanctions into his declaration supporting his 2009 litigation and into his statement of the case in this appeal.⁵ **Compare, for example, CP-873, 223 and Appellant Brief p.18.** The Court found that there was no

⁵ Some accusations related to the inadvertent filing of a draft declaration in the prior litigation (not unlike his counsel's initial filing of a draft version of his appeal brief in the present case). **CP-570.** It was promptly corrected when discovered. **CP-430-431, 456-457, 433-441.** Valley Com's full response to his sanctions motion can be found at **CP-449-462.** Again in light of Judge Yu's ruling his allegations are unsupported by the record. **CP -909, 574.** *Sherry, supra* 160 Wn.2d 611 at nt. 1. Furthermore, Phillips did not appeal Judge Yu's ruling and cannot re-argue this issue now.

factual basis for any sanctions and twice rejected his request. **CP -909, 574.** The Court also denied Phillips' motions for reconsideration and to amend his complaint. **CP-839-843, 845-846, 847-848.** A final order was entered on November 10, 2008. **CP-574-575.** Neither party appealed.

B. Valley Com continues to make the documents available for Phillips' review⁶

Before the first case was even concluded, Phillips threatened more litigation causing Valley Com to explain the principle of *res judicata* to him. **CP-656, 658-659.** During the next several months, Phillips continued to complain about Valley Com's responses, continued to request the same (usually already produced or exempt, or non-existent) documents even though disclosure of these documents had previously been litigated. He continued to request information (testimony) rather than identifiable documents and continued his vituperative attacks upon Valley Com and its agents. **CP-620-625, 95-97, 663-664, 672-679, 681.** He identified documents by the specific Bates-stamp number which had been assigned to documents in the just completed litigation. **CP-95, 681.** Again Valley Com responded. **CP-23-24, 101, 102, 25, 103-109, 662, 111, 661.** Valley Com gave him another opportunity to re-review his complete personnel file and other documents on November 24, 2008 and again provided him with any requested copies. **CP-95-97, 23-24, 25, 620-621.** It again gave

⁶ See **CP-532-534** for more detailed account.

him any non-exempt, non-duplicate documents along with an index cross-referencing any duplicates and explaining the basis of any withholding or any redaction. **CP-103-109, 620-21.**

One request for specific Bates-stamped documents was for Bates #347-#351 which were memos from 2006, “to or from Phillips,” about his application materials. **CP-681,114-118.** These documents had originally been identified as exempt and provided for the Judge’s review in the 2008 litigation. **CP-289.** Although they had not been specifically ordered to be released, Valley Com released them to be consistent with Judge Yu’s decision about other post-hiring application information. **CP-623, II. 4-17.**

When his complaints continued, Valley Com offered to sit down with Phillips in an attempt to understand what he was seeking, allow him to review once again any non-exempt documents, to explain the basis for any exemption, and try to resolve the issues. **CP-622, II.18-25.** To this end the parties met again on February 12, 2009, but Phillips refused to look at the notebooks and documents Valley Com had available for him to re-review. **CP-623 II.18-25; CP-624 II.1-4.** He refused to be satisfied with Valley Com’s efforts and refused to meet again, demanding that all the notebooks from the prior litigation be turned over to him, regardless of the Judge’s prior rulings and the existence of any attorney-client privileged or other exemption status. **CP-624-625, 683-86.**

C. Phillips files his second case on issues that could or should have been addressed in the first litigation

In April 2009 Phillips filed a second show cause motion, *Russ Phillips v Valley Communications*, Case No. 09-02-16309-0 KNT (2009) (the present case), based on the same requests and documents that had been at issue in his prior show cause motion. **CP-1-12, 1147 #7.**⁷ He tied his request for sanctions back to his original requests from 2006 and 2007 and issues that were or could have been ruled on in the 2008 case. **CP-14-19; 1172-1179, 1147 #7.** He claimed he was entitled to sanctions for records the court previously concluded were not subject to release. **CP-550, 15, 417 II.22-23.** He pointedly declined any *in camera* review. **CP-4 II.6-8; CP 186 II.15-16.** He admitted that all except some exempt or non-existent documents were already in his possession or had been made available for his review prior to filing his second suit. **CP-14-19, 1172-1179, 1146 #3.** He also filed for an improper purpose a motion to disqualify Valley Com's attorney. **CP-1148 #8.**

Valley Com filed a response and motion to dismiss. **CP-524- 571.** It also moved to strike the inadmissible portions of Phillips' 84-page declaration, which the Court granted in part by striking hearsay, opinion

⁷ Phillips has not assigned error to any of the factual findings in Judge White's order of November 2, 2009 (nor did he ever appeal that order). Where appellant does not assign error to the trial court's findings of fact, they become verities on appeal. RAP 10.3(g), *Cowiche Canyon Conservancy v. Bosley* 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

testimony, irrelevant and argumentative or conclusory statements, but retaining legal argument, in his declaration and from the pleadings. **CP-1039-1049, RP 77-78.** Valley Com provided the Court with a chart, Exhibit 21, which showed where each item listed in his proposed order had been raised in the prior litigation. **CP-911-919.** The chart specified which requests had been completed more than one year before, thus subject to the one year statute of limitations under the PRA. *Id.* It also briefly summarized the substantive lack of any basis for his claims and referenced the section of Valley Com's brief where this was more fully discussed. *Id.*

King County Superior Court Judge White reviewed the briefing and held oral argument on the matter. **RP 1-89, CP-986-988.** Phillips admitted he could have appealed the original case but decided to file a new lawsuit instead. **RP-19-22.** He confirmed, as Judge Yu had found, that all of his requests related back to the same matter, i.e., his employment at Valley Com. **CP-575 II.6.; RP-22-24.** After spending close to an hour formulating his order, Judge White properly dismissed the case, ruling that the matter was barred by *res judicata*, collateral estoppel, and the statute of limitations. **CP-986-988, RP-79 II.22-25.**

Valley Com requested injunctive relief from Phillips' continued requests for the same documents and from further duplicative litigation.

CP-1068-1081. Phillips duplicative requests and repetitive litigation have been a drain on the agency's limited resources and a distraction from its vital purpose of providing 9-1-1 services. **CP-1119-1121, 1124-1127.**

Valley Com limited its request for a protective order to specific types of documents. **CP-1072.** Namely, that Phillips be prohibited from filing additional public record requests for the same documents which were already in Mr. Phillips possession or which previously had been litigated.⁸

CP-1072. Valley Com asked to be relieved of the burden of having to continually respond to or identify the documents or explain the basis for withholding or redactions, if those documents are already in Mr. Phillips possession or had already been the subject of current or prior litigation.

CP-1072-1077. Thus, if Phillips filed a new request that could be read to encompass documents which had already been litigated, Valley Com would only have to respond to that portion which involved newly requested records. **CP-1077.** Valley Com did not propose to prohibit Phillips from filing new requests for different records. **CP-1077.** The only exception to this was a request that Phillips be enjoined from requesting records that would clearly involve attorney-client privilege, work-product or litigation matters which would be exempt from disclosure under the law

⁸ This referred in particular to the 1728 Bates stamped documents produced in his prior public record litigation, but also to documents which had originated from him or had been served on him or provided to him in any litigation between him and Valley Com.

anyway. **CP-1078**. This portion of Valley Com's request for equitable relief was based on Phillips' continued requests for communications between Valley Com and its attorneys or individuals having a common interest in the outcome of pending or anticipated litigation involving Mr. Phillips. **CP-1078-1081**.

Judge White found merit in the request but denied the motion. **RP-83 ll 12-13, CP-1094-1096**. Based on the Court's comments and initial ruling on its motion, Valley Com submitted a motion for reconsideration on the issue of enjoining further litigation of the same requests or documents. **CP-1114-1118, RP-81-84**. Again the Court denied the motion. **CP-1144**.

Valley Com also responded to Phillips' motion for reconsideration. **CP-1128-1137**. Following denial of his motion for reconsideration, Phillips appealed the order to dismiss. **CP-989-993**. Valley Com cross-appealed the denial of injunctive relief. *Notice of Cross-Appeal*. Despite appealing the dismissal of his second case Phillips tried simultaneously to continue litigating the matter in the trial court. **CP-1148, #12 and 13**. A month after filing his notice of appeal, he submitted a "Motion for Supplemental Pleading," which sought to re-litigate the same requests and issues addressed that he had just appealed. **Id.**

Several months later in November 2009 the Court awarded CR 11 sanctions against Phillips. **CP-1145-1155**. Sanctions were based on a string of violations, including his improper motion to dismiss Valley Com's attorney and his motion for supplemental pleading. **CP-1145-1155**. The sanctions decision was never appealed.

IV. RESPONSIVE ARGUMENT

A. Standard of review

Appellant has not identified any standard of review. This is an appeal from a motion to dismiss. Dismissal was based on the legal principles of *res judicata*, collateral estoppel and statute of limitations. Questions of law are generally reviewed de novo. *Lynn v. Washington State Dept. of Labor and Industries* 130 Wn.App. 829, 125 P.3d 202 (Div 1 2005) (applying de novo standard of review and affirming dismissal based on *res judicata*); *Kuhlman v. Thomas* 78 Wn.App. 115, 120, 897 P.2d 365 (Div 1 1995). (affirming summary judgment dismissal of case on basis of *res judicata*). Factual findings, however, particularly when based on live testimony, are not disturbed on appeal when supported by substantial evidence. *Bering v. SHARE* 106 Wn.2d 212, 220-221, 721 P.2d 918 (1986). In light of the live testimony that the trial judge heard during the show cause hearing and his access to the full records of both cases, Valley Com urges the Court to give due deference to the Court's factual

findings. Under either standard, Judge White correctly applied the law and his decision to dismiss should be affirmed.

Although, as explained below, the sanctions motion is not properly before this court, a CR 11 decision is reviewed under the abuse of discretion standard. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.* 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). Judge White did not abuse his discretion in applying sanctions. Mr. Phillips failure to appeal this order makes the trial court's decision final.⁹

B. Judge White properly dismissed Mr. Phillips second litigation (Appellant's Assignment of Error #1)

To paraphrase *Kuhlman, supra*, the sole issue this Court must decide on direct appeal is whether the trial court erred, as a matter of law, by granting defendants' motion to dismiss Phillips' second litigation on the basis of res judicata, collateral estoppel and the statute of limitations. Neither the history of the first litigation nor any substantive issues in the underlying cause of action are on appeal.

1. Judge White correctly determined that the claims and issues raised in the second litigation were barred by res judicata (Appellant's issue #4) and collateral estoppel

Res judicata and collateral estoppel are fundamental principles of

⁹ The plaintiff's appeal is not a case involving the public policy surrounding the PDA, but the policies and rationale surrounding finality of litigation and the application of collateral estoppel or res judicata *to the facts*.

law which hold that once a final decision is rendered in a judicial action, it is binding upon the parties to the litigation such that the prior judicial action will bar the parties from bringing the same claims or issues in any future action. *Res judicata* bars assertion of the same claim, including all claims or issues which could have been litigated, whether or not they actually were. Collateral estoppel “prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” *Rains v. State* 100 Wn.2d 660, 665 (1983). Both doctrines are designed to create finality to litigation and respect for judicial decisions, to limit harassment and vexation of the parties, and to prevent overburdening the courts with repetitious litigation:

The law of *res judicata* ... consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.... The most purely public purpose served by *res judicata* lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results.... A second largely public purpose has been found in preserving courts against the burdens of repetitious litigation.... The judicial interest in avoiding the public burdens of repetitious litigation is allied with the interest of former litigants in avoiding the parallel private burdens. For the most part, attention is focused on the need to protect a victorious party against oppression by a[n]... adversary.... The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means of finally ending private disputes. The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain

prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of *res judicata*.

Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 30-31 (1995)(internal citations omitted). Courts “are mindful of the need for judicial finality and the potential for abuse of this revered system by those who would flood the courts with repetitive, frivolous claims which already have been adjudicated at least once.” *Matter of LaLande* 30 Wn.App. 402, 405 (1981)(rejecting petitions which sought relief similar to relief already sought in previously filed petitions). “The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.” *Marley v. Department of Labor and Industries of State*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). Judge White correctly ruled that both doctrines barred Phillips’ second litigation.

In determining whether an action is barred by *res judicata*, the prior judgment should have a “concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.” *Rains, supra* at 663.

Here the subject matter of the two actions was the same. In both actions Phillips raised the same disagreements over how Valley Com

handled or responded to his requests. These included his arguments about documents he already had in his possession, indexes and withholding logs, and the timeframe of Valley Com's responses. He dated almost every alleged "violation" of his second case back to the same requests which were part of his first litigation. Moreover, both cases involved the same core set of documents, i.e., the Bates-stamped documents, which were created as part of his first court claim. The documents requested dealt with Phillips' or his partner's employment at (or post-employment interaction with) Valley Com. All the Bates stamped documents were available for Judge Yu's *in camera* review. Any challenges to these documents could or should have been raised at that time.

The next element is also met because the causes of action were identical—a show cause motion filed in King County Superior Court under Washington's Public Records Act. The two suits involved the same right of access to public records, invoking the Public Records Act and to a lesser extent other statutes related to access to personnel or medical files. Both actions involved the same nucleus of facts and the same documents. Additionally, Phillips submitted many of the same exhibits and pleadings from the previous litigation in his second show cause motion, clearly indicating that the same evidence was being presented.

Finally there is no dispute that the parties, Phillips and Valley

Com, were the same in both the 2008 and 2009 actions. “Because the parties are identical, the quality of the persons is also identical.” *Pederson v Potter* 103 Wn.App. 62, 73 (2000). Thus, all the elements of *res judicata* were present and, as a matter of law, Judge White properly dismissed the case.

Phillips does not directly analyze these elements. The cases he cites merely show that *res judicata* does not apply where some elements are missing, such as, where a cause of action or subject matter does not have a concurrence of identity.¹⁰ These cases do not show that any required element is missing in this situation. Phillips reliance on *Spokane Research & Defense Fund* is particularly misplaced. After acknowledging that “[r]es judicata...is intended to prevent piecemeal litigation and ensure the finality of judgments,” the Court there concluded that the agency had waived its defense of *res judicata*. *Spokane Research & Defense Fund v. City of Spokane* 155 Wn.2d 89, 99-100, 117 P.3d 1117 (2005). Here Valley Com did not waive *res judicata* defense. It asserted it, briefed it, and fully analyzed it. **CP-524, 535-542, 980-984.**

To prevent piecemeal litigation, *res judicata* prohibits not only the relitigation of claims and issues that were actually litigated but also *all*

¹⁰ His “quote” about collateral estoppel allegedly cited from *Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 253 (1955) does not exist in the case. *Appeal brief* p.44. In fact that case only involved *res judicata*. He misleads the Court elsewhere by a purported quote from *Smith v. Okanogan County*, 100 Wn.App. 7, 13 which does not exist in the case. p.32.

claims and issues which could have been litigated in a prior action.

Pederson v. Potter 103 Wn.App. 62, 67 and 69 (2000). Plaintiff “may not now relitigate issues that were or could have been raised in the prior actions.” *Camer v. Seattle School Dist. No. 1* 52 Wn.App. 531, 536 (1988) (holding plaintiff’s claims were barred by *res judicata* even though one claim had not previously been brought because, at the time of prior litigation, it could have been brought). “In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined on the merits, in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties ***might have had*** their suit thus disposed of, if they had properly presented and managed their respective cases.” *Pederson* at 70.

Phillips cannot avoid the preclusive effects of *res judicata* simply by claiming that he may not have made some of his current arguments in the prior litigation or because he abandoned his arguments at some point, or the Court ruled against his motion to amend, or because each Bates-stamped document that was available for review may not have been specifically ruled on. He raised or could have raised the issues in the prior litigation. **CP- 911-919, 535-542**. Phillips could have preserved any objection to the trial court’s ruling via an appeal. He opted not to do so. Certainly any claim or issue based in any way on public disclosure

requests from 2006 or 2007 is barred. His argument that *res judicata* should not apply to requests made after the first appealable order of May 2008 has no merit because it ignores the next six months of litigation during which later requests were litigated. **CP-124-126, CP-871, 873, 875, 876-8, 1146 #4.** Tellingly his declaration submitted with the 2009 show cause motion contains verbatim portions of his 2008 sanctions motion which had incorporated later requests. **Compare CP-873, CP-223 for example.** In turn, it has been shortened into his statement of the case for appeal, despite the Judge's order striking the declaration's inadmissible content. ***Appellant Brief* p.18; RP-77-78.** His attempt to minimize the preclusive effect of his 2008 sanctions motion overlooks the fact that the first Court did reach the merits, finding, "[t]here is no factual basis to support the imposition of sanctions on Valley Communications." **CP-909.** It reiterated this in its order of November 2008. **CP-574.** In claiming that the order of May 2008 was the only final appealable order in the first case, Phillips misleadingly omits the remainder of Judge White's finding.

Judge White specifically handwrote into his findings the fact that:

Phillips also did not appeal the other final orders entered by the Court in Cause No. 08-2-04291-0 KNT: Order on (Denying) Motion to Amend Complaint 8/26/08; Order Denying Reconsideration of Order on Redacted Documents, 8/26/08; Order Denying Reconsideration of Order Sealing Documents, 8/26/08, Order on Motion for

Sanctions 8[sic]/8/08 [i.e.10/8/08] and Order on Penalties
11/10/08.

CP-1147. As Judge White recognized, later events were subject to other final orders and Phillips failed to appeal those decisions. Failure to appeal an order turns the order into a final adjudication, precluding any re-argument of the same claim. *Marley* at 537-538. Phillips admitted he could have appealed the issues instead of filing a new suit. **RP-19-22.** Phillips instead chose to file a new lawsuit.

Additionally any claim or issue related to any of the 1728 Bates-stamped documents which were already subject to an *in camera* review could have been presented to Judge Yu during the prior litigation. Any litigation regarding them, therefore, in a subsequent proceeding or in this appeal is barred. Phillip attempts to get around this fact by arguing the orders did not discuss each of the 1728 pages of records. Simply because an order may not have precisely identified a document does not mean the Court did not review it. Any limitation of Judge Yu's review was Phillips choice. He stated, "I am willing to have the court review a much smaller number of documents and rule on the redactions...It is not necessary for the court to rule on each item." **CP-748.** He could have had the court review every single document in his initial claim. He cannot now assert that his decision to limit the Court's focus in claim no. 1 entitles him to a

second litigation on the same Bates-stamped documents. If the 2008 litigation narrowed issues to a select few records, it does not entitle Mr. Phillips to relitigate his requests simply by now requesting a specific ruling on a document he did not previously challenge. By his reasoning, he could file some 1728 separate lawsuits, each one addressing a separate page or raising a slightly different objection to the exemptions or method of disclosure. The whole purpose of *res judicata* and collateral estoppel is to prevent such piecemeal and unending litigation. *Spokane Research, supra* at 99 (citing *Landry v. Luscher* 95 Wn.App. 779 (1999)); *Kuhlman v. Thomas* 78 Wn.App. 115 (1995)(affirming dismissal on basis of *res judicata* where plaintiff split cause of action for strategic reasons). As Judge Yu stated, she did review all of the documents. **CP-417 II.9-11, 418 II.9-10** (“The Court reviewed all of the documents submitted by Defendant....”), **688-689** (“After reviewing hundreds of pages and undertaking numerous efforts to understand the multitude of requests made by Mr. Phillips, the court does not find that Valley Communications has responded in bad faith.”).

Phillips’ rejection in the second litigation of a Court review of any of the documents further confirms that this was not a new dispute. Contrary to his representations on appeal, claiming that he asked the Court in the second litigation to review the records *de novo* (*Appellant brief*

p.48), Phillips clearly rejected another Court review of the documents.

CP-4 II.6-8, 186 II.15-16.¹¹

Although Phillips did not identify collateral estoppel as a separate issue on appeal, he alludes to it under his issue #4 questioning the application of res judicata. Collateral estoppel applies where (1) the issue decided in the prior adjudication is identical to the one presented in the new action, (2) there was a final judgment on the merits, (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and (4) the application of the doctrine does not work an injustice on the party against whom the doctrine is to be applied. *Rains* at 665. Many issues in the first litigation were identical to those presented in the second. The trial court issued rulings on the merits of all motions. Phillips failed to appeal any of the Court's decisions. The parties were identical and, because Phillips had an unencumbered, full and fair opportunity to litigate his claim in a neutral forum, the application of the doctrine of collateral estoppel will not work an injustice on him. *Rains* 100 Wn.2d at 666. A plaintiff can be collaterally estopped from obtaining unredacted versions of a document through public records requests after

¹¹ He stated that "an in camera review of disputed records will not be necessary as the court is being asked to determine whether the agency's overall failure to properly cite exemptions violates the statutes of the PRA, not if the specific withholdings were justified." **CP-4 II.6-8**. This is outside the scope of judicial review which under the Public Records Act is limited to reviewing the denial of a record, reasonable time estimates, and considering injunctive relief. WAC 44-14-08004(5).

previous litigation approved the redactions. *Martin v. Department of Justice* 488 F.3d 446 (2007) **CP-999-1010**. In another case, a plaintiff was collaterally estopped from relitigating the release of the same type of document which had already been determined in a prior FOIA action but for a different timeframe. *National Treasury Employees Union v. I.R.S.* 765 F.2d 1174 (1985) **CP-1011-1015**. Judge White correctly concluded that collateral estoppel applied.

Phillips analogy to an investigative report which changes its exempt status between requests is a red herring. He has identified no change in circumstance between the two litigations which might have made a disputed document lose its exempt status necessitating release under a later request. Moreover, his seeking penalties relating back to his original requests confirms that he was challenging the agency's original responses (which had clearly been litigated in the 2008 case) and not some later or hypothetical response.

Phillips has limited his argument on appeal to the five points addressed in his opening brief, specifically response time (Issue #1), the three items identified under Issue #2, i.e. (1) Bates numbered documents #347- 351; (2) the "e-mail from January 18, 2006 [sic]; (3) the numerous 'already in your possession' exemptions," *Appellant's Brief* p.42, and the explanation of exemptions (not separately identified as an issue but

discussed under Issue #4). Assignments of error not argued or discussed in an opening brief are considered abandoned even if argument on them is included in reply brief. *Dickson v. U.S. Fidelity & Guaranty Co.* 77 Wn.2d 785, 787-8, 466 P.2d 515 (1970). Accordingly, this Court is precluded from considering other issues even if Phillips raises them in his reply brief.¹² The record shows that these specific issues were raised or could have been litigated in the first show cause action and were therefore properly dismissed.

a) The response time was or could have been raised in the prior litigation (Issue #1)

Although Phillips' argument focuses on disputes over the time Valley Com took to respond to specific communications and on the actual responses, the only true issue before this Court is whether he did or could have raised the issue in the first litigation.¹³ The timeliness issue was raised in the first case on multiple occasions. **CP-1166, 713, 746,761, 803.** Valley Com addressed the issue as early as its initial answer, explaining how the law allows for multiple extensions as reasonable. WAC 44-14-04003(6). **CP-163.** The Court ultimately did not find any violation of the

¹² To the extent that Phillips may try to raise other allegations, **CP- 911-919** shows where all of the alleged violations that Phillips raised in the second litigation had or could have been raised in the original litigation.

¹³ Valley Com strenuously disputes Phillips' depiction of the facts concerning timeliness of its responses. It asserts that it has fully complied with the law in responding to all of his numerous and duplicative public record requests. A more accurate explanation of the facts and of the substantive arguments can be found at: **CP- 529-534,560-561,563-568,612-625,911-920.**

statute based on Valley Com's response times. Indeed the Court held that Valley Com did not act in bad faith in responding to Phillips confusing and voluminous public records requests, recognizing that Valley Com had complied with the law. If Phillips felt Judge Yu erred, he could have appealed but he did not.

Even if Phillips had limited the timeliness issue to his 2006 requests, he could have raised it with respect to any request addressed in the prior litigation. In particular he could have raised the question of the reasonableness of Valley Com's estimated response time to his August 24/25, 2008 request when responding to Valley Com's motion for a protective order. He clearly knew by then Valley Com was basing its estimated response time on the result of the protective order and the date of a final judgment in the case. Despite his mischaracterization of the scope of that request (which did not request all Bates stamped records but only encompassed records that had previously been provided to him through public records request **CP-93**), he does not claim that Valley Com failed to meet its estimated response date. Similarly he could have raised the timing of Valley Com's initial responses to that request and/or to his August 3/4, 2008 clarification request.¹⁴ Both were incorporated into the

¹⁴ Valley Com responded to Phillips' email received on August 25 within the five business days' response time. **CP-563**. Phillips' email received on August 4, 2008 requesting clarification of a statement in a declaration did not appear to be a new public

first litigation when they were raised in the motion for protective order.

CP-121-126. *Res judicata* properly applies to these.

Phillips' new allegation that Valley Com did not respond to his January 19 request for Bates #347-351 within five business days is also without merit. His original argument concerning Bates #347-351 referred back to his 2006 requests, not to his 2009 request. **CP-15.** A party may not raise a new issue or argument on appeal. RAP 2.5(a). Moreover, contrary to his unsupported allegations, Valley Com clearly responded to his January 19, 2009 request within five business days when it notified him on January 23 that the documents would be available at the previously arranged review date. **CP-661, 623.**

b) *The January 18, 2007 email was or could have been litigated in Phillips first court action*

In its explanation of withholdings from the 2006 requests, Valley Com identified a document dated January 18, 2007 as a potentially responsive, post-request record exempt from disclosure under attorney-client privilege and work product. **CP-40.** In so doing, Valley Com went beyond its legal obligations because documents created after a request is

record request. **CP-560-561.** Phillips admitted that he was only seeking information in his 8/24/08 (8/25/08) request. **CP-247 II. 11-12.** The Public Records Act does not apply to requests for information. WAC 44-14-04002(2)(..."An "identifiable record" is not a request for "information" in general....Public records requests are not interrogatories..."); *Smith v. Okanogan Cnty* 100 Wn.App. 7, 15 (2000) ("...these requests constitute requests for information, not public records. The requests therefore did not fall under RCW 42.17 [RCW 42.56] and the County was not required to take any action."). An agency is not required to take any action in response to requests for information.

made fall outside its scope. WAC 14-44-04004(4)(a). Judge Yu was unable to locate a document of this date in the binders provided for her *in camera* review. **CP-420 II.4-5**. In its letter and index sent to Phillips on August 1, 2008, Valley Com identified as exempt an email from Valley Com’s attorney dated January 18, 2007. Valley Com did not make a connection between it and the Court’s earlier statement about a document of the same date. **CP-618 II.7-8**.

However, Phillips was placed on notice that the document did exist. **CP-68, 77**. Disclosure was made to Phillips well before the first litigation had closed—even before Judge Yu had ruled on Phillips motions to amend his complaint or for reconsideration. **CP-839-848**. Phillips does not challenge the exempt status of the email but only quarrels with its inadvertent omission from the documents reviewed by Judge Yu. He had ample opportunity to bring this to the attention of the Court while the first litigation was still pending. He did not do so. Having failed to do so, he is precluded from raising it now. Judge White properly found this issue was barred from further litigation.

c) ***Bates stamps 347-351 were part of the documents available for the first Court’s in camera review.***

All Bates stamped documents, including Bates #347-351, were available for the Court’s *in camera* review in the first litigation. Phillips’

speculation to the contrary is unsupported by any admissible evidence and his claim that the Bates stamped documents were supposed to be served on him is contrary to law. Documents provided to a judge for *in camera* review are filed under seal and are not available to the opposing party. WAC 44-14-08004. Prior to the close of the previous case, Phillips had in his possession a list which specifically identified Bates #347-351 as containing application information exempt under RCW 42.56.250.¹⁵ **CP-289**. The Court considered the issue of application materials and ordered release of two other documents, Bates #0001-3, concluding that he was entitled to it, not under the Public Records, but under a separate statute, RCW 42.12. **CP-416 #2, #5**. The Court never ordered the release of Bates #347-351. Had Phillips felt that the Court should have ordered the release of Bates #347-351, he could have asked the Court to review these records or appealed the Court's decision. He did neither. That Valley Com later released Bates #347-351, when he specifically requested them, again because it felt that their release would be consistent with Judge Yu's prior rulings, this does not invalidate the prior litigation and its preclusive effect. Judge White correctly found *res judicata* and collateral estoppel precluded further litigation surrounding disclosure of these documents.

¹⁵ Originally identified as exempt, these documents became non-responsive when Phillips modified the scope of his request in January 2007 and never technically withheld. **CP-551-552**.

d) *Phillips previously litigated or could have litigated the identification of documents as “in your possession”*

In his appeal, Phillips has focused on Valley Com’s use of “in your possession” when, in response to his June 2008 request, Valley Com pointed out what requested documents were already available to him because he already possessed them.¹⁶ Not only did Phillips previously question Valley Com’s handling of his June 20, 2008 request in the first litigation, he specifically raised the question of whether an agency could point to documents that were already in his possession in response to a request. **CP-597, 859, 873, 875, 882.**

The Court disagreed with his argument. It held that the issue of whether or not documents should have been disclosed was moot where Phillips admittedly had the specific documents already in his possession. **CP-416, #3, #6.** The Court also ruled that Valley Com had not acted in bad faith in responding to his confusing requests. **CP-575.** Its conclusion was consistent with both logic and public records law. “[I]t would be illogical and wasteful to require an agency to produce multiple copies of

¹⁶ The documents identified as being in his possession were mostly motions, exhibits or Bates-stamped documents from the 2008 case. Others were from other litigation or were documents which had originated from Phillips. Valley Com assisted Phillips in accessing the documents by pointing out the exhibit number or other identifying information which indicated to Valley Com that the document was already available to him. **CP-71-82.** Valley Com did not deny him access to any such document, requesting that he notify it, if it was mistaken in believing a particular document was in his possession, so that it could provide him with another copy if necessary. **CP-70.** Phillips never stated he did not have the identified documents. For full discussion of the lack of any withholding based on the reference to “in your possession” see **CP-558-560.**

the exact same document." *Defenders of Wildlife v. U.S. Department of Interior* 314 F.Supp.2d 1, 10 (2004), **CP-1027**. "The court appropriately denied a cause of action to enforce redisclosure of records known by the complainant to already be in his possession." *Daines v. Spokane County* 111 Wn.App. 342, 349 (2002). (affirming dismissal of Public Records Act claims where the suit was unnecessary because plaintiff already had the documents in his possession). Judge White properly dismissed this issue.

e) The explanation of exemptions had been previously litigated (issue #4)

Several times in his original litigation, Phillips raised the issue of whether Valley Com should have provided him with a withholding log or index instead of the narrative explanation of the withholdings that it had given him.¹⁷ **CP-1164, 746 ll.17, 746-748,494,768,773,776,804, 859-860,911-912**. The Court never found any violation of the law based on this argument. He cannot now rely on a case, *Rental Housing Ass'n of Puget Sound v. City of Des Moines* 165 Wn.2d 525 (2009), which was decided after the end of the first litigation, in order to resuscitate his

¹⁷ In his arguments, Phillips often confuses the question of a withholding log or index with an imaginary index of all the records provided to him (something which did not exist and for which there is no legal requirement that Valley Com create. **CP-616 ll.20; WAC 14-44-04003(5); WAC 14-44-04004(4)(a); Smith, supra**), or with any index provided to Judge Yu, which was either served on him during the first litigation or, as *in camera* review, would have been filed under seal and not available to an opposing party or subject to release under RCW 42.56.290. WAC 44-14-08004. Again the issue of indexes was raised in the prior litigation and is substantively unsupported. **CP-859-860, 561-563**.

argument and claim. Whether the case supports his theory, or whether it is distinguishable as Valley Com contends **CP-545-547**, is immaterial. “The res judicata effect of final decisions already rendered is not affected by subsequent judicial decisions giving new interpretations to existing law. As the Washington Supreme Court has observed: ‘If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation.’” *Lynn v. Washington State Dept. of Labor and Industries* 130 Wn.App. 829, 836 (Div I 2005)(citing *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 823, 576 P.2d 62 (1978)). Judge White correctly recognized that *Des Moines* was not authority at the time Phillips litigated his requests (or at the time Valley Com had responded). **RP-19-21**. He correctly held that *res judicata* applied regardless of subsequent interpretation of the law.

In the 2008 case, Phillips had his opportunity to raise all of his allegations about Valley Com’s responses to his public records requests, most of which center on the same 1728 documents and the same personal interest Phillips had in documents relating to his prior employment and litigation with Valley Com. If he failed to raise any claim or issue as to a specific document or request in his first cause of action, he clearly had his opportunity to do so. Allowing him a second bite at the apple wastes the Court’s and the parties’ time and resources, undermines the finality and

respect due the Court's prior decisions, and encourages the continued harassment of a public agency by a disgruntled former employee through the use of public records litigation over confusing and contradictory requests. This action was barred by *res judicata* and collateral estoppel and Judge White properly dismissed it.

2. Judge White correctly found that the statute of limitations applied to Phillips litigation over several responses to his public disclosure requests.

Judge White ruled that any claims based on requests made and completed prior to April 22, 2008 were also barred by the statute of limitations. **CP-986 ¶2**. Although alluding to the statute of limitations in his briefing, Phillips failed to assign error to or to present a separate issue regarding dismissal based on the statute of limitations. This Court therefore may decline to review this issue and affirm dismissal on this basis. RAP 10.3. To the extent it wishes to consider it, Judge White's ruling was appropriate.

The Public Records Act has a one year statute of limitations. "Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." RCW 42.56.550(6). Phillips's focus on the alleged lack of privilege logs in the present case misses several points.

First, there is no requirement for a privilege log where there is no withholding. The statute of limitations simply runs from the date the documents are produced. Therefore, Phillips was properly barred from raising any claims based on requests where there was no withholdings. Secondly, *Rental Housing, supra* which he refers to was decided two years *after* Valley Com had finished responding to many of the requests at issue and several months *after* Phillips already unsuccessfully litigated his demand for a privilege log in the 2008 case. *Rental Housing* did not necessarily rule out the possibility that other methods of providing the same type of information as found in a privilege log could be sufficient to state a claim of exemption and triggering the statute of limitations. “[O]ther means of sufficiently identifying particular records without disclosing protected content” may be allowed to prevent disclosure of the information protected by an exemption. *Rental Housing* at 538 (citing *PAWS II* 125 Wn.2d 243 nt. 18, (1994)). Valley Com sufficiently identified information to claim an exemption in its pre-*Rental Housing* letters sent well over a year before Phillips initiated his second round of litigation. Finally, the 2008 Court’s *in camera* review of documents submitted to it in March 2008 eliminated any need to create a more detailed privilege log. The issue became moot. The statute of limitations ran on all requests answered prior to April 22, 2008. Judge White

properly dismissed any claims based on requests completed prior to that date.

3. Mr. Phillips has no legal or factual basis for claiming that the second show cause motion was to enforce the judgment of the first show cause case (Appellant's issues #2 and #3)

Phillips' attempted to repackage his second show cause motion into a show cause motion to enforce the judgment of the 2008 litigation. This argument is legally and factually unsupportable. While the Public Records Act allows for judicial resolution of three specific types of issues through its show cause process, enforcement of a judgment is not one of them. RCW 42.56.540, RCW 42.56.550(1) and (2); WAC 44-14-08004(5). Phillips only filed his show cause motion pursuant to the Public Records Act. **CP-1**. Moreover Valley Com complied with the prior judgments. There was simply no legal or rational basis for filing a new show cause motion to "enforce" a judgment that has already been complied with. Phillips has tacitly recognized this by deleting his factually unsupportable allegations on this issue from the third and final version of his brief. Moreover, no such argument was presented to the lower court, and therefore cannot be raised now. RAP 2.5. These issues should be dismissed.

C. Trial Court's CR11 Sanctions decision is not properly before this Court because it was never timely appealed (Appellant's Assignment of Error #2; Issue #5)

Appellant's assignment of error #2, the November 2, 2009 award of CR 11 sanctions against Russell Phillips *Appellant's brief p. 5*, is not properly before this Court. The trial court's decision to sanction Phillips for CR 11 violations was never appealed. An appellate court's review is generally limited to the decision or parts of the decision designated in the notice of appeal. RAP 2.4. Exceptions for reviewing post-trial motions do not include decisions based on CR 11 violations. RAP 2.4(c). An appellate court may review a trial court's order or ruling not designated in the notice of appeal but only where "(1) the order or ruling prejudicially affects the decision designated in the notice, ***and*** (2) ***the order is entered, or the ruling is made, before the appellate court accepts review.***" RAP 2.4(b) (emphasis added).

Here the ruling on CR 11 sanctions occurred several months *after* this Court accepted review. Phillips did not file any later notice designating Judge White's decision as subject to appeal (even though he was represented by counsel within the time to appeal the supplemental order entered on November 25, 2009. **CP-1156-1157**). The time for such a notice has passed. **RAP 5.2**. Phillips did not even designate the order as part of the record on appeal. It was only included when Valley Com

supplemented the record with it in January 2010 to support its objection to Phillips continued violation of court rules.

The CR 11 sanctions were based on a variety of rulings. The ruling was based on the court's denial of Phillips' motion to dismiss Valley Com's attorney of record which was found to have been filed for an improper purpose; the denial of Phillips' motion for supplemental pleadings found to have been filed without a reasonable inquiry without legal or factual basis; and the granting of Valley Com's motion to strike Phillips' unsupported allegations. **CP-1148 #8, #12, #13, #14 1151 #7, 1152 #8, 1153 #3 and #5.** Contrary to Phillips assertions Judge White did reach factual findings that the motions had been filed for improper purpose and without reasonable inquiry. *Id.* Phillips did not assign error to any of the Judge White's factual findings, thus they are verities on appeal. RAP 10.3(g), *Cowiche Canyon Conservancy v. Bosley* 118 Wn.2d 801, 808, 828 P.2d 549 (1992). The decision should be affirmed.

V. REQUEST FOR COSTS AND FEES

Pursuant to RAP 14 and 18, Valley Com requests an award of the costs, fees and expenses incurred in responding to Phillips frivolous appeal and his failure to comply with the Rules of Appellate Procedure. RAP 18.9 (a) provides an appellate court may order a party who 'files a frivolous appeal, or fails to comply with these rules to pay terms or

compensatory damages' to any party harmed by its actions. Washington Courts have held: "[a]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal." *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 330, 917 P.2d 100 (1996); *State ex rel. Quick Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998). "Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." *Yurtis v. Phipps*, 143 Wn.App. 680, 696, 181 P.3d 849 (2008).

In light of applicable case law and Judge White's well reasoned opinion, based on longstanding rules precluding duplicative litigation, Phillips' appeal is devoid of merit and therefore frivolous. He cited no reasonable basis for reversal nor did he make rational, good-faith argument for modification of existing law. He failed to comply with numerous rules, including on-going failure to meet deadlines and the submission of three significantly different versions of his appeal brief in violation of 10.2 and 10.7(1). He sought to mislead this Court with statements that are unsupported by the record or citations and by assigning error to an order that was never appealed. Award of costs and attorney fees is therefore appropriate pursuant to RAP 18.9 (and costs under RAP 14). Valley Com respectfully requests it be awarded reasonable costs and

fees to be determined upon submission of supporting documentation of actual costs and fees at the conclusion of this appeal process.

VI. CROSS APPEAL ARGUMENT

A. Standard of Review

A grant or denial of an injunction is reviewed for the abuse of discretion. *Kucera v. State, Dept. of Transp.* 140 Wn.2d 200, 209 (2000). The grant or denial of a protective order is also reviewed under the abuse of discretion standard. *King v. Olympic Pipeline Co.* 104 Wn.App. 338, 348 (Div 1 2000) (remanding to trial court for failing to consider all factors in denial of stay and denial of protective order). A trial court necessarily abuses its discretion where it has based its ruling on an erroneous view of the law. *Fisons, supra.* 122 Wn.2d at 339. Failure to exercise discretion is an abuse of discretion. *Bowcutt v. Delta North Star Corp.* 95 Wn.App. 311, 320, 976 P.2d 643 (1999).

B. Judge White erred in denying injunctive relief after finding the request had merit

Judge White acknowledged that Valley Com's motion for a protective order against Phillips's continued litigation and duplicative, harassing public record requests had merit. **RP-83 II.12-13.**

Since December 2006, Phillips has filed almost twenty multi-part public record requests and two law suits, all related to the same documents

and the same subject matter. **CP-27-33,43-44, 51,55, 633,636,638,60, 64-65, 850, 89-90,93-94,855,95-97, 663-664, 672-679, 681; CP-575 ll.6, RP-22-24.** Although the requests may be phrased differently, most are duplicates, asking for the same records (i.e. the 1728 bates-stamped records or some sub-set of them). For example, in his initial set of requests he had asked for the personnel file of his former supervisor, Cathleen Robertson, and was provided with the three disciplinary documents which were determined to be non-exempt. **CP-31, 40.** Several months later, he asked for her disciplinary file, which was essentially a request for these same three documents. **CP-55 #1.** Two years and one lawsuit later, he was still requesting her disciplinary records. **CP-681 #1.** As another example, he has asked for, and been given a January 2007 invoice on at least five separate occasions. **CP- 55 #5 (see response 57 #5), 638 #1, 60#1, 64 #10, 663 #2.** Some requests are so broadly worded that they also encompass pleadings and exhibits from his past and pending litigation. **(See, for example, CP-64, #1, 71-77.)** He also has continued to request privileged communications between Valley Com and its attorneys, including documents that Judge Yu specifically ruled were exempt under attorney-client privilege **(for example see, CP-677 #1 and 678 #5, 417 #8(e)(i)).** He has filed two lawsuits over the same requests and same documents.

Valley Com requested a protective order, designed to preserve the respect for judicial finality and the attendant peace of mind which should have been derived from the conclusion of the first litigation. Valley Com carefully limited its request for injunctive relief to specific types of documents. It asked that Phillips be prohibited from filing additional public record requests for the same documents which were already in Mr. Phillips possession or which previously had been litigated. **CP-1072, 1076-77.** This referred in particular to the 1728 bates stamped documents reviewed in his prior public record litigation, but also to documents which had originated from him or had been served on him or provided to him in any litigation between him and Valley Com.¹⁸ The non-exempt bates-stamped records had already been provided to him on numerous occasions and their exemptions and redactions previously litigated. Valley Com did not ask to withhold non-exempt public records that Phillips has never seen before, but to be relieved of the burden of continually having to redisclose the same documents and continually identifying and explaining the basis for the withholdings and redactions of documents which had already been the subject of litigation. Thus, if Mr. Phillips filed a new request which

¹⁸ This would include the litigation over his unemployment benefits which ran from December 2006 through August 2008, (in part Case No. 07-2-39771-0 KNT), his union grievance which was dismissed in January 2008, his first public record litigation from February through November of 2008 (Case No. 08-2-04291-0 KNT) and the current case from April 2009 through the present (Case 09-02-16309-0 KNT; Appellate No. 63876-9).

could be read to encompass documents which had already been litigated, Valley Com would only have to respond to that portion which involved newly requested records.

Valley did not propose to prohibit Mr. Phillips from filing new requests for different records. The only exception to this was a request that he be enjoined from requesting records which would clearly involved attorney-client privilege, work-product or litigation matters that would be exempt from disclosure under the law anyway. **CP-1078-80**. This portion of its request for equitable relief was based on Mr. Phillips's continued requests for communications between Valley Com and its attorneys or individuals having a common interest in the outcome of pending or anticipated litigation involving Mr. Phillips. Attorney-client privileged communications and work-product are specifically exempt from public disclosure. RCW 42.56.290; RCW 5.60.060; *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716 (2007). Valley Com also requested any alternative relief available. **CP-1118**.

Judge White acknowledged that Valley Com's motion had merit. **RP-83 II.12-13**. He then denied the motion. He either failed to exercise his discretion or acted unreasonably or, as discussed below, based his decision on an erroneous view of the law, any of which constitutes an

abuse of discretion. *Kucera, Bowcutt, Fisons, supra*. Injunctive relief should be granted.

C. Judge White erred in concluding he lacked authority to enjoin future requests for or future litigation over the same documents and issues

“In Washington, every court of justice has inherent power to control the conduct of litigants who impede the orderly conduct of proceedings.... Accordingly, a court may, in its discretion, place reasonable restrictions on any litigant who abuses the judicial process. RCW 2.28.010(3)It has been established that in Washington trial courts have the authority to enjoin a party from engaging in litigation upon a ‘specific and detailed showing of a pattern of abusive and frivolous litigation.’” *Yurtis v. Phipps*, 143 Wn.App. 680, 693, 181 P.3d 849 (2008) *review denied* 164 Wn.2d 1037, 197 P.3d 1186 (2008) (internal citations omitted). Like the present case, *Yurtis* involved a pro se plaintiff who refused to accept finality of litigation and continued relitigating the same claims and issues. In addition to affirming dismissal of the case on the basis of *res judicata*, collateral estoppel and the statute of limitations, the Appellate Court went on to prohibit plaintiff from filing any further actions or appeals related to the same transaction that was subject of present and prior litigation. This is the same relief Valley Com has asked

for, along with limited relief from continued public records requests. CP-1068-1081, 1114-1118.

The *Yurtis* Court noted its authority is codified in RCW 2.28.010(3). *Id.* It also derives from the Washington State Constitution which vests Superior and District courts with jurisdiction over all cases founded in equity, including the power to grant injunctive relief. Wash. Const. Art. IV, § 6.

The superior court has original jurisdiction in all cases in equity. Const. art. IV, sec. 6. Its inherent powers encompass all the powers of the English chancery court. *Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 415, 63 P.2d 397 (1936). The Legislature is constitutionally prohibited from abrogating or restricting these equitable powers. The writ of injunction is the “strong arm of equity.” So any legislation that diminishes the superior court's constitutional injunctive powers is void. *State v. Werner*, 129 Wn.2d 485, 496, 918 P.2d 916 (1996) (citing *Blanchard*, 188 Wn. at 415, 63 P.2d 397). And we narrowly read exceptions to superior court jurisdiction. *Orwick v. City of Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). Unless the Legislature clearly indicates its intention to limit jurisdiction, statutes should be construed as imposing no limitation.

Bowcutt, supra at 319 (finding trial court abused its discretion by failing to exercise its discretion in determining injunctive relief).

The Public Records Act (“PRA”) clearly provides for injunctive relief. The relevant section states in full:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its

representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

RCW 42.56.540 (formerly RCW 42.17.330). A unanimous Supreme Court originally read this section as allowing a court to enjoin the disclosure of records, even where not otherwise exempt, if disclosure was not in the public interest and would cause substantial or irreparable damage to person or governmental functions.

We hold that RCW 42.17.330 does create an independent basis upon which a *court* may find that disclosure is not required, if the court, upon a request for an injunction under RCW 42.17.330, finds (1) that disclosure is not in the public interest and (2) that disclosure would cause substantial and irreparable damage to a person or a vital government function.

Dawson v. Daly 120 Wn.2d 782, 794, 845 P.2d 995 (1993) (emphasis in original). The *Dawson* Court recognized that the injunctive relief protection provided by Sec. 330 (now Sec. 540) differs from protections provided by specific exemptions identified in the PRA. The Court clearly differentiated the two distinct situations. Under the first, an agency can

withhold documents under the enumerated exemptions of the PRA without a Court review (unless or until challenged by the requestor). Under the second situation, documents can be withheld under the injunctive relief section but the agency or person must obtain Court approval to do so. *Id.* In *Dawson* a prosecutor had followed the latter course and sought a permanent injunction against release of public records. The Supreme Court remanded to the trial court to enter appropriate injunctive relief if, upon review, the trial court determined the request had merit, based on the lack of public interest and damage to the person or government agency.

The following year, however, a split Court declined, in a footnote, to endorse the holding of *Dawson*, characterizing the ruling as dicta and asserting that the injunctive relief section was merely procedural, not a separate exemption. *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 257 and nt. 7, 884 P.2d 592 (1994). The dissent strongly objected. It argued that Sec. 330 (now Sec. 540) *does* create a basis upon which to hold documents exempt when the conditions of the section are met, and no separate exemption is required. *Id.* at 274-75. Without specifically saying so, Judge White apparently based his concerns about his authority to grant Valley Com's requested relief under the PRA on the *PAWS II* decision, a broad reading of which has effectively nullified the plain language of the PRA's injunction

provision and the holding of *Dawson*.

As the *PAWS II* Court recognized, statutes should not be read to be in such a way as to render any portion meaningless or superfluous. *Id.* at 260. Yet this is precisely what its interpretation did. If a document already falls within a separate exemption, it can be withheld without the need for injunctive relief. *PAWS II*'s broader reading, therefore, makes sec. 540 and the statutory reference to injunctive relief meaningless. If document can be withheld under a specific exemption, there is no need to seek an injunction. It is only when specific exemptions fail to protect persons or vital government interests that injunctive relief is necessary. The Courts provide the safeguard in weighing the damage against the public interest in each specific case.

There was no reason to render the injunctive relief section of the statute meaningless. *PAWS II* was an exemption case, not an injunction case. Its decision should never have been extended to the second situation identified in *Dawson* (i.e., where the agency seeks out injunctive relief before a final withholding) and it should not affect a Court's ultimate equitable authority. Unlike the *Dawson* case (or the present case), *PAWS II* did not actually involve a request for injunctive relief. In *PAWS II*, the government agency had already withheld the documents without seeking prior injunctive relief. Sec. 330/540 was only raised as an alternate "vital

governmental functions” basis for the original withholding of the documents *after* the disclosure had been denied and *after* the requestor sought judicial review, challenging the withholdings. *PAWS II* essentially falls into the first category identified by *Dawson*, where an agency is only supposed to rely on specific exemptions unless it seeks injunctive relief. Based on that factual situation, the Court’s actual conclusion (which it articulated as “RCW 42.17.330 does not require withholding the [withheld documents] in their entirety” *Id.* at 261 (emphasis added)) does not conflict with *Dawson*. Its footnoted comment, relegating the holding of *Dawson* to dicta, is itself nothing more than dicta.

Moreover, neither *Dawson* nor *PAWS II* addressed a court’s statutory authority to control the conduct of litigants and enjoin them from further litigation. RCW 2.28.010(3); *Yurtis, supra*. Furthermore, neither *Dawson* nor *PAWS II* addressed a court’s Constitutionally-derived equitable authority which cannot be abrogated by any legislative limitation and which allows a court to fashion broad equitable remedies. Wash. Const. Art. IV, § 6; *Bowcutt, supra.*, *Blanchard, supra.*

Despite later amendments, the PRA still contains a general reference to the right to injunctive relief. Indeed, recent legislation has acknowledged the need for injunctive relief under the PRA, regardless of the existence of any specific exemption, where the purpose of the request

is to harass. RCW 42.56.565. Although Sec. 565 is limited to requestors who are serving a criminal sentence, another bill was introduced to amend Sec. 540 to explicitly include similar injunctive relief against any requestor. 2009 HB 1316. While this proposed change has not yet been adopted, the legislature has another year to vote on it. Both demonstrate the Legislature's recognition that individuals who abuse the Public Records Act for improper purposes may need to be enjoined. Neither existing language nor proposed changes limit the Courts' Constitutional power to apply equitable relief. Wash. Const. Art. IV, § 6.

Even under the *PAWS II*'s interpretation, if responsive documents are exempt under another provision of the act, section 540 still provides a means for issuing injunctive relief. As discussed above, Valley Com narrowly tailored its request for injunctive relief from duplicative requests for documents that it had already provided to Phillips or which had already been litigated. Valley Com did not ask to *withhold* non-exempt public records that Phillips has never seen before. It only asked to be relieved from the burden of having to continually re-release documents that Phillips had already been given access to on numerous occasions—most of which he had been given copies of free of charge. The only withholding Valley Com asked for was for documents for which there is a specific exemption—either as determined through the prior litigation or under

attorney-client privilege and work-product. RCW 42.56.290; RCW 5.60.060; *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716 (2007).

The PRA also incorporates the Civil Rules of the Courts, including CR 26, through RCW 42.56.070 (“other statutes”) and RCW 42.56.290. *O’Connor v DSHS* 143 Wn.2d 895, 910 (2001). Although the Court in *O’Conner* overruled a general protective order prohibiting a litigant from filing *any* public record request and requiring the litigant to utilize *only* the discovery process, the Court agreed that “records relevant to a controversy to which an agency is a party are exempt from public inspection and copying under the Public Records Act if those records would not be available to another party under superior court rules of pretrial discovery.” *Id.* at 912. Phillips has admitted that his public records requests are for purely personal “future litigation” “to gain evidence for his claim of wrongful discharge.” *CP-800* ¶¶3-4; *Response to motion to modify* p.3, ¶¶5-6. Although litigants as members of the public may file public records requests, the “public records act was not intended to be used as a tool for pretrial discovery.” *Limstrom v Ladenburg*, 136 Wn. 2d 595, nt. 9 (1998). The Civil Rules allow discovery to be limited where it is unreasonably cumulative, duplicative, or unduly burdensome, or where the party seeking discovery has had ample opportunity to obtain the information sought. CR 26(b). It is not unusual for a Court to issue a protective order where

discovery has been duplicative and harassing. *Steele v. Lundgren* 85 Wn.App. 845, 855(1997); *Shields v. Morgan Financial, Inc.* 130 Wn.App. 750, 759-60 (2005). The continued submission of multiple requests for information is unreasonably duplicative and cumulative.¹⁹

The PRA contemplates enjoining the examination of public records where “such examination would clearly not be in the public interest and...would substantially and irreparably damage vital governmental functions.” RCW 42.56.540. No public interest is met in the continued submission of the same requests so that the same individual can review the same documents previously released or previously identified as exempt. The cost in time and money drains limited resources away from Valley Com’s primary and vital purpose as a 9-1-1 dispatch center. **CP-1119-1121, 1124-1127**. Instead of being able to use its funds to service the community for police, fire and medical response, Valley Com’s limited taxpayer resources are being depleted to respond to repetitious public records requests and litigation from a disgruntled and litigious former employee planning to sue or at least use public disclosure laws to harass

¹⁹ For examples of Phillips’ numerous duplicative requests, see description in motion for injunctive relief **CP-1068-1071** declaration of Liz Henneke **CP-616-625** and his actual communications: **CP-27-33,43-44, 51,55, 633,636,638,60, 64-65, 850, 89-90,93-94, 858-859,855,95-97, 663-664, 672-679, 681**. Generally he continues to make requests for records referencing himself or his employment at Valley Com, for his personnel and medical files, for the personnel file of his former supervisor Cathleen Robertson, for documents provided to Dr. Decker, for invoices from Valley Com’s attorneys, for communications between Valley Com and its attorneys, for various Bates-stamped documents as well as “clarification” requests. *Id.*

his former employer. The public can learn no new information by his continuing submission of duplicate requests, while Valley Com's continued obligation to respond to duplicate requests will substantially and irreparably damage its vital government functions. Even where requests do not completely duplicate prior requests, their broad wording usually encompasses documents that have been previously provided to Phillips or are otherwise already in his possession or have been the subject of previous litigation, including those that the Court specifically ruled were properly redacted or exempt from disclosure or ordered by the Court to be sealed.

There is no public interest served in providing an individual with copies of documents he already has and in many cases has requested several times. There is no public purpose in forcing a public agency to continually explain to the requesting party the basis for any withholding or redactions for the same documents, particularly where a Court has already approved the withholding or redaction or ordered a document to remain sealed. The Courts have acknowledged this by noting there is no cause of action under the PRA for documents already in the plaintiff's possession. *Daines v. Spokane County*, 111 Wn.App. 342 (2002).

There is also a strong public policy in favor of finality to litigation as seen in the doctrines of *res judicata* and collateral estoppel. *Yurtis*,

supra at 693; *Hilltop Terrace. supra* 126 Wn.2d at 30-31; *Matter of LaLande* 30 Wn.App. 402, 405 (1981). A court's equitable power allows it to fashion broad remedies to put an end to litigation. *Hough v. Stockbridge* 150 Wn.2d 234, 236, 76 P.3d 216 (2003). Phillips's actions and statements confirm that absent an explicit injunction, there will be no end to his duplicative public records requests and litigation. He continues to file requests for the same batch of documents and continues to litigate them. After appealing this action he submitted a "supplement pleading" which sought to re-litigate the same requests and issues he had just appealed. **CP-1148, #12 and 13**. Earlier, Phillips told the Court "[If] I should have brought these to the Court's attention as soon as I made public disclosure requests, while the hearing was going on..., we would still be in that hearing because it would have been ongoing, non-stop." **RP-18 II.18-20**.

Judge White correctly recognized the merits of Valley Com's request for injunctive relief. But even while acknowledging his inherent authority to grant injunctive relief, he expressed concern that the relief requested was not available under the Public Records Act. **RP-61-62, 81-83**. In doing so he erroneously viewed the law and his equitable authority through the narrow prism of the *PAWS II* decision. The *PAWS II* decision has unduly nullified the plain reading of the statute and the holding of

Dawson. Not only does the plain statutory language of Sec. 540 not support the restrictive interpretation given it by the *PAWS II* decision, but such a restrictive interpretation renders that section meaningless and also creates an unconstitutional limitation on a Court's equitable authority. As an exemption case, and not an injunction case, its analysis should not apply here. It rendered the injunctive relief section meaningless. It failed to take into account a Court's inherent equitable authority which cannot be abrogated and which allows a court to fashion broad equitable relief to put an end to litigation. Because Judge White relied on an erroneous view of the law, he abused his discretion in denying Valley Com's request for injunctive relief. Injunctive relief should be granted.

VII. CONCLUSION

For the above reasons, Valley Com respectfully requests that Phillips' appeal be dismissed and Judge White's order to dismiss Case No. 09-02-16309-0 KNT be affirmed.

Valley Com also requests that its cross appeal be granted and that an order be issued prohibiting Phillips from requesting documents which have already been provided to him, are otherwise in his possession or which were the subject of this or prior litigation between him and Valley Com, and from engaging in further litigation over the documents or the requests.

Finally, Valley Com requests costs, fees and expenses pursuant to RAP 14 and RAP 18.1 and RAP 18.9 for Phillips' bringing a frivolous appeal and failing to comply with the Rules of Appellate Procedure.

Respectfully submitted this 25 day of March 2010,

 #36037 for
Eileen Lawrence, WSBA# 11885
DAVIS GRIMM PAYNE & MARRA
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
Phone: (206) 447-0182
Facsimile: (206) 622-9927
Attorney for Respondent/Cross Appellant
Valley Communications

No. 63876-9

COURT OF APPEALS

DIVISION I OF THE STATE OF WASHINGTON

Russell Phillips,
Appellant/Cross Respondent

v.

Valley Communications,
Respondent/Cross Appellant

**CERTIFICATE OF SERVICE
BY U.S. MAIL**

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COURT OF APPEALS
DIVISION I
CLERK OF COURT
JENNIFER L. HARRIS

I, Betsy E. Green, Legal Assistant to Eileen M. Lawrence, attorney for Valley Communications, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and I am competent to be a witness herein.

That on the 25th day of March, 2010, I forwarded by electronic transmission, as evidenced by the attached copy of the e-mail to Mr. Schoenrock, a true and correct copy of Valley Communications' *Brief of Respondent/Cross-Appellant* and subsequently deposited in the United States Mail at Seattle, Washington, a true and correct copy of the same with first class postage fully prepaid, addressed to the below listed individual at his last known address, as set forth herein.

I further certify that on the 25th day of March, 2010, I forwarded by electronic transmission addressed to tim@schoenrocklaw.com and by U.S. Mail with first class postage fully prepaid thereon a true and correct copy of this *Certificate of Service* with accompanying documents as set forth below.

Timothy Schoenrock
Schoenrock Law, LLC
6 South 2nd Street, Suite 316
Yakima, WA 98901
Attorney for Appellant Russell Phillips

Via U.S. Mail
 Via Facsimile: (509) 463-0881
 Via Electronic Transmission: tim@schoenrocklaw.com

DATED this 25th day of March, 2010, at Seattle, WA.



Betsy E. Green, Legal Assistant to
Eileen M. Lawrence, Attorney for
Valley Communications
Davis Grimm Payne & Marra
701 5th Avenue, Suite 4040
Seattle, WA 98104-7097
Ph. 206-447-0182
Fax: 206-622-9927
Email: bgreen@davisgrimmpayne.com

Betsy Green

From: Betsy Green [bgreen@davisgrimmpayne.com]
Sent: Thursday, March 25, 2010 10:51 AM
To: 'tim@schoenrocklaw.com'
Cc: 'miranda@schoenrocklaw.com'
Subject: Phillips v. Valley Communications, Court of Appeals Case No. 63876-9 re Valley Communications' Appeal Brief
Attachments: image001.gif; Valley Com Appeal Brief 03.25.10.pdf; Certificate of Service re Valley Com Brief 03.25.10.pdf

Mr. Schoenrock: Attached please find Valley Communications' Brief of Respondent/Cross-Appellant and Certificate of Service which is filed today with the Court of Appeals. A hard copy of the brief and attending Certificate of Service is also sent to you by U.S. Mail. If you are unable to access either of the attached documents, please advise. Thank you.

Betsy E. Green, Legal Assistant
to Eileen M. Lawrence, Patrick S. Pearce
and Megan M. Fouty
DAVIS GRIMM PAYNE & MARRA
701 5th Avenue, Suite 4040
Seattle, Washington 98104
206.447.0182 Ext. 2684
206.622.9927 (Fax)
E-mail: bgreen@davisgrimmpayne.com

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