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COURT OF APPEALS

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STATE OF WASHINGTON

NO. 40286-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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JEFFERY MCKEE,

Appellant,

v.

KITSAP COUNTY PROSECUTOR'S OFFICE,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF  
PIERCE COUNTY, STATE OF WASHINGTON  
Superior Court No. 09-2-14012-5

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BRIEF OF RESPONDENT KITSAP COUNTY

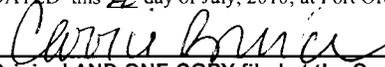
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This brief was served, as stated below, via U.S. Mail. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED this 22<sup>nd</sup> day of July, 2010, at Port Orchard, Washington.

  
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Did the Superior Court err by granting Kitsap County's CR 12(b)(6) and CR 12(c) motion to dismiss this Public Records Act action for failure to state a claim upon which relief can be granted when the Verified Complaint for Violation of the Public Records Act ("Complaint") failed to identify the corporate defendant capable of being sued in its caption and instead named the Kitsap County Prosecutor's Office as the party defendant?

2. Did the Superior Court manifestly abuse its discretion in denying Appellant's oral motion to amend his defective complaint made for the first time during oral argument for Kitsap County's CR 12(b)(6) and CR 12(c) motion to dismiss, nearly fifty days after the County filed its motion to dismiss making plain the defect in Appellant's complaint?

3. Did the Superior Court err in dismissing Appellant's action with prejudice where Appellant inexcusably failed to attempt to amend his defective Complaint until the hearing in which Kitsap County's CR 12(b)(6) and CR 12(c) motion to dismiss was heard, when the defect consisted of naming a party which could not legally be sued in the state of Washington?

## **II. STATEMENT OF THE CASE**

The operative complaint in this action alleges that the Kitsap County Prosecutor's Office ("Prosecutor's Office) violated Washington's Public Records Act, RCW Chapter 42.56, ("PRA") in the course of responding to multiple requests for documents by appellant Jeffery R. McKee. CP 3-121. The Complaint is lengthy, with detailed recitation of PRA requests dated September 18, 2006, January 18, 2007, January 6, 2008, October 31, 2008 and June 20, 2009. CP 4-11. The focus of appellant's requests are twelve criminal files on record with the Prosecutor's Office in which the appellant is identifiable as a suspect, victim or witness. CP 4-5. To support appellant's claims regarding PRA requests and responses thereto, 16 exhibits are appended to the complaint. CP 4-11, 15-121. The caption of both the summons and the complaint name the Prosecutor's Office instead of the municipal corporation of Kitsap County ("County"). CP 1, 3.

### **A. PROCEDURAL HISTORY**

On September 30, 2009, appellant Jeffery McKee filed his Summons and his Complaint with the Pierce County Superior Court, setting forth causes of action under Washington's Public Records Act based upon purportedly improper or incomplete responses to five PRA requests submitted by appellant to a county office, the Kitsap County Prosecutor's Office. CP 1-2,

3-121. On October 22, 2009, Kitsap County filed its motion to dismiss complaint for failure to state a claim upon which relief can be granted and motion for judgment on the pleadings. CP 158-166. Citing Washington Civil Rules 12(b)(6) and 12(c), the motion identified multiple grounds on which the Complaint should be dismissed, namely failure of the caption to name the correct party defendant, barring of claims under the one-year statute of limitations, and barring of claims for records previously disclosed to the Appellant. CP 160-165. On November 18, 2009, the Appellant filed a response brief to the County's motion. CP 132-150. The Appellant did not move to amend his Complaint, but instead addressed the party defendant issue in his Response Brief by citing to the Complaint's text in which the Prosecutor's Office is identified as a "department of Kitsap County" and citing to occasions (outside his Complaint) in which County departments or offices have been named as party defendants. CP 136. On December 3, 2009, the County filed its reply brief regarding the motion. CP 167-176. On December 11, 2009, the Honorable Katherine M. Stolz heard the County's 12(b)(6) and 12(c) motion on each of the cited grounds, and granted the motion to dismiss on the grounds that the Appellant's Complaint failed to name the correct party opponent, i.e. one which could be sued under Washington law. RP 12/11/2009 5-14, 22, 24. The Court declined to issue rulings on the other grounds identified by the County. RP 12/11/2009 24.

The Court dismissed the action with prejudice, finding that Appellant had sufficient time in which to move to amend his Complaint and failed to do so. RP 12/11/2009 22-23. During his oral argument on the improper party defendant issue, Appellant stated that if the Court found against him on that issue “[he] would ask that [he] be able to change the caption on the Complaint to name the county.” RP 12/11/2009 15. Beyond making this remark, Appellant did not actually move in this hearing for the Court to amend the Complaint to substitute the name of the County in the case’s caption. RP 12/11/2009 15-16. At the close of the December 11, 2009 hearing, the Court signed an order granting the motion to dismiss, and scheduled entry of findings of fact, conclusions of law and order of dismissal for January 8, 2010. RP 12/11/2009 22-24; CP 151. On January 8, 2010, the Court conducted the hearing for entry of findings, conclusions and order, signing the County’s proposed order and dismissing the action with prejudice. RP 01/08/2010 3-5; CP152-56. During this hearing, Appellant directly asked the Court’s permission to amend the Complaint, which the Court declined due to the passage of time cited in the earlier hearing. RP 01/08/2010 4-5.

## **B. FACTS**

Appellant's Summons and Complaint each name the "Kitsap County Prosecutor's Office" as the sole defendant in the documents' caption. CP 1, 3. The caption of pleadings in the action did not change at any time during the pendency of the action. CP 122, 132, 151, 152 (FOF 1), 158, 167. Paragraph No. 2 of the Complaint's "Parties" section provides: "The Defendant, Kitsap County Prosecutor's Office, is a department of Kitsap County, Washington." CP 3. On October 21, 2009, Kitsap County filed an Answer to the Plaintiff's Public Records Act Complaint ("Answer"). CP 152 (FOF 5). Ordinarily, the Answer would not be cited in a motion based strictly on the Complaint's content of the Complaint, but the Court denied Appellant's late and oral motion to amend the Complaint and dismissed the action with prejudice, citing in part the notice provided by the Answer. CP 155 (COL 10,11). The Answer's Facts section admits to the trial court's subject matter jurisdiction of the action but asserts that the Plaintiff has failed to establish personal jurisdiction over Kitsap County, citing RCW 36.01.010 and RCW 36.01.020. CP 153 (FOF 7). The Answer's Affirmative Defenses asserts that the Plaintiff has failed to state a claim upon which relief can be granted. CP 153 (FOF 8).

Kitsap County filed its motion to dismiss complaint for failure to state a claim upon which relief can be granted and motion for judgment on the

pleadings on October 22, 2009, one day after filing its Answer. CP 158-166.

The motion plainly notified the Court and Appellant that the action was brought against a party incapable of being sued and further that personal jurisdiction was not established. CP 161-62. In its reply brief filed December 3, 2010, the County once again alerted the Appellant that the Complaint was ineffective as against the municipal corporation of Kitsap County and that the County was exercising its right to assert this defense. CP 167-169.

As noted above, the Complaint alleges that the Prosecutor's Office violated Washington's Public Records Act in the course of responding to his PRA requests dated September 18, 2006, January 18, 2007, January 6, 2008, October 31, 2008 and June 20, 2009. CP 4-11. The requests are overlapping, and each request pertains to one or more of the twelve criminal files on record with the Prosecutor's Office in which the appellant is identifiable as a suspect, victim or witness. CP 4-11. The County's motion to dismiss brief succinctly sorted through this tangled procedural history and then pronounced the Complaint defective as to the correct party defendant on pages four and five of an eight-page brief. CP 161-62. In so doing, the County provided notice of a patent defect in the Complaint at least 45 days prior to the December 11, 2009 hearing on the motion to dismiss. RP 01/08/2010 5; CP 155 (COL 11).

### III. ARGUMENT

#### A. APPELLANT'S COMPLAINT FAILED TO NAME THE ONLY GOVERNMENTAL ENTITY CAPABLE OF BEING SUED IN THIS ACTION, KITSAP COUNTY.

Kitsap County moved to dismiss the action under CR 12(b)(6) and CR

12(c). CR 12(b) provides in pertinent part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, **(6) failure to state a claim upon which relief can be granted**, (7) failure to join a party under rule 19. (emphasis added)

In considering a motion for dismissal for failure to state a claim under CR 12(b)(6), a trial court should dismiss a claim “only if ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’ ”<sup>1</sup>

CR 12(c) provides:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If,

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<sup>1</sup> *Gorman v. Garlock, Inc.*, 155 Wn.2d 198,214, 118 P.3d 311 (2005), quoting *Bravo v. Dolsen Cos.*, 125 Wn.2d 745,750, 888 P.2d 147 (1995), quoting *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987).

on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Each rule applies to the complaint in this action, which named the “Kitsap County Prosecutor’s Office” as the party defendant. This is contrary to RCW 36.01.020, which provides:

The name of a county, designated by law, is its corporate name, and it must be known and designated thereby in all actions and proceedings touching its corporate rights, property, and duties.

As a municipal corporation, the County may sue and be sued “in the manner prescribed by law” and the County exercises its powers through various commissioners, officers, and agents.<sup>2</sup> For example, a county board of commissioners does not have the capacity to be sued:

RCW 36.01.020 provides that the County itself, not its Board of County Commissioners, “must be” designated in any action “touching its corporate rights, property and duties.”<sup>3]</sup>

In *Nolan v. Snohomish County*,<sup>4</sup> the Court of Appeals discussed what entity is capable of suing and being sued, when the government argued that a

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<sup>2</sup> RCW 36.01.010; RCW 36.01.030.

<sup>3</sup> *Foothills Development Co. v. Clark County Bd. of County Com'rs*, 46 Wn.App. 369, 375, 730 P.2d 1369 (1986), review denied, 108 Wn.2d 1004 (1987).

<sup>4</sup> *Nolan v. Snohomish County*, 59 Wn.App. 876, 802 P.2d 792 (1990), review denied, 116 Wn.2d 1020 (1991).

plaintiff should have named both a county and a county council:

RCW 36.32.120(6), read together with RCW 36.01.010 and .020, makes clear the legislative intent that ***in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued.*** It follows that a county council is not a legal entity separate and apart from the county itself. Jurisdiction over the Snohomish County Council is achieved by suing Snohomish County. No purpose would be served by naming both the County and the County Council in this proceeding. The County argues that they are both indispensable parties, but the law gives no support to such a contention.

Nolan gained jurisdiction over the only indispensable party when he sued Snohomish County. The trial court erred in holding that the County Council was an indispensable party.<sup>5]</sup>

In *Broyles v. Thurston County*,<sup>6</sup> the Court of Appeals considered whether a county was liable for the actions of its Prosecuting Attorney who had been sued for employment law violations. The Court held that the county, not its prosecuting attorney, was the proper party.<sup>7</sup>

A county is a municipal corporation authorized by law to exercise powers the state grants to it. RCW 36.01.010. The county is no single person or entity. Rather, it exercises its powers through various commissioners, officers, and agents. RCW 36.01.030. Here, we hold that the county is not shielded from the administrative actions of its prosecutor or deputy prosecutors merely because their part of the county

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<sup>5</sup> *Nolan*, 59 Wn.App. at 883 (emphasis added).

<sup>6</sup> *Broyles v. Thurston County*, 147 Wn.App. 409, 195 P.3d 985 (Div. 2 2008).

<sup>7</sup> *Broyles*, 147 Wn.App. at 428, citing *Nolan*, 59 Wn.App. at 883.

function lies in the prosecutor's office.[<sup>8</sup>]

The Public Records Act speaks generally in terms of government agencies.

RCW 42.56.010(1) defines “agency” under the PRA:

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

The Kitsap County Prosecutor’s Office is clearly a local agency as the PRA defines that term. Nonetheless, to state a claim upon which relief can be granted and which can withstand challenge upon the pleadings, the complaint must sue the municipal corporation in its corporate status. A caption that simply names the relevant county office or department fails to meet that test.

**B. THE TRIAL COURT PROPERLY DENIED APPELLANT’S ORAL REQUEST TO AMEND THE COMPLAINT BECAUSE HE INEXCUSABLY DID NOT FILE A MOTION TO AMEND THE COMPLAINT AFTER BEING PLACED ON NOTICE OF THE COMPLAINT’S DEFECT.**

The Appellant first alluded to the possibility of amending his Complaint’s caption during remarks in open court on December 11, 2009, but made no motion. RP 12/11/2009 15. The Appellant then orally moved to

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<sup>8</sup> *Broyles*, 147 Wn.App. at 428.

amend the Complaint during the court hearing of January 8, 2010. RP 01/08/2010 4. Thus, Appellant's first utterance regarding a change to the caption of this action came at least 45 days after Kitsap County's motion to dismiss, and the Appellant never filed a written motion for leave to amend the complaint.

Washington Civil Rule 15 governs amendment of the complaint, providing in part:

**(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Under this rule, leave to amend should be freely given unless "it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim."<sup>9</sup> CR 15 exists to "facilitate proper decisions on the merits" however, "[t]he touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party."<sup>10</sup>

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<sup>9</sup> *Adams v. Allstate Ins. Co.*, 58 Wn.2d 659, 672, 364 P.2d 804 (1962), quoting *Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir. 1961) (additional citations omitted).

<sup>10</sup> *Quality Rock Products, Inc. v. Thurston County*, 126 Wn.App. 250, 272, 108 P.3d 805

CR 15(c) governs “relation back” of motions to amend to add a party:

**(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Determination of relation back under CR 15(c) rests within the discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion.<sup>11</sup>

The party moving to change a party against whom a claim is asserted bears the burden of proof to prove the conditions precedent of CR 15(c).<sup>12</sup> The moving party also has the burden of proving that the mistake in failing to amend in a timely fashion was excusable.<sup>13</sup> When no reason for the omission

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(2005), quoting *Wilson v. Horsley*, 137 Wn.2d 500, 505-06, 974 P.2d 316 (1999).

<sup>11</sup> *Foothills Development Co.*, 46 Wn.App. at 374, citing *Caruso v. Local Union No. 690 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Amer.*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983).

<sup>12</sup> *Foothills Development Co.* 46 Wn.App. at 375, citing *Anderson v. Northwest Handling Sys., Inc.*, 35 Wn.App. 187, 191, 665 P.2d 449 (1983).

<sup>13</sup> *Foothills Development Co.*, 46 Wn.App. at 375, citing *Woodcrest Inv. Corp. v. Skagit Cy.*, 39 Wn.App. 622, 626, 694 P.2d 705 (1985).

appears from the record, the omission will be characterized as inexcusable.<sup>14</sup>

A party's neglect in moving to amend to identify an unnamed party is fatal if the unnamed party is a matter of public record and the party who sought amendment offers no cogent explanation for failing to name the right party.<sup>15</sup>

In fact, failure to establish any one of the CR 15(c) elements is fatal to the relation back of a complaint.<sup>16</sup> This is the state of the law notwithstanding the actual and constructive notice language of the CR 15(c) relation back rule.<sup>17</sup>

In the instant case, Appellant can offer no reason for failing to move to amend the Complaint in a timely fashion: It is a matter of public record that Kitsap County is the sole corporate defendant capable of being sued for alleged acts of its offices and departments, and the Appellant had ample notice of this fact prior to the December 11, 2010 hearing. By contrast, in a case where a *county* issued a notice in the name of a county department for a code enforcement proceeding, the recipient's initial failure to name the county as a

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<sup>14</sup> *Foothills Development Co.*, 46 Wn.App. at 375, citing *North Street Ass'n v. Olympia*, 96 Wn.2d 359, 369, 635 P.2d 721 (1981).

<sup>15</sup> *Culpepper v. Snohomish County Dept. of Planning and Community Development*, 59 Wn.App. 166, 171-72, 796 P.2d 1285 (1990), *review denied*, 116 Wn.2d 1008 (1991), citing *Tellinghuisen v. King Cy. Council*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984).

<sup>16</sup> *Foothills Development Co.*, 46 Wn.App. at 375, citing *Kiehn v. Nelson's Tire Co.*, 45 Wn.App. 291, 724 P.2d 434 (1986).

<sup>17</sup> *Culpepper*, 59 Wn.App. at 170, citing *North Street Ass'n v. Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981) (amendment to CR 15 still does not permit joinder if the plaintiff's delay is due to inexcusable neglect.).

party in a subsequent writ of review action was excusable neglect.<sup>18</sup> In the absence of excusable neglect appearing in the record, RCW 36.01.020 “requires that the County be named in the action”. Here, there can be no relation back under CR 15(c).<sup>19</sup>

Finally, CR 15(a) requires that if a party moves to amend a pleading, the party shall attach an unsigned “copy of a proposed amended pleading denominated ‘proposed’ . . . to the motion.” Moreover, the Pierce County Superior Court Local Rules do not recognize motions to interlineate previously filed documents:

(e) Interlineations.

(1) Pleadings and Other Papers. No interlineations, corrections or deletions shall be made in any paper after it is filed with the clerk. Any such mark made prior to filing shall be initialed and dated by all persons signing the document.

The record shows that the Appellant filed no written motion for leave to amend the complaint and presented no proposed amended complaint for the Court’s consideration. Beyond Appellant’s failure to meet the criteria for CR 15(c), the Appellant’s only motion to amend the complaint was in effect a nullity.

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<sup>18</sup> *Culpepper*, 59 Wn.App. at 173.

<sup>19</sup> *Culpepper*, 59 Wn.App. at 172, citing *Foothills Development Co.*, 46 Wn.App. at 375.

**C. THE TRIAL COURT PROPERLY DISMISSED THE ACTION WITH PREJUDICE BECAUSE A DISMISSED COMPLAINT WHICH FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS BY DEFINITION NOT VIABLE.**

When a court dismisses a claim under CR 12(b)(6), it is with prejudice.<sup>20</sup> A motion to dismiss for failure to state a claim and a motion for judgment on the pleadings generally raise identical issues.<sup>21</sup> It follows that a motion brought and granted under both CR 12(b)(6) and CR 12(c) is granted with prejudice. Where as here the trial court grants a CR 12(b)(6) motion, it is necessarily finding that “the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.”<sup>22</sup> Where as here, the Complaint made out a case against a party defendant incapable of being sued, this particular complaint is defective and not susceptible to being re-filed.

Appellant cites to no authority for the proposition that a dismissed defective complaint is capable of being re-filed, aside from general citation to

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<sup>20</sup> See e.g. *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 373, 223 P.3d 1172 (Div. 2 2009); *Parsons v. Comcast of California/Colorado/ Washington I, Inc.*, 150 Wn.App. 721, 725, 208 P.3d 1261 (Div. 1 2009); *Corona v. Boeing Co.*, 111 Wn.App. 1, 4, 46 P.3d 253 (Div. 1 2002); *Blewett v. Abbott Laboratories*, 86 Wn.App. 782, 784-85, 938 P.2d 842 (1997), *review denied*, 133 Wn.2d 1029 (1998).

<sup>21</sup> *Suleiman v. Lasher*, 48 Wn.App. 373, 739 P.2d 712, *review denied*, 109 Wn.2d 1005 (1987), *citing* J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 294-95 (1985).

<sup>22</sup> *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978), *citing* *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977).

CR 8(f)'s mandate to construe all pleadings to do substantial justice. This *pro se* appellant is held to the standard of a licensed member of the bar, and the trial court did not abuse its discretion in denying his unreasonably late and legally ineffectual oral motion to amend the Complaint. This Appellant had the opportunity to file a timely written motion to amend before the Court conducted its hearing on the motion to dismiss, and effectively waived it. Under these circumstances, the Appellant does not deserve yet another chance to get it right.

**D. KITSAP COUNTY IS ENTITLED TO COSTS AND ATTORNEYS' FEES ON APPEAL.**

A party prevailing on appeal is also entitled to costs and attorneys' fees authorized by court rule and statute. Respondent formally requests under RAP 18.1 that the Court award costs and fees pursuant to RAP 14.2, RAP 14.3, RCW 4.84.010 and RCW 4.84.080.

**IV. CONCLUSION**

For the foregoing reasons, the Court should affirm Judge Stolz's dismissal of Appellant McKee's lawsuit.

DATED July 22, 2010.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Neil Wachter", with a long horizontal stroke extending to the right.

NEIL R. WACHTER, WSBA #23278  
Senior Deputy Prosecuting Attorney