

No. 45039-9-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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GLEND A NISSEN,

Appellant/Cross-Respondent,

v.

PIERCE COUNTY, a public agency, PIERCE COUNTY  
PROSECUTOR'S OFFICE, a public entity,

Respondents/Cross-Appellants.

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BRIEF OF RESPONDENTS/CROSS-APPELLANTS  
PIERCE COUNTY AND  
PIERCE COUNTY PROSECUTOR'S OFFICE

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A. INTRODUCTION

This is the second of two appeals arising out of a Public Records Act, RCW 42.56 ("PRA") request made by the appellant Glenda Nissen for the private phone records of Pierce County Prosecutor Mark Lindquist, which were in the possession of Verizon. When she was denied those records by Pierce County ("County") Nissen<sup>1</sup> brought an action against the County in the Thurston County Superior Court to compel production of the records and to obtain penalties and attorney fees under the PRA ("*Nissen I*"). Nissen's action was dismissed on December 23, 2011 and her motion for reconsideration was denied on February 28, 2012.<sup>2</sup>

Undeterred, Nissen made a second PRA request to the County on December 9, 2011 seeking essentially the identical records to those she requested in *Nissen I*. The County rejected that request for the same reasons it rejected the request in *Nissen I* on February 7, 2012 and March 12, 2012. Nissen filed the present action in Thurston County Superior Court on November 30, 2012 ("*Nissen II*"), knowing of the adverse outcome of her action in *Nissen I*. The trial court here properly dismissed Nissen's case on collateral estoppel principles. The trial court erred,

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<sup>1</sup> When referring to the County, this brief includes the Pierce County Prosecutor's Office unless otherwise stated.

<sup>2</sup> Those decisions are the subject of Nissen's appeal in Cause No. 44852-1-II, which will be heard by this Court on February 25, 2014.

however, in denying the imposition of CR 11 sanctions against Nissen and her counsel.

B. ASSIGNMENTS OF ERROR

The County acknowledges Nissen's assignments of error, but believes the issues are more properly formulated as follows:

1. Was the trial court correct in concluding that Glenda Nissen's second PRA lawsuit seeking personal records of Pierce County Prosecutor Mark Lindquist filed after dismissal of her first PRA lawsuit that sought effectively identical personal records barred under principles of collateral estoppel?

2. Alternatively, should the trial court have dismissed *Nissen II* on res judicata grounds both because Nissen effectively split her claim and claim preclusion principles foreclosed its filing?

On cross-appeal, the County assigns error as follows:

1. The trial court erred in denying the County's motion for sanctions by an order entered on June 7, 2013.

The issues pertaining to that assignment of error are as follows:

1. Did the trial court abuse its discretion in refusing to sanction Nissen and/or her counsel under CR 11 and/or RCW 4.84.185 where Nissen's filing had no factual or legal basis and the filing was but one facet of Nissen's strategy of abusing litigation to intimidate and harass the County and its officers? (Assignments of Error on Cross-Review Number 1)

2. Did the trial court abuse its discretion in refusing to sanction Nissen's counsel for abusive conduct in the course of the case evidencing a serious lack of candor

with the trial court? (Assignments of Error on Cross-Review Number 1).

C. STATEMENT OF THE CASE<sup>3</sup>

Glenda Nissen has obsessively pursued the production of private phone records of Pierce County Prosecutor Mark Lindquist. On August 3, 2011 Nissen, through counsel, first requested this information. CP 334. Nissen requested "any and all of Mark Lindquist's cellular telephone records for number 253-861-XXXX or any other cellular telephone he uses to conduct his business, including text messages from August 2, 2011." CP 334. The County declined to produce those records, which it did not possess. CP 335. Nissen then filed an action under RCW 42.56.070(1) in the Thurston County Superior Court on October 26, 2011,

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<sup>3</sup> Nissen's brief is stunningly improper, RAP 10.7, as it blatantly violates so many of the requirements in RAP 10.3, making a response to it by the County, and appropriate assessment of its arguments by this Court fundamentally difficult. For example, RAP 10.3(a)(5) requires a statement of the case to be a fair recitation of the facts and procedure in a case without argument. Instead, Nissen's statement of the case is but another aspect of her argument. *See, e.g.*, Br. of Appellant at 7, 8, 12-15.

Further, RAP 10.3(a)(5) and RAP 10.4(f) requires citation to the record for factual claims. Instead, Nissen ranges far outside the record to make her baseless arguments. *See, e.g.*, Br. of Appellant at 28.

In *Hurlbert v. Gordon*, 64 Wn. App. 386, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992), Division I sanctioned counsel for submitting a brief that made "references to the clerk's papers which were either non-existent, or difficult if not impossible to find, because of typographical errors in the references." *Id.* at 400. The brief also contained flatly erroneous cites to the record, references to blocks of pages, or no record cites at all. *Id.* In sanctioning counsel, the court pointedly stated that "the briefing errors wasted the time of opposing counsel and hampered the work of the court." *Id.* at 401. This Court has also imposed sanctions in an analogous case. *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999). Sanctions are similarly merited here against Nissen's counsel.

seeking production of those records, penalties under the PRA, and attorney fees. CP 332-40. The case was initially assigned to the Honorable Gary Tabor and later to the Honorable Christine Pomeroy.<sup>4</sup>

At the scheduling conference in that case, Judge Pomeroy asked for clarification whether the issues before her concerned the "telephone records of an elected official." CP 344. Nissen's counsel answered, "Yes, your Honor. And to add one other point, there are also text messages. You mentioned phone calls, so phone calls and text messages within the basic confines of what you describe, yes." CP 345. Thereafter, Nissen moved the Court to compel "the preservation of text messages" at issue because the "[p]arts of the public records request at issue seeks text messages sent from or received by Mr. Lindquist's phone." CP 348-49. The County moved to dismiss Nissen's complaint under CR 12(b)(6), and Judge Pomeroy ultimately dismissed Nissen's action, ruling that the records were not subject to disclosure under the PRA as a matter of law. CP 359-60. In her oral ruling from the bench, Judge Pomeroy stated in pertinent part:

As a matter of law, I find that no public record exists with the billing statement or the records of the private cell phone

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<sup>4</sup> Ordinarily, counsel for Pierce County references "the trial court" in appellate briefs. Here, where appropriate as three judges have addressed the issue in the case, the trial court is referenced by the judge's name for the sake of clarity.

of the public employee, that being the Pierce County Prosecutor...

I find that 42.56.050, the invasion of privacy is simply that. I go back to number one, it is not a public record. The private cell phone records of a public elected official or a public employee are not public records. Number two. I believe that he has a right to privacy as a valid exemption; and three, I do think that I have absolutely no power to require the third-party provider, without a search warrant application with probable cause, to disclose records. I have no power to do so under this Act. Whether or not this Act violates the elected official or public official's constitutional rights, be either state or federal, I find that they still have those rights; that just because you run for public office does not make you exempt in your maintaining of your right against search and seizure, either under the state constitution or the federal constitution, and that's my ruling.

CP 363-64. Judge Pomeroy signed her written order on December 23, 2011. CP 359-60. Nissen filed a motion for reconsideration, which was denied on February 28, 2012. CP 367.

Notwithstanding the foregoing proceedings in *Nissen I*, Nissen made an effectively identical PRA request initially on December 9, 2011. CP 28. That request sought production of the private cell phone records of Prosecutor Lindquist, requesting the "text content on Verizon Wireless #253-861-XXXX from July 29, 2011 to August 4, 2011, that relate to the conduct of government or the performance of any governmental or proprietary function." CP 28. The County denied that request on February 17, 2012 for the following reasons:

1. The subject cell phone number is Mr. Lindquist's personal cell phone.
2. The text messages you are requesting for this cell phone are not in the possession of the Pierce County Prosecuting Attorney.
3. The record that you are asking us to obtain and review for production is not a public record in that it does not relate to the conduct of government or the performance of any governmental or proprietary function. RCW 42.17.020(42).
4. If these records were public records, they would be exemption [sic] from production by RCW 42.56.050, RCW 42.56.250(3), RCW 9.73.260 and 18 U.S.C. § 2701 et. seq.

CP 29. The County reiterated its denial of Nissen's request in a later March 12, 2012 letter. CP 31.

Despite the December 23, 2011 and February 28, 2012 orders in *Nissen I*, Nissen filed the present action in the Thurston County Superior Court on November 30, 2012,<sup>5</sup> alleging that the County violated the PRA by not providing her the private cell phone records of Pierce County Prosecutor Mark Lindquist. CP 6-15. The case was assigned to the Honorable Christine Schaller. RP (3-1-13) at 1.

The County again moved to dismiss the *Nissen II* complaint under CR 12(b)(6) because her complaint was barred under principles of res judicata (claim preclusion) or collateral estoppel (issue preclusion). CP

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<sup>5</sup> Given the dates of the *Nissen I* orders and the date the complaint in *Nissen II* was filed, Nissen and her counsel were *fully aware* of the results in *Nissen I* when the complaint in *Nissen II* was filed. Nissen and her counsel knew the complaint in *Nissen II* was barred by collateral estoppel because paragraph 3.6 of her complaint attempted to distinguish *Nissen I* from *Nissen II*. CP 7.

307. Nissen's complaint asserted identical issues raised and resolved against her in *Nissen I*. CP 26-34, 332-40.

Nissen's counsel's awareness that *Nissen II* was barred by collateral estoppel was evident in her oral misrepresentations to the trial court. Nissen's counsel claimed to Judge Tabor that *Nissen II* differed because it sought text messages:

MS. MELL: [F]irst of all, this is not an identical case for request for records that have already been requested and denied and is up on appeal. The request for records is different. It contains a request for text messages of Prosecutor Lindquist[.]

CP 1141. Nissen's counsel repeated this statement to Judge Schaller in stating that *Nissen I* concerned only "phone records," but did not concern text messages or text content.

THE COURT: But you don't agree that these are the same - these are text messages. Were the other ones telephone?

MS. MELL: Telephone records, and they pertain to a much narrower point in time. It's August 3<sup>rd</sup>, We're dealing with a broader scope of information and specifically text content *as opposed* to phone records.

CP 1169 (emphasis added). She later repeated this falsehood when she wrote, "The request is for text content, not phone records." CP 887.

Nissen and her counsel always knew that *Nissen I* involved text messages. Prior to the filing of *Nissen I*, Nissen's current counsel exchanged correspondence with the Verizon Wireless "Law Enforcement

Resource Team Court Order Compliance Group," claiming there was an "ongoing investigation," and specifically requesting preservation of all "data, and any other information" associated with a specific phone number, which she knew to be the Prosecutor's *personal phone*. CP 67-68. In response, Verizon advised her that federal law required a search warrant for the "text message content" she requested. CP 68. Nissen thereafter asked Judge Pomeroy in *Nissen I* to obtain the text message content from Verizon without a warrant and lodge it with the Court. CP 1134-63.

Nissen's counsel also mischaracterized Judge Pomeroy's ruling to Judge Schaller in an effort to avoid its preclusive effect. She asserted that "*Nissen I* was not litigated on the merits on text messages as public records. The oral opinion and the written order are silent about text content." CP 886-87. Judge Pomeroy's decision, however, made it clear she was reaching *all* of the records sought by Nissen, which included text messages. "As a matter of law, I find that no public record exists within the billing statements *or* the records of the private cell phone of the public employee, that being the Pierce County Prosecutor." CP 363 (emphasis

added).<sup>6</sup> Judge Pomcrocy further stated she lacked the authority to access the text content held by Verizon absent grounds for a search warrant. *Id.*

Judge Schaller granted the County's motion on May 24, 2013, dismissing Nissen's *Nissen II* action because "the identical legal issue was decided in *Nissen I*." CP 883, 1005-07.

The County moved for sanctions against Nissen and her counsel. CP 1109-24.<sup>7</sup> Judge Schaller denied the County's motion for sanctions by an order entered on June 7, 2013. CP 1271-74. Nissen appealed the dismissal order and the County cross-appealed the denial of its motion requesting CR 11 sanctions against Nissen and her counsel. CP 1014, 1275.

#### D. SUMMARY OF ARGUMENT

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<sup>6</sup> Nissen yet again contends that the trial court's ruling in *Nissen I* did not address text content. Br. of Appellant at 12. That is simply not so. In addition to the colloquy quoted above, Judge Pomeroy's ruling regarding all "phone records" necessarily encompassed the text messages. CP 117. "The private cell phone records of a public elected official or a public employee are not public records." *Id.*

<sup>7</sup> A prerequisite to seeking CR 11 sanctions is notice to the potentially offending party to permit them to avoid the sanctionable conduct. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 229, 829 P.2d 1099 (1992). Here, Nissen had ample notice. Pierce County gave Nissen and her counsel notice of its intent to seek an award of attorney fees when they answered in *Nissen II*. CP 22. Moreover, Nissen was aware of the potential for CR 11 sanctions here as Nissen's counsel expressed concern about CR 11 early in the litigation when she conditioned her agreement to strike the unnecessary deposition of Detective Sergeant Wood upon the County's stipulation to not argue that Nissen's complaint was a frivolous lawsuit filed to harass the County, the Prosecutor's Office, and Prosecutor Lindquist. CP 1141-45. In the January 25, 2013 hearing on a motion to quash, Nissen's counsel noted her understanding of the CR 11 implications of her *Nissen II* complaint. *Id.* (statements by Nissen's counsel that she would remove paragraphs 3.3 and 3.4 from her complaint if the County's counsel would agree to modify its answer to those paragraphs and would agree to not argue that her purpose was to harass).

The trial court was correct in determining that Nissen's complaint in *Nissen II* was barred under issue preclusion principles where that complaint sought effectively the same cell phone and text message records determined by the court in *Nissen I* to be unavailable to her under the PRA. That decision was also supported under claim preclusion principles and on the merits under the PRA's definitions of a public record and its applicable exemptions.

The trial court erred in failing to sanction Nissen and her counsel pursuant to CR 11 or RCW 4.84.185, or under the court's inherent authority. Nissen filed the complaint in *Nissen II*, knowing the same issues were resolved against her in *Nissen I*; she had no reasonable basis to believe her complaint in *Nissen II* was meritorious. Her complaint in *Nissen II* violated CR 11 for its effort to harass the County, an illicit purpose for litigation. The conduct of Nissen's counsel in making deliberately misleading statements to the trial court in *Nissen II* was sanctionable under the court's inherent authority.

E. ARGUMENT

- (1) Nissen's PRA Action Is Barred Under Principles of Res Judicata or Collateral Estoppel

The trial court here properly granted the County's CR 12(b)(6)<sup>8</sup> motion concluding that Nissen, disappointed with the outcome in *Nissen I*, filed *Nissen II*, a thinly disguised effort to circumvent Judge Pomeroy's decision. This Court should not tolerate Nissen's abuse of the litigation process.

(a) Collateral Estoppel

The trial court properly concluded collateral estoppel prevented Nissen from relitigating issues resolved in *Nissen I*. CP 1011-12. Collateral estoppel is a legal issue this Court reviews de novo. *Lemond v. State, Dep't of Licensing*, 143 Wn. App. 797, 803, 180 P.3d 829 (2008).

While res judicata or claim preclusion prevents a plaintiff from bringing the same claim under a different theory, issue preclusion prevents

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<sup>8</sup> CR 12(b) provides in pertinent part for dismissal of a complaint for "(6) failure to state a claim upon which relief can be granted." A dismissal for failure to state a claim is appropriate "where it is clear from the complaint that the allegations set forth do not support a claim ..." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). A plaintiff like Nissen is not entitled to relief, and her claim is subject to dismissal, if the complaint alleges no facts which would justify recovery. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 580 (1978). A court is "not required to accept the complaint's legal conclusions as true." *West v. State, Wash. Ass'n of County Officials*, 162 Wn. App. 120, 128, 252 P.3d 406 (2011). See also, *Haberman v. Wash. Pub. Power Supply System*, 109 Wn.2d 107, 120-21, 744 P.2d 1032 (1987) (same). A court may ignore a plaintiff's conclusory factual allegations if they "do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself." *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 863, 233 P.3d 861 (2010) (plaintiff's alleged "set of facts" opposing CR 12(b)(6) must be those "which plaintiff could prove, consistent with the complaint, [that] would entitle the plaintiff to relief on the claim") (*quoting Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). This Court reviews dismissal orders under CR 12(b)(6) de novo. *Austin v. Ettl*, 171 Wn. App. 82, 87, 286 P.3d 85 (2012).

the relitigation of an issue that has already been litigated and determined even where the plaintiff asserts a new and distinct claim. *Shoemaker*, 109 Wn.2d at 507. The elements of issue preclusion are: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Id.*

The trial court correctly concluded that the 4 elements of the doctrine were satisfied here, even though Nissen's second PRA request involved a slightly different range of days for which records were sought. Nissen's complaint in *Nissen I* and here both revolve around the same legal issue -- whether the private cell phone and text message records of a public employee are subject to disclosure under the PRA.

Nissen contends that the four elements of collateral estoppel cannot be met here. Br. of Appellant at 18-30. Her arguments are utterly baseless.

Nissen first contends that collateral estoppel is inapplicable unless it is mutual, citing *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967). Br. of Appellant at 18. Mutuality only addresses the third element of collateral estoppel, the identity of the parties. *Bordeaux*, 71 Wn.2d at 396. It does not relate to mutuality of remedy, as Nissen apparently argues. The parties in *Nissen I* and *Nissen II* were identical.

Nissen further asserts that there was no final decision on the merits in *Nissen I* because the case was resolved on a CR 12(b)(6) motion. Br. of Appellants at 19-21.<sup>9</sup> Her argument is wrong. A dismissal on a CR 12(b)(6) motion is a final adjudication on the merits because Washington law liberally treats final judgments on the merits for preclusive purposes. Thus, for res judicata purposes, an unappealed summary judgment is a final judgment for purposes of res judicata. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004); *Ensley*, 152 Wn. App. at 899-902. Similarly, an agreed order may be a final judgment. *Miles v. State*, 102 Wn. App. 142, 152, 6 P.3d 112 (2000), *review denied*, 142 Wn.2d 1021 (2001) (agreed order of dependency was basis for collateral estoppel). Similarly, the following are final judgments: a stipulation for voluntary dismissal of an action, *Thompson v. King County*, 163 Wn. App. 184, 190-92, 259 P.3d 1138 (2011), a judgment by confession, *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2000), *review denied*, 143

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<sup>9</sup> Nissen's citation of federal authority in her brief at 20 only *supports* the County's position. Federal law has long given preclusive effect to a Rule 12(b)(6) dismissal. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L.Ed.2d 103 (1981); *Angel v. Bullington*, 330 U.S. 183, 190, 67 S. Ct. 657, 91 L.Ed.2d 832 (1947). Nissen's apparent contention that the dismissal carries no preclusive effect if appealed is not supported by *any Washington authority*. The mere filing of a notice of appeal does not render a trial court decision somehow "interlocutory." In fact, the judgment is *fully enforceable* while an appeal is pending unless stayed. RAP 7.2(c); RAP 8.1; *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 44, 802 P.2d 1353 (1991) (judgment is presumed valid and, unless superseded on appeal, it is enforceable). Nissen's argument that a litigant may refile a dismissed lawsuit against the same defendants so long as she appeals the first suit's dismissal totally disregards the interests of judicial economy and finality of judgments upon which collateral estoppel and res judicata are based.

Wn.2d 1006 (2001), or a dismissal with prejudice arising out of a settlement. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 861, 762 P.2d 1 (1986).<sup>10</sup>

Nissen had every opportunity in *Nissen I* to argue her theories on the merits, a key requirement of the United States Supreme Court's decision in *Angel*. She did not prevail. The order of dismissal in *Nissen I* was on the merits.

Nissen repeats her frivolous argument on "horizontal stare decisis" apparently contending that a trial court need not honor the decision of another trial court even where all of the elements for preclusion are met. Br. of Appellant at 21. This argument, too, is baseless. *Bauman v. Turpen*, 139 Wn. App. 78, 87 n.7, 160 P.3d 1050 (2007), cited by Nissen, does not support her position. *Bauman* cites to *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 224 n.19, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001) which makes clear that a decision of a superior court is not precedential. But the fact a decision is not precedential does not mean it fails to carry preclusive effect. In the proper case, a superior court decision carries preclusive effect. To hold otherwise would invariably defeat the doctrines of res judicata or collateral estoppel.

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<sup>10</sup> Even though Nissen attempts to parse the language of her two PRA requests to make them factually distinguishable, br. of appellant at 19, the legal issues in both cases are exactly the same.

*Nissen I* was resolved on the merits.<sup>11</sup>

Nissen's attempt to argue that the issues were different in the two cases, br. of appellant at 29-30, boils down to the fact that different days were at issue. That is insufficient. The *legal issues* were identical. The only case Nissen cites, *Thurston County v. Western Wash. Growth Management Hearings Bd.*, 158 Wn. App. 263, 240 P.3d 1203 (2010), involved 2 cases with entirely different issues pertaining to the size of Yelm's urban growth area under the Growth Management Act, given the different population resolutions adopted by the County. *Id.* at 269.

Finally, the fourth element of collateral estoppel -- whether the doctrine's application would work an injustice on Nissen -- is satisfied here. Nissen's argument is fundamentally belied by the fact that she already had an opportunity in *Nissen I* to argue that the records at issue are public records under the PRA. Both Nissen and the County fully briefed this issue in the County's successful CR 12(b)(6) motion and Nissen's unsuccessful motion for reconsideration in *Nissen I*. In short, this legal ground has already been fully litigated by the same parties in the same court.

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<sup>11</sup> Nissen also makes a strange argument in her brief at 21-25 that no preclusive effect should be given to *Nissen I* because the scope of discovery in that case and *Nissen II* were different. Her lengthy excursion into this issue is utterly irrelevant to the collateral estoppel analysis. Nissen did not file a motion in *Nissen II* asking for a continuance to conduct additional discovery. No discovery violation was present in *Nissen II*. The decision in *Nissen I* precluded the filing of *Nissen II*.

Moreover, merely because a constitutional issue is in play (and the PRA is not such a constitutional issue) does not mean that this fourth element favors Nissen. In *Southcenter Joint Venture v. National Democratic Policy Committee*, 113 Wn.2d 413, 419-20, 780 P.2d 1282 (1989), cited by Nissen, br. of appellant at 26-27, the Court principally chose not to apply collateral estoppel because Southcenter was not in privity with a party in a prior action, *id.* at 418, and the cases involved differing issues -- different types of constitutional rights. *Id.* at 419.<sup>12</sup>

Even where constitutional rights *are* implicated, the Washington Supreme Court applies preclusion principles to forestall relitigation of issues that have already been litigated. See *Recall of Pearsall-Stipek*, 129 Wn.2d 399, 402-03, 918 P.2d 493 (1996) (applying res judicata to preclude duplicative recall petitions that were brought pursuant to article I, sections 33 and 34 of the Washington State Constitution).

In this case, all the elements of collateral estoppel are satisfied, and Nissen has no constitutional right of her own to assert. Indeed, Nissen has never claimed (nor can she) that any of her own constitutional rights were implicated by her public records request because Nissen has no constitutional claim with respect to public records; the PRA, like its federal counterpart, is

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<sup>12</sup> The Court noted that collateral estoppel should not apply in important issues of law, *id.* at 419, but that assertion was dicta as the Court had already found that other elements of collateral estoppel were not satisfied.

purely a statutory right. *DeLong v. Parmalee*, 157 Wn. App. 119, 162-63, 236 P.3d 936 (2010), *review granted, remanded on other grounds*, 171 Wn.2d 1004 (2011). *See also, McBurney v. Young*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1709, 1718, 185 L. Ed. 2d 758 (2013) (the "Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws"); *see also, Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 40, 120 S. Ct. 483, 145 L.Ed.2d 451 (1999) (the Government could decide "not to give out [this] information at all").<sup>13</sup> The Constitution simply does not entitle Nissen to whatever information she believes may be a public record. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 14, 98 S. Ct. 2588, 57 L.Ed.2d 553 (1978) ("The Constitution itself is [not] a Freedom of Information Act"). The only constitutional rights involved in this case are held by Prosecutor Lindquist.

In sum, the trial court properly applied principles of collateral estoppel to bar Nissen from relitigating issues previously resolved in *Nissen I*.

(b) Res Judicata<sup>14</sup>

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<sup>13</sup> *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007) (federal law identical to Washington Public Records Act provides persuasive guidance as to meaning of PRA).

<sup>14</sup> Res judicata is an issue of law reviewed de novo by this Court. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *review denied*, 168 Wn.2d 1028 (2010).

The trial court could have also concluded that Nissen's PRA complaint in *Nissen II* was barred by res judicata.<sup>15</sup>

Res judicata, in some aspects, is even broader in its sweep than collateral estoppel. As this Court recently noted in *Marshall v. Thurston County*, 165 Wn. App. 346, 267 P.3d 491 (2011), res judicata requires a final judgment on the merits. *Id.* at 352. As argued *supra*, that requirement is satisfied here as to *Nissen I*.

The doctrine is implicated when a party seeks to split its cause of action. *Landry v. Loscher*, 95 Wn.2d 779, 782, 976 P.2d 1274, review denied, 139 Wn.2d 1006 (1999) (Allowing a plaintiff to split claims "would lead to duplicitous suits and force a defendant to incur the cost and effort in defending multiple suits."). *See also, Karlberg v. Otten*, 167 Wn. App. 522, 280 P.3d 1123 (2012). A party must assert all of its legitimate claims in a single lawsuit. Restructuring the same claim in a subsequent action is barred because a plaintiff only gets "one bite at the apple." *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Further, the doctrine prevents a plaintiff from filing the same

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<sup>15</sup> Res judicata is an alternate ground for affirmance. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698-99, 952 P.2d 590 (1998) (appellate court can affirm judgment on any grounds established by pleadings and supported by proof); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (appellate court can affirm on any theory, even if trial court did not consider it); *Pietz v. Indermuehle*, 89 Wn. App. 503, 512, 949 P.2d 449 (1998) (same). Nissen did not address this issue in her brief.

claim under a different theory. *Id.* at 507. Here, *nothing* prevented Nissen from seeking the records she ultimately sought in *Nissen II* at the time she first sought them in *Nissen I*. She split her cause of action.

Res judicata also forecloses a party's effort to bring a second lawsuit raising identical grounds as the first. Claim preclusion bars the second lawsuit where the actions share the same: (1) subject matter, (2) causes of action, (3) persons and parties, and (4) quality of the persons for or against whom the action is filed. *Marshall*, 165 Wn.2d at 355.

In addressing the identity of claims, the application of the doctrine is not confined to issues actually litigated in the first action. As this Court has noted, the doctrine applies both to matters that were actually litigated and those that "could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding." *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997). *See also, Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980).

The policy rationale for res judicata has long been clear in Washington. The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings. *Wash v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d

215 (1949). The doctrine thus avoids the disrespect to the system that follows if the same matter were twice litigated to inconsistent results, it preserves the courts' valuable time from repetitious litigation, it protects a victorious party against oppressive conduct by their adversary, and maintains the conclusive effect of prior adjudications. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30-31, 891 P.2d 29 (2005). All of these policy considerations apply here, compelling dismissal of Nissen's complaint.

Here, the first, second, and fourth elements of res judicata are uncontested. The first element, that the persons and parties are the same, is satisfied because Nissen and the County were parties in both cases. The second element, the same cause of action, is satisfied because Nissen's sole cause of action in the first case was the County's alleged violation of the PRA, and her sole cause of action in this case is for alleged violation of the PRA. The fourth element, same quality of persons for or against whom the claim is made, is satisfied as well. The "quality" requirement simply requires a "determination of which parties in the second suit are bound by the judgment in the first suit." *Ensley*, 152 Wn. App. at 905. Because the parties to this lawsuit are the same as the parties in the previous lawsuit and all parties were bound by the court's dismissal, the fourth element is satisfied.

Although it is difficult to discern, Nissen only contested the third element, same subject matter, below. CP 488-94. When determining whether two actions involve the same subject matter the court considers:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

*DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000), review denied, 146 Wn.2d 1016 (2002).

The subject matter of this case is identical to the subject matter of the first case because the records requested in the first case are included within those requested in this case. The cases arise out of the same transactional nucleus of facts. A side by side examination of the two requests reveals that the requests are indistinguishable. In *Nissen I*, Nissen requested:

[A]ny and all of Mark Lindquist's cellular telephone records for number 253-851-XXXX [sic] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

CP 334. Here, Nissen sought:

[T]he text content on Verizon Wireless # 253-861-XXXX from July 29, 2011 to August 4, 2011 that relate to the conduct of government or the performance of any governmental or proprietary function. This request relates to the cell phone used by Mark Lindquist.

CP 28. Both of her requests specifically asked for Prosecutor Lindquist's personal cell phone records, and both specifically asked for text messages.<sup>16</sup> Nissen's second request encompassed the same days, plus additional days, but this makes no difference for the claim preclusion analysis. Simply extending the time period of the request to encapsulate additional days in no way alters the subject matter of the request, which is the same Verizon records. Both requests attempt to obtain the content of text messages from Prosecutor Lindquist's private cell phone.

Not only do the records requests in both lawsuits seek the same type of records, the only legal claims Nissen advanced in both lawsuits are for alleged violation of the PRA. Accordingly, the legal issues in both lawsuits -- whether the PRA applies to the private cell phone records of a public employee, whether any PRA exemptions are applicable, and whether disclosure of such records would violate a public employees' right to privacy -- are identical.

In light of the identical claims and requests, all four considerations for determining whether the subject matter of two lawsuits are the same are

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<sup>16</sup> In her second request, Nissen inserted the word "content," CP 25, and contends that the text communications are public records because the text content is created by the public employee and not the phone company. However, by any plain reading of her request, Nissen's request in *Nissen I* for all "Mark Lindquist's cellular telephone records... including text messages" includes the "content" of those text messages, which is what she argued in her first PRA action. CP 28, 334. Any alleged "distinction" that she specifically used the word "content" in the second request is a desperate ploy to distinguish the indistinguishable.

satisfied. First, the rights and interests of both the County and Prosecutor Lindquist would be impaired by allowing this lawsuit to move forward, as Judge Pomeroy already ruled that the requested records are not public records subject to disclosure, dismissing the prior lawsuit. Second, just as in the first case, the pleadings alone are sufficient to determine the purely legal questions before the court. Third, the rights of the parties involved in the first case are the same as those at issue here. Finally, the transactional nucleus of facts is exactly the same since the requests are legally identical.

The claim in *Nissen I* is legally indistinguishable from the claim in *Nissen II*. Dismissing Nissen's current claim avoided the possibility of inconsistent results, prevented the needless burden of repetitious litigation, protected the County as the prevailing party in the first litigation, and maintains the conclusive effect of the prior litigation. This Court should affirm the trial court's order.

(2) The PRA Is Inapplicable Here<sup>17</sup>

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<sup>17</sup> While the PRA is a strongly worded mandate for disclosure of public records, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 344-45, 217 P.3d 1172 (2009), that statute makes clear which records are subject to its provisions and affords certain statutory exemptions. Courts interpret the disclosure provisions of the PRA liberally and its exemptions narrowly, *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008), but that liberal construction imperative does not permit courts to ignore the plain language of the Washington Constitution or another statute's specific public disclosure exemption. *Building Industry Ass'n of Wash. v. Dep't of Labor & Indus.*, 123 Wn. App. 656, 666, 88 P.3d 537, review denied, 154 Wn.2d 1030 (2004) ("The general mandate that the PDA be liberally construed does not permit us to ignore the plain language of WISHA's specific public disclosure exemption."). This Court must review any PRA issue *de novo*. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 145, 240 P.3d 1149 (2010).

Nissen spends a considerable part of her brief, *br. of appellant* at 30-45, rearguing the underlying issues already addressed in *Nissen I*. Nissen misses the point that Judge Schaller resolved this case on issue preclusion principles. The County does not intend to reargue the substantive PRA issues or the need for an *in camera* review here. Because the substantive PRA issues in *Nissen I* and *Nissen II* are identical, the County incorporates by reference its substantive analysis of the PRA issues set forth in its briefing and that of Prosecutor Lindquist on the merits from *Nissen I*.

As recounted in the *Nissen I* briefs referenced above, the records Nissen seeks are Mark Lindquist's personal phone records and are therefore not "public records" within the meaning of RCW 42.56.010(3) because they are not prepared, owned, used, or retained by a public agency. Public employees, including elected officials, are not "offices" or "agencies" under the PRA. *See* RCW 42.56.010(1). Neither the County nor Prosecutor Lindquist possessed the records. Further, multiple exemptions in the PRA protect these personal records from disclosure.

Finally, the personal records Nissen seeks are protected by state and federal constitutions and statutes and there is no lawful authority for her proposed invasion of Prosecutor Lindquist's privacy. It is well established law that police and prosecutors cannot seize the personal phone records of criminals without a warrant under the Fourth Amendment to the United States

Constitution or article I, § 7 of the Washington Constitution,<sup>18</sup> and public employees are not criminals, nor are their private communications public records.

Nissen proposes to rewrite the PRA so that anyone -- including criminals -- could seize the personal records of police and prosecutors or any other public employee. This Court should reject such an approach. Nissen cites to *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476, *review granted*, 175 Wn.2d 1022 (2012) and *State v. Roden*, 169 Wn. App. 59, 279 P.3d 461, *review granted*, 175 Wn.2d 1022 (2012) as supporting the proposition that "there is no reasonable expectation of privacy in sent text messages." Br. of Appellant at 14. But Nissen ignores the facts in these cases that are applicable here. Both cases hold that a criminal defendant has no expectation of privacy in a text message that he has sent to a drug dealer to facilitate a drug purchase. *See Hinton*, 169 Wn. App. at 31 (addressing the defendant's constitutional challenge); *Roden*, 169 Wn. App. at 61, 68 (addressing the defendant's chapter 9.73 RCW privacy act challenge). Relevant here, this

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<sup>18</sup> The question of whether the government can access the private cell phone records of American citizens even for ostensible national security reasons has been addressed in our courts. For example, in *Klayman v. Obama*, \_\_\_ F. Supp.2d \_\_\_, 2013 WL 6571596 (D.D.C. 2013), the district court held that the wholesale, warrantless gathering of private phone record metadata of American citizens by the National Security Agency pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq., and the USA Patriot Act, with the participation of telecommunications and internet companies, violated the Fourth Amendment to the United States Constitution. The court specifically addressed cell phone data. *Id.* at \*20. *See also, United States v. Jones*,

Court's majority opinion in *Hinton* explains: "It is important to note that Hinton is arguing a privacy interest in another's electronic device, not his own." *Hinton*, 169 Wn. App. at 33. "[A] defendant has a privacy interest in messages stored on his or her own cell phone" and "electronic communications, including text messages, may not be intercepted and searched." *Id.* at 44. This Court ultimately held:

On his own iPhone, on his own computer, or in the process of electronic transit, Hinton's communications are shielded by our constitutions. But after their arrival, Hinton's text messages on Lee's iPhone were no longer private or deserving of constitutional protection. Accordingly, the trial court did not err by denying Hinton's motion to suppress.

*Id.* at 45 (footnote omitted). Under *Hinton* and *Roden*, all citizens, including public officials and public employees, have privacy interest in the text messages associated with their smart phones.

Nissen also cites *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 177 L.Ed.2d 216 (2010) as support for her statement that "In the context of public employment privacy is never absolute." Br. of Appellant at 22. But nowhere does that case so state. Moreover, the *Quon* case did not concern a government employee's use of his personal cell phone. *Quon* held only that the City did not offend the Fourth Amendment by reviewing, for a legitimate business purpose, the records of text messages sent and received by

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U.S. \_\_\_, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012) (warrantless use of GPS device to track a vehicle's movement violated Fourth Amendment).

a police officer on a pager that the City provided to the officer for police business. No similar circumstance is present here.

In sum, on the merits, Nissen was not entitled to the personal cell phone and text message records of Pierce County Prosecutor Mark Lindquist.

(3) The Trial Court Erred in Failing to Impose CR 11/RCW 4.84.185 Sanctions Against Nissen and Her Counsel

The trial court erred in determining that CR 11/RCW 4.84.185 sanctions should not be applied against Nissen and her counsel for filing the complaint in *Nissen II*. CP 1109-24, 1271-74.

Washington law forbids the use of the litigation process for improper purposes.<sup>19</sup> CR 11<sup>20</sup> provides that a person signing a pleading impliedly warrants that it asserts legitimate positions and is not filed for an illegitimate purpose. In determining whether to award fees, the Court must consider the CR 11's purpose, which is to deter baseless filings and to curb abuses

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<sup>19</sup> Over 20 years ago, Judge Stanley Worswick wrote: "Starting a lawsuit is not trifling thing. By the simple act of signing a pleading, an attorney sets in motion a chain of events that surely will hurt someone." *Cascade Brigade v. Economic Dev. Bd. for Tacoma-Pierce County*, 61 Wn. App. 615, 617, 811 P.2d 697 (1991) (affirming CR 11 award against an attorney). Similarly, in *Watson v. Maier*, 64 Wn. App. 889, 891, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992), former Chief Justice Gerry Alexander wrote while sitting on this Court: "A famous lawyer once said: 'About half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop.'" This Court affirmed CR 11 sanctions and awarded fees on appeal against an attorney who reiterated arguments that had previously been determined to be meritless, noting "[t]his type of misuse of the system should be discouraged." *Id.* at 901. The same should be true here.

<sup>20</sup> The text of the pertinent portions of CR 11 are reproduced in the Appendix.

of the judicial system. *Bryant*, 119 Wn.2d at 219. RCW 4.84.185<sup>21</sup> provides penalties against parties who file frivolous actions. The same standard is used when reviewing sanctions imposed under CR 11 and RCW 4.84.185. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 837-38, 946 P.2d 946 (1990). The principal difference between CR 11 and RCW 4.84.185 is that the latter applies only if the entire action is frivolous. *See State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903-05, 969 P.2d 64 (1998).

Washington courts prohibit two types of filings: (1) those that are not "well grounded in fact and ... warranted by ... law;" and (2) those that are "interposed for any improper purpose;" *Miller v. Badgley*, 51 Wn. App. 285, 300-01, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). These are considered alternative violations, and either can result in an award of attorney fees. *Harrington v. Pailthorp*, 67 Wn. App. 901, 912, 841 P.2d 1258 (1992), *review denied*, 121 Wn.2d 1018 (2002). Moreover, courts have the inherent authority to sanction bad faith actions by parties in litigation.<sup>22</sup> Each of these bases for sanctions applies here.

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<sup>21</sup> The text of RCW 4.84.185 is reproduced in the Appendix.

<sup>22</sup> Under this equitable power of the courts, it is not necessary to find that an action was brought in bad faith or for the purposes of delay or harassment in order to find that

(a) The Nissen II Complaint Was Not Warranted by Existing Law

A filing is "baseless" if it is "(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law." *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994), *review denied*, 125 Wn.2d 1015 (1995) (*citing Bryant*, 119 Wn.2d at 219-20). "A complaint is *legally* frivolous where it is not based on a plausible view of the law." *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 115, 791 P.2d 537 (1990), *affirmed*, 119 Wn.2d 210, 829 P.2d 1099 (1992) (emphasis in original). An action is considered frivolous when it "cannot be supported by any rational argument on the law or facts." *Clarke v. Equinox Holdings*, 56 Wn. App. 125, 132, 783 P.2d 82, *review denied*, 113 Wn.2d 1001 (1989).

Nissen recognized the import of collateral estoppel in her unsuccessful attempts to distinguish the two legally identical lawsuits. Her complaint here stated:

3.6 This complaint is distinct from the earlier action in that this action concerns Lindquist's refusal to disclose the text content from his Verizon Wireless #253-861-XXXX from July 29, 2011 to August 4, 2011, that relate to the conduct of government or the performance of any governmental or proprietary function. The earlier case concerns phone records and some text context [sic], but not all of the text content requested on December 9, 2011 -- PA Reference No. 161/11-1428.

CP 7-8, 27.

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an action is frivolous under RCW 4.84.185. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 311-12, 202 P.3d 1024 (2009).

Rather than articulating separate subject matters, paragraph 3.6 highlights that the subject of both lawsuits is the *same*: records and text content from a personal cell phone. The identity of subject matter cannot be legally distinguished by the fact that *Nissen I* involved text messages on the personal phone for August 2 and 3, 2011, whereas *Nissen II* involved text messages on the same phone for July 29 through August 4, 2011. *Nissen I* and *Nissen II* involved legally indistinguishable public records requests. Both lawsuits litigated text messages on a personal cell phone.<sup>23</sup> Although in paragraph 3.5 she acknowledges the judgment issued in *Nissen I*, nothing in paragraph 3.6 acknowledges its legal effect. Rather, *Nissen II* involved the *very same text messages as litigated in Nissen I*, and messages from additional days.

Nissen's counsel repeatedly attempted to mislead Judge Schaller as to the nature of the request in *Nissen I*, relying on ever-changing mischaracterizations of the record. Nissen's counsel tried to argue: (1)

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<sup>23</sup> At the scheduling conference in *Nissen I*, Judge Pomeroy asked for clarification whether the issues before her concerned the "telephone records of an elected official." CP 344. Nissen's then counsel answered, "Yes, your Honor. And to add one other point, there are also text messages. You mentioned phone calls, so phone calls and text messages within the basic confines of what you describe, yes." CP 345. Thereafter, Nissen's counsel moved that Court to compel "the preservation of text messages at issue because the parts of the public records request at issue seek text messages sent from or received by Mr. Lindquist's phone." CP 348-49.

that the request in *Nissen I* did not deal with text messages,<sup>24</sup> (2) that the request in *Nissen I* was not for text content;<sup>25</sup> (3) that the texts in *Nissen I* were different because of the days requested;<sup>26</sup> and (4) that *Nissen I* covered phone records only. CP 886-97. Notwithstanding these mischaracterizations, the trial court correctly ruled that the legal issues presented in *Nissen I* and *Nissen II* were the same. CP 881-85.

Tellingly, as Judge Schaller's letter opinion noted, Nissen wholly failed to respond to the County's collateral estoppel argument in her response to the County's motion to dismiss. CP 884. Instead, she focused on the inapplicable doctrine of "horizontal stare decisis" and other issues non-responsive to collateral estoppel. *Id.* Even in her motion for reconsideration, Nissen failed to muster any legally plausible arguments to defeat collateral estoppel. Instead, she rehashed unsupported arguments made in both *Nissen I* and *Nissen II* regarding issues of standing, discovery, *in camera* review, the Record Retention Act, and compelled disclosure of personal records. She

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<sup>24</sup> Nissen's counsel falsely told Judge Tabor that *Nissen I* did not involve "text messages." CP 1141.

<sup>25</sup> Nissen's counsel falsely told Judge Schaller that *Nissen I* did not involve "text content." CP 1169.

<sup>26</sup> "The first matter implicated phone records including text messages for *only one day only*." CP 292. "Nissen's prior requests were for telephone records, to include any text messages *on August 2nd only* ... Judge Pomeroy's decision affects only the disclosure of telephone records with text context [sic] *for August 2nd*." CP 1121-22. Contrary to these three misrepresentations, *Nissen I* litigated both Aug. 2 and 3. CP 1179.

even returned to "horizontal stare decisis." CP 886-98. The failure of Nissen's counsel to articulate any rational argument in law or fact against the application of collateral estoppel demonstrates that *Nissen II* was not well grounded in fact or warranted by existing law.

*Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 979 P.2d 464 (1999), *review denied*, 139 Wn.2d 1027 (2000), controls here. There, Division I held that a trial court erred in not awarding attorney fees after the case was dismissed on collateral estoppel grounds. *Déjà Vu* challenged a Federal Way ordinance requiring dancers to maintain a four-foot distance from patrons. Prior to initiating suit against Federal Way, *Déjà Vu* and several other companies lost a superior court lawsuit challenging the constitutionality of Bellevue's exotic dance ordinances, one of which included a four-foot minimum distance between dancers and patrons. Following Bellevue's successful defense of its ordinance, Federal Way enacted its own ordinance and *Déjà Vu* challenged that ordinance in federal court. The federal court dismissed *Déjà Vu*'s lawsuit against Federal Way on collateral estoppel grounds. Meanwhile, the litigation on the Bellevue ordinance reached our Supreme Court, which affirmed the superior court's ruling.

One month after the Supreme Court's ruling, *Déjà Vu* initiated another action against Federal Way, arguing that the ordinance was

unconstitutional but arguing solely on state constitutional grounds. Federal Way moved for dismissal, asserting the preclusive effect of the federal court's prior decision. The trial court granted Federal Way's summary judgment motion, but denied Federal Way's request for attorney fees for having to defend a frivolous action. Division I held that the trial court properly dismissed based on collateral estoppel, but also ruled that the trial court abused its discretion in failing to award attorney fees pursuant to CR 11 and RCW 4.84.185 when there was no rational argument in law or fact to suggest the matter had not already been decided. *See id.* at 263-64.

Similarly, in *Racy*, Division III upheld an award of attorney fees against a school district for ignoring the decision in a prior case when it filed a lawsuit against a teacher's union. Both the trial court and Court of Appeals found that a prior Supreme Court ruling rendered the school district's arguments untenable because the case concerned an action between a school district and its teachers' union, and involved identical collective bargaining agreement provisions. The court also noted that the parties were represented by the same counsel. Accordingly, the trial court's award of attorney fees pursuant to RCW 4.84.185 was appropriate:

It was therefore frivolous to file an action that ultimately raised the same issue (even if the context was slightly different) as that decided in *Mount Adams*. The questions

presented here was the same as presented there—who decides whether a grievance is subject to arbitration? The *Mount Adams* court resolved that specific issue. The District ignored the holding of that case and proceeded with its lawsuit.

*Id.* at 314-15. Thus, although the *Racy* court did not apply collateral estoppel, the principle driving the award of attorney fees was the same as in *Déjà Vu*—it was frivolous for counsel to ignore a holding in a prior case and to proceed with a lawsuit when the relevant issues had already been decided.

Bluntly put, Nissen and her counsel filed *Nissen II* knowing full well that the basis for her PRA had been *rejected* in *Nissen I*. Nissen and her counsel thus *knew that Nissen II was not well-grounded in law*. Like the plaintiffs and their counsel in *Déjà Vu* and *Racy*, Nissen and her counsel chose to ignore the prior holding and proceeded with a lawsuit that was clearly barred. The conduct was sanctionable.

(b) Nissen's Complaint Was Filed for Improper Purposes

CR 11 also bars litigation that is pursued for an illicit purpose such as harassment of an opposing litigant. *See Bryant*, 119 Wn.2d at 217; *Harrington*, 67 Wn. App. at 912; *Skilcraft Fiberglass v. Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993) (upholding sanctions imposed on attorney). Indeed, "CR 11 was designed to reduce `delaying tactics, procedural

harassment, and mounting legal costs." *Suarez v. Newquist*, 70 Wn. App. 827, 834, 855 P.2d 1200 (1993) (*quoting Bryant*, 119 Wn.2d at 219) (trial court abused its discretion by denying CR 11 award in case where counsel filed improper affidavits of prejudice for the purpose of delaying proceedings) (internal citations omitted).<sup>27</sup>

The extreme rancor of Nissen and her counsel toward the County, the Prosecutor's Office, and Prosecutor Lindquist are manifested in the unsupported, unnecessary, unprofessional, inflammatory and improper language Nissen's counsel has repeatedly employed in what should have been a straightforward PRA litigation where her motives for seeking the records were irrelevant.

- The PRA complaint falsely and unnecessarily alleges the Prosecutor retaliated against Nissen and engages in "continuing misconduct and abuse of his office." CP 7.
- Nissen mischaracterizes the resolution of her prior claim to suggest "misconduct" by the Prosecutor's Office when none was present. *Id.*
- Nissen's counsel stated in a declaration, with no explanation or evidence or relevance, that Nissen believes that text messages reveal "hostile" and "retaliatory" animus of Prosecutor Lindquist. CP 1086.
- At the hearing on Nissen's Motion for Contempt, Nissen's counsel, again without any evidence, accused Prosecutor Lindquist of "retaliatory things" and possessing "retaliatory and discriminatory animus." RP (3-1-13) at 10, 18.

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<sup>27</sup> Importantly, even if this Court determines that Nissen was entitled to the records at issue in *Nissen I*, the filing of the complaint in *Nissen II* for an illicit motive is sanctionable. See *Quick-Ruben v. Verharen*, 136 Wn.2d at 904 (sanctions warranted where pleading was filed for an improper purpose).

- In a brief, Nissen's counsel wrote, yet again with no evidence: "Nissen has reason to believe the text messages are incriminating." CP 294.
- In her response to the County's motion to dismiss, Nissen's counsel accused the elected Prosecutor of committing a felony, subject "up to ten years in prison," for violating the Records Retention Act. "Mark Lindquist's concealment of text messages sent by him or as Pierce County's Prosecutor amounts to criminal misconduct, which this court may not endorse." CP 479-80.<sup>28</sup>

It is noteworthy that Nissen and her counsel *repeat* the inflammatory unsupported charges, often without reference to the record, including allegations of criminal conduct, against Prosecutor Lindquist in their brief in this Court. Br. of Appellant at 8, 18, 28, 33-34, 41-42, 44.

Nissen's counsel has no objective evidence of her defamatory claims. In fact, the findings in a hearing on Nissen's claim of improper conduct by the County, the Prosecutor's Office, and Prosecutor Lindquist directly refute her accusations, but she selectively redacted the report she presented to the trial

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<sup>28</sup> To falsely accuse another of criminal conduct is defamation per se. *Amsbury v. Cowles Pub. Co.*, 76 Wn.2d 733, 739, 458 P.2d 882 (1969). A judicial proceedings privilege shields otherwise defamatory statements made in pleadings and briefs, *McNeal v. Allen*, 95 Wn.2d 265, 267-68, 621 P.2d 1285 (1980), but that does not license Nissen or her counsel to use litigation for abusive purposes:

The fact that statements made in pleadings are absolutely privileged does not mean that an attorney may abuse the privilege with impunity. As we pointed out in *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 564 P.2d 1131 (1977), the attorney is subject to the supervision and discipline of the court.

*Id.* at 267. Some of counsel's baseless accusations were supposedly offered to show Nissen's reasons for her record requests, but RCW 42.56.080 expressly states that the reasons for the request are not required and *are therefore irrelevant*.

court to hide specific facts and findings adverse to Nissen. CP 1256-58. Rather than focus on the issues relevant to a PRA action, Nissen and her counsel have violated CR 11 with baseless *ad hominem* attacks, which show a harassing purpose aimed at undermining public trust in the Prosecutor's Office, Prosecutor Lindquist, and the legal system, apparently hoping to cause them embarrassment and harm in the media and before the voters. This was a misuse of the legal system.

Moreover, this lawsuit is the latest in a series of harassing filings by Nissen and her counsel against the County, the Prosecutor's Office, and Prosecutor Lindquist. CP 1183-85. In a 17-month period, Nissen and her counsel collectively filed 12 complaints against members of the Prosecutor's Office. *Id.* First, Nissen, represented by current counsel, filed a June 15, 2011 claim for damages, where she referred to the Prosecutor as a "diabolical mastermind." CP 1184. On or about the same date, Nissen also filed an improper governmental action complaint (i.e. whistleblower), an ethics complaint, and three bar complaints against the Prosecutor and his staff. *Id.*

On July 26, 2011, Nissen and the County reached an agreement pertaining to Nissen's restriction from the private areas of the Prosecutor's Office. *Id.* Nissen was represented by her current counsel. *Id.* The County paid for a mediation and ultimately for Nissen's attorney fees. *Id.*

No misconduct was found and no money was awarded to Nissen. As a condition of the resolution, both sides agreed not to file additional complaints for events occurring before July 26, 2011. *Id.* Soon thereafter, Nissen and her counsel collectively filed three supplemental bar complaints against the Chief Criminal Deputy, the Chief of Staff, and Prosecutor Lindquist alleging conduct that pre-dated the resolution (all were dismissed), a new improper governmental action complaint against the Chief Criminal Deputy, the Chief of Staff, Prosecutor Lindquist and several deputy prosecutors alleging 16 adverse actions (all dismissed), and two PRA lawsuits, which were both dismissed. CP 1184-85.<sup>29</sup>

Nissen and her counsel have engaged in a pattern of baseless accusations and conspiracy theories against the Prosecutor's Office, Mark Lindquist, and several deputies that is sanctionable under CR 11, and the trial court erred by failing to sanction Nissen and her counsel.

(c) The Trial Court Had Inherent Authority to Award Attorney Fees Against Nissen and Her Counsel

The trial court possessed inherent power to assess attorney fees against an attorney for bad faith conduct in litigation. *Hiller Corp. v. Port Angeles*, 96 Wn. App. 918, 927-30 (1999), *review denied*, 140 Wn.2d

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<sup>29</sup> While Nissen's current counsel was not counsel of record in *Nissen I*, she signed declarations in support of Nissen, and sat at counsel table during court proceedings. CP 1185.

1010 (2000) (discussing prelitigation misconduct, procedural bad faith, and substantive bad faith as grounds for awarding fees). This Court's decision in *Rogerson* is particularly apt authority for sanctioning Nissen for procedural bad faith, her vexatious conduct in the litigation. *Id.* at 928. Indeed, the courts' inherent authority to sanction for bad faith conduct extends even to situations involving constitutionally-based activities by litigants. *In re Recall of Lindquist*, 172 Wn.2d 120, 136-38, 258 P.3d 9 (2011) (frivolous recall petition filed for political harassment); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343 (1998) (CR 11 and inherent equitable powers justified sanctions for frivolous multiple recall petition).

Lying to a court is a clear example of bad faith in litigation. As noted earlier, Nissen's counsel did precisely that when she asserted at an early scheduling hearing that *Nissen I* concerned only "phone records" and not text messages:

THE COURT: But you don't agree that these are the same - these are text messages. Were the other ones telephone?

MS. MELL: *Telephone records*, and they pertain to a much narrower point in time. It's August P. We're dealing with a broader scope of information and *specifically text content as opposed to phone records*.

CP 1111 (emphasis added). After the case was dismissed, Nissen's counsel repeated this misstatement in her motion for reconsideration at 1-2, where she stated, "The request [in *Nissen II*] is for text content, not phone records." *Id.* These are not casual or accidental misstatements; Nissen's counsel knowingly misrepresented the subject matter of *Nissen I* to Judge Schaller in an effort to confuse the record and evade the collateral estoppel defense.

Nissen's counsel also misrepresented the dates involved in *Nissen I*. "Nissen's prior requests were for telephone records, to include any text messages on August 2<sup>nd</sup> only . . . Judge Pomeroy's decision affects only the disclosure of telephone records with text context [sic] for August 2<sup>nd</sup>." CP 1121-22. Nissen's counsel repeated this false description of *Nissen I* in her motion to preserve evidence and lodge records, stating, "The first matter implicated phone records including text messages for one day only." CP 292. Contrary to these misrepresentations, *Nissen I* involved records and text messages from both August 2 and 3, 2011. CP 1179.

A lawyer has particular ethical obligations of candor with the courts in presenting evidence and legal arguments. RPC 3.3(a) states:

A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

Our Supreme Court has established the appropriate standard for assessing counsel's candor with the courts in a legion of disciplinary cases. *E.g., In re Disciplinary Proceedings Against Kamb*, 177 Wn.2d 851, 305 P.3d 1091 (2013) (attorney misrepresented lack of court order to Department of Licensing); *In re Disciplinary Proceedings Against Rodriguez*, 177 Wn.2d 872, 306 P.3d 893 (2013) (attorney submitted forged documents or documents with forged signatures to agency); *In re Disciplinary Proceedings Against Conteb*, 175 Wn.2d 134, 284 P.3d 724 (2012) (attorney misrepresented employment history in his application for political asylum); *In re Disciplinary Proceedings Against Simmerly*, 174 Wn.2d 963, 285 P.3d 838 (2012) (attorney submitted grossly inflated proof of claim for fees to bankruptcy court); *In re Disciplinary Proceedings Against Ferguson*, 170 Wn.2d 916, 246 P.3d 1236 (2011) (attorney distorted the facts misrepresenting actions of opposing counsel in an effort to secure ex parte order). As this recitation of recent Supreme Court RPC 3.3 cases evidences, our Supreme Court has little

tolerance for counsel who intentionally misrepresent the facts in a case, and thereby pollutes the litigation process.

Moreover, this Court has made it clear that sanctions under RAP 18.9(a) are appropriate where an attorney violates the provisions of RPC 3.3. In *In re the Welfare of R.H., T.A., T.H., N.R., and Z.R.*, 176 Wn. App. 419, 309 P.3d 620 (2013), this Court imposed sanctions against an attorney who repeatedly misrepresented the record in oral argument describing such conduct as "unprofessional." *Id.* at 430 ("Even if we charitably assume that counsel's misrepresentations were the result of carelessness, her insistence on the accuracy of her assertion is inexcusable. Such repeated and blatant oral misrepresentations of the content of the record does a disservice to her client and this court."). The same is true of Nissen's counsel.

In sum, the filing of the complaint in *Nissen II* and the associated conduct of Nissen and her counsel were sanctionable, whether under CR 11, RCW 4.84.185, or the courts' inherent authority. *Nissen II* raised the identical legal issue as *Nissen I* and, therefore, was not warranted by existing law. Nissen filed a baseless complaint for her own illicit motives. Not only were the County, its Prosecutor's Office, and Prosecutor Lindquist harmed, but the taxpayers who pay the bills were harmed as well. Judge Schaller should have sanctioned Nissen and her counsel.

(4) Nissen's Appeal Is Frivolous

Nissen's appeal is frivolous under RAP 18.9(a).<sup>30</sup> Washington appellate courts award fees on appeal to parties who have abused the appellate rules or filed frivolous appeals.<sup>31</sup> An appeal is frivolous if it is essentially factual, rather than legal, in nature, involves discretionary ruling where discretion was not abused by the trial court, or the appellant cannot cite any authority in support of its position. A respondent may recover its fees on appeal from the party filing a frivolous appeal. *Millers Casualty Ins. Co. v. Biggs*, 100 Wn.2d 9, 665 P.2d 887 (1983); *Boyles v. Dep't of Retirement Systems*, 105 Wn.2d 499, 716 P.2d 869 (1986).

RAP 18.9(a) permits an appellate court to impose sanctions where a party uses the rules to delay or for an improper purpose. RAP 18.7

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<sup>30</sup> RAP 18.9(a) states:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

<sup>31</sup> The test for frivolous appeal has been in place since 1980:

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an 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 was no reasonable possibility of reversal.

*Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, review denied, 94 Wn.2d 1014 (1980).

specifically incorporates the provisions of CR 11. *Bryant*, 119 Wn.2d at 223 (party filed motion on appeal to disqualify opposing counsel); *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83, *review denied*, 113 Wn.2d 1016 (1989). This incorporation of CR 11 suggests a single frivolous appellate issue may be sanctionable. Thus, an appellate court may impose sanctions for a party's recalcitrance or obstructionism, as our Supreme Court acknowledge in *In re Adoption of B.T.*, 150 Wn.2d 409, 421, 78 P.3d 634 (2003). A party that files a series of groundless motions and appeals may face sanctions. *Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831, *review denied*, 96 Wn.2d 1002, 628 P.2d 831 (1981).

Moreover, a party appealing a trial court's sanction decision may be deemed to be continuing the intransigence that supported the initial sanctions awards, and face further sanctions on appeal. *Quick-Ruben*, 136 Wn.2d at 905.

Here, Nissen's appeal is frivolous, a continuation of the frivolous trial court position taken by Nissen and her counsel. Appellate sanctions are appropriate.

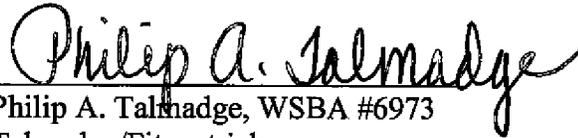
#### F. CONCLUSION

The trial court properly dismissed Nissen's complaint, but should have imposed sanctions against Nissen and her counsel for the reasons set forth herein.

This Court should affirm the trial court's order dismissing Nissen's complaint and reverse the trial court's order denying sanctions. The Court should remand the case to the trial court for entry of a fee award as sanctions against Nissen and her counsel. Costs on appeal, including reasonable attorney fees, should be awarded to the County.

DATED this 24<sup>th</sup> day of January, 2014.

Respectfully submitted,



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Cross-Appellants

# APPENDIX

CR 11(a):

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage; custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence, or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

RCW 4.84.185:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

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EXPEDITE:  
 Hearing is set  
Date: May 24, 2013  
Time: 9:00 a.m.  
Judge/Calendar: Judge Schaller  
 No hearing is set.

SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY

GLEND A NISSEN,  
  
Plaintiff,  
  
v.  
  
PIERCE COUNTY, a public agency;  
PIERCE COUNTY PROSECUTOR'S  
OFFICE, a public entity,  
  
Defendants.

No. 12-2-02452-6

~~PROPOSED~~ ORDER GRANTING  
PIERCE COUNTY'S CR 12(b)(6)  
MOTION TO DISMISS WITH  
PREJUDICE

THIS MATTER, having come before the Court on Pierce County's CR 12(b)(6) Motion to Dismiss, the Court having considered the records and files herein, and specifically:

1. Defendant Pierce County's CR 12(b)(6) Motion to Dismiss;
2. Declaration of Michael A. Patterson in Support of Defendant Pierce County's CR 12(b)(6) Motion to Dismiss;
3. Nissen's Response to Defendant Pierce County's 12(b)(6) Motion to Dismiss;
4. Declaration of Joan K. Mell in Support of Nissen's Response to Defendant Pierce County's 12(b)(6) Motion to Dismiss;
5. Reply in Support of Defendant Pierce County's CR 12(b)(6) Motion to Dismiss;

[PROPOSED] ORDER GRANTING PIERCE  
COUNTY'S CR 12(b)(6) MOTION TO DISMISS  
WITH PREJUDICE - 1  
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PATTERSON BUCHANAN  
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- 6. Nissen's Supplemental Statement of Authorities in Response to Defendant Pierce County's Motion to Dismiss; and
- 7. Response to Plaintiff's Supplemental Statement of Authorities in Response to Defendants' Motion to Dismiss.

The Court being fully advised in the premises, now therefore it is hereby ORDERED, ADJUDGED AND DECREED that:

Defendants Pierce County and Pierce County Prosecutor's Office's CR 12(b)(6) Motion to Dismiss is GRANTED in accordance with the Court's Letter Opinion Granting Motion to Dismiss dated April 22, 2013 (attached as Exhibit A), and this action is dismissed with prejudice.

~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_~~

DATED this 22 day of May, 2013.

  
The Honorable Christine Schaller

Presented by:

PATERSON BUCHANAN  
FOBES & LEITCH, INC.; P.S.

  
By: Michael A. Ratterson, WSBA #1976  
Of Attorney for Defendants Pierce  
County and the Pierce County  
Prosecutor's Office

[PROPOSED] ORDER GRANTING PIERCE  
COUNTY'S CR 12(b)(6) MOTION TO DISMISS  
WITH PREJUDICE - 2  
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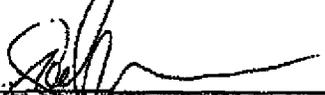
PATERSON BUCHANAN  
FOBES & LEITCH, INC., P.S.

2112 Third Avenue, Suite 500  
Seattle, WA 98121 Tel. 206.462.6700 Fax 206.462.6701

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Approved as to Form:

III BRANCHES LAW, PLLC

By:   
Joan K. McLaughlin WSBA # 21319  
Of Attorney for Plaintiff

[PROPOSED] ORDER GRANTING PIERCE  
COUNTY'S CR 12(b)(6) MOTION TO DISMISS  
WITH PREJUDICE - 3  
254299.doc

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Seattle, WA 98121 Tel. 206.462.6700 Fax 206.462.6701

0-000001007

EXHIBIT A

0-000001008

Superior Court of the State of Washington  
For Thurston County

Gary R. Tabor, Judge  
Department No. 1  
Chris Wickham, Judge  
Department No. 2  
Anne Hirsch, Judge  
Department No. 3  
Carol Murphy, Judge  
Department No. 4



Lisa L. Sutton, Judge  
Department No. 5  
James J. Dixon, Judge  
Department No. 6  
Christine Schaller, Judge  
Department No. 7  
Erik D. Price, Judge  
Department No. 8

2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502  
Telephone (360) 786-5560 • Fax (360) 754-4060

April 22, 2013

Joan Mell  
Attorney at Law  
1033 Regents Blvd, Ste 101  
Fircrest, WA 98466-6089

Michael Patterson  
Attorney at Law  
2112 3<sup>rd</sup> Avenue, Ste 500  
Seattle, WA 98121-2391

Re: *Glenda Nissen v. Pierce Co. and Pierce Co. Prosecutor's Office, No. 12-2-02452-6*  
*Defendant Pierce County's CR 12(b)(6) Motion to Dismiss*

**Letter Opinion Granting Motion to Dismiss**

Dear Ms. Mell and Mr. Patterson:

The defendants, Pierce County and the Pierce County Prosecutor's Office, move to dismiss this case entirely under CR 12(b)(6). This court reviewed and considered the entire file for this case, including the motion to dismiss, the declaration of Michael A. Patterson, the declaration of Joan K. Mell, the response, the reply, the plaintiff's supplemental statement of authorities, and the response to the supplemental statement of authorities. The court also entertained oral argument on March 29, 2013.

The defendants present three grounds for dismissal of this Public Records Act complaint. It argues that (1) the doctrine of collateral estoppel mandates dismissal of this action; (2) the doctrine of res judicata bars this litigation; and (3) as a matter of law, the defendants did not violate the PRA. The Court is very interested in the legal issue(s) related to the PRA as presented in this case and the Court has spent a substantial amount of time reviewing all of the briefing, reading statutes and cases and hearing argument in this matter. Although the Court might like to reach the substance of the case at hand, the court concludes that the first issue is

dispositive. Therefore, the court makes no ruling regarding res judicata or the merits of the underlying PRA litigation.

#### Procedural History

In two lawsuits, Glenda Nissen sued Pierce County for failing to disclose records from the personal cellular telephone of elected prosecutor Mark Lindquist. The lawsuits each involved different PRA requests, although the requests are largely similar.

The first lawsuit was filed under Thurston County Cause Number 11-2-02312-2 (Nissen I). Nissen sued Pierce County and the Pierce County Prosecutor's Office for violating an August 3, 2011 public records request made on her behalf by a third party. The request read:

Please produce any and all of Mark Lindquist's cellular telephone records for number 253-861-[redacted] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

Declaration of Michael Patterson, Ex. A, at page 3 (complaint for cause number 11-2-02312-2). Lindquist moved to intervene and the court granted the motion. Pierce County moved to dismiss and Judge Christine Pomeroy granted the motion. Decl. of Patterson, Ex. D.

The written ruling does not explain Judge Pomeroy's rationale. However, the oral ruling provides three rationales. First, the court reasoned that the records are not public records because "the Prosecutors Office did not have or retain in its possession the alleged record." Decl. of Patterson, Ex. E. Second, the court reasoned that Lindquist "has a right to privacy as a valid exemption" under RCW 42.56.050. *Id.* Finally, the court held that it has "absolutely no power to require the third-party provider [Verizon Wireless], without a search warrant application with probable cause, to disclose records." *Id.* The court elaborated that such an order would violate the constitutional protection against unreasonable search and seizure. The court denied a motion for reconsideration and the matter is currently under review at our Supreme Court.

In the second lawsuit (Nissen II), at issue today, Nissen again sued Pierce County and the Pierce County Prosecutor's Office for violating a public records request. On December 9, 2011, she requested through counsel that the County:

Please produce for public inspection the text content on Verizon Wireless # 253-861-[redacted] from July 29, 2011 to August 4, 2011 that relate to the conduct of government or the performance of any governmental or proprietary function. This request relates to the cell phone used by Mark Lindquist.

Amended Complaint, at 3. Lindquist did not move to intervene in this case and he is not a party. The defendants moved to dismiss under CR 12(b)(6), in part because the earlier litigation bars this action.

### Collateral Estoppel

Collateral estoppel bars the relitigation of an issue by a party who has had a full and fair opportunity to present his or her case, even if the subsequent litigation presents a different claim or cause of action.<sup>1</sup> *In re Marriage of Mudgett*, 41 Wn. App. 337, 342, 704 P.2d 169 (1985). The doctrine's purpose is to achieve finality of disputes, promote judicial economy, and prevent harassment of and inconvenience to litigants. *Harison v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

The doctrine applies only if four basic requirements are met: (1) the identical issue was decided in the prior action, (2) the first action resulted in a final judgment on the merits, (3) the party against whom preclusion is asserted was a party to or in privity with a party to the prior adjudication, and (4) application of the doctrine does not work an injustice. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507 (1987).

Here, all four requirements are met. First, the identical issue was decided in *Nissen I*. The issue is whether Pierce County has any duty or ability to disclose information from a cellular phone that is owned personally by Mark Lindquist, when he did not consent to such disclosure. To resolve this issue, the court must determine whether the records are "public records" under the PRA's definition, whether the right to privacy articulated in RCW 42.56.050 serves to exempt these records from public disclosure, and whether the constitutional right to privacy prohibits disclosure. *Nissen* cannot prevail in this lawsuit unless she prevails on these issues. Yet Judge Pomeroy already ruled on these identical issues. She held that the records are not "public records" because they are not retained by the parties, that RCW 42.56.050 serves as a valid exemption from disclosure, and the constitutional right to privacy prohibits disclosure. The identical issues were decided in the prior action, and accordingly this requirement is met.

Regarding the second requirement, the first action resulted in a final judgment on the merits. The pendency of an appeal does not destroy the finality of a judgment. *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619 (1961). The third requirement is also satisfied. The plaintiff and defendants in both lawsuits are identical. Although Lindquist was an intervener in the first lawsuit and is not a party in this lawsuit, the requirement is that the party "against whom preclusion is asserted"

<sup>1</sup> The parties dispute whether the two lawsuits present different claims or causes of action, based on differences between the two PRA requests. The court does not rule on that issue because it applies the doctrine of collateral estoppel, which allows dismissal of subsequent litigation even if the claims are distinct.

– here, Nissen – was a party in the prior adjudication. *Shoemaker*, 109 Wn.2d at 507. That is true here.

The fourth requirement is the only one that Nissen directly disputes.<sup>2</sup> She argues that it would be unfair to apply this doctrine. She argues that this court has the power to stay this litigation pending appeal in the first lawsuit and, further, dismissing this lawsuit:

prejudices Det. Nissen's ability to access the remaining texts that are public records. She needs a substantive decision on the texts at issue in this case. With a favorable ruling for disclosure, this court will likely have the opportunity to temporarily stay any disclosure pending appeal.

Det. Nissen's Response to Defendant's Motion to Dismiss, at 14.

Nissen is concerned that, if the Supreme Court reverses the decision from the first case, her victory will be hollow in this case because the records would have been destroyed by that time. This argument is problematic. The set of records requested in Nissen I is largely identical to the set of records requested in Nissen II. Further, Nissen previously asked this court to preserve evidence that may be responsive to her PRA request. The court denied that motion, holding that it "does not have authority to order Defendants to preserve Mark Lindquist's cell records." Amended Order Denying Plaintiff's Motion to Preserve Evidence. Therefore, the records may be destroyed regardless of whether this lawsuit is stayed pending appeal or whether it is dismissed. Additionally, the most likely course of events is that Nissen will appeal this case and it will be consolidated to Nissen I. Even if the cases are not consolidated, reversal of Judge Pomeroy's decision may be grounds to re-evaluate this case based on a change in law. CR 60(b)(11). The court finds that applying the doctrine of collateral estoppel will not "work an injustice" against Nissen. *Shoemaker*, 109 Wn.2d at 507. The fourth and final requirement of collateral estoppel is met.

Accordingly, as required by law, the court hereby applies Judge Pomeroy's rulings to this case. Those rulings are dispositive and require dismissing the entire lawsuit. The defendants' motion for dismissal under CR 12(b)(6) is GRANTED.

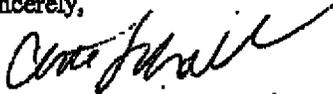
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<sup>2</sup> Nissen has not responded to the argument regarding collateral estoppel. Instead, she focused on the doctrine of "horizontal stare decisis," which is not at issue in this case.

All Counsel  
April 22, 2013  
Page 5

The parties may schedule presentation of an order consistent with this opinion on the civil motion calendar, or may present an agreed order *ex parte* to judicial assistant Kristal Rowland.

Sincerely,



Judge Christine Schaller  
Thurston County Superior Court

0-000001013

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2013 MAY 16 PM 3:33

BETTY J. GOULD, CLERK

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4 SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY  
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6  
7 GLENDA NISSEN

8 Plaintiff,

9 and

10 PIERCE COUNTY, public agency;  
PIERCE COUNTY PROSECUTOR'S OFFICE, a  
public entity

11 Defendants.

NO. 12-2-02452-6

ORDER DENYING RECONSIDERATION

12  
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14 I. BASIS

15 This matter came before the court on Plaintiff's Motion for Reconsideration of the Court's  
16 Letter Opinion Granting Motion to Dismiss filed on 4-22-13. The Court having reviewed and  
17 considered all documents filed in association with the motion before the court and all other relevant  
18 pleadings, as well as recognizing that an order of dismissal has yet to be entered in accordance with the  
19 Court's decision, and deciding the matter without argument;

20 III. ORDER

21 IT IS ORDERED that

22 Plaintiff's Motion for Reconsideration is DENIED.

23 DATED this 16<sup>th</sup> day of May, 2013.

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26 JUDGE CHRISTINE SCHALLER  
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FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA  
2013 JUN -7 AM 11:17  
BETTY J. GOULD, CLERK

[ ] Expedite  
[x] Hearing is set  
Date: June 7, 2013  
Time: 9:00 a.m.  
Judge: The Honorable Christine Schaller  
[ ] No hearing is set.

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

GLENDANISSEN, an individual,  
  
Plaintiff,  
  
v.  
  
PIERCE COUNTY, a public agency; PIERCE  
COUNTY PROSECUTOR'S OFFICE, a public  
agency,  
  
Defendants.

NO. 12-2-02452-6  
ORDER ON JUNE 7, 2013 MOTIONS

THIS MATTER came before the Court on June 7, 2013 on Defendant Pierce County's Motion for Award of Attorney's Fees.

The Court heard oral argument of counsel for Plaintiff and counsel for Defendants. The Court considered the pleadings filed in this action and the following:

- 1. Defendant Pierce County's Motion for Award of Attorney's Fees;
- 2. Declaration of Michael A. Patterson in Support of Pierce County's Motion for Award of Attorney's Fees;
- 3. Declaration of Dawn Farina in Support of Motion for

III BRANCHES LAW, PLLC  
Joan K. Mell  
1033 Regents Blvd. Ste. 101  
Fircrest, WA 98466  
joan@3br  
253-50-000001271  
281-664-4643 fx

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Award of Attorney's Fees;

- 4  
5 4. Det. Nissen's Response to Defendant Pierce County's Motion for Award of  
6 Attorney's Fees and Costs and Counter Motion for Sanctions and to Strike  
7 Farina Declaration;  
8  
9 5. Declaration of Det. Nissen in Support of her Response to Pierce County's  
10 Motion for Award of Attorney's Fees and Costs and in Support of CR 11  
11 Sanctions Against Pierce County and Its Counsel and in Support of Striking  
12 Farina's Declaration;  
13  
14 6. Pierce County's Reply to Plaintiff's Opposition to Award of Attorney Fees;  
15  
16 7. Declaration of Dawn Farina in Response to Nissen's Declaration Filed in  
17 Opposition to Pierce County's Motion for Award of Attorney Fees;  
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19 8. Defendants' Response to Plaintiff's Motion to Strike Declaration of Dawn  
20 Farina;  
21  
22 9. Defendants' Motion to Shorten Time for Defendants' Motion to Strike  
23 Declaration of Glenda Nissen and Unauthenticated "Blog"; and  
24  
25 10. Defendants' Motion to Strike Declaration of Glenda Nissen and  
26 Unauthenticated "Blog".

27 Based on the arguments of counsel, the pleadings and evidence presented  
28 and on file in this matter, it is hereby; ORDERED, ADJUDGED, AND

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30 DECREEED:

- 31 1. Defendant Pierce County's Motion for Award of  
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3 Attorney's Fees is Denied.

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5 2. Det. Nissen's Motion to Shorten Time is Granted.

6 3. Det. Nissen's Motion to Strike Farina Declaration is Granted *in part and*  
7 *denied in part.*

8 4. Det. Nissen's Motion for CR 11 Sanctions is ~~Granted~~ *Denied.*

9 5. Motion to Shorten Time for Defendants' Motion to Strike Declaration of

10 Glenda Nissen and Unauthenticated "Blog" is Denied; *in part and*  
11 *granted in part*  
*see below #7*

12 6. Defendants' Motion to Strike Declaration of Glenda Nissen and

13 Unauthenticated "Blog" is Denied. *in part and granted in part;*

14 7. *Re: # 5:*  
15 *The blog was not relevant. The motion to shorten time is granted.*  
16 *Defendants motion to supplement the record is denied,*  
17 *as to ~~to~~ hawton Humphrey's investigative report dated 4-3-12;*  
18 *As to the declaration of Nissen and Farina the court is*  
19 *not considering any evidence that is not relevant nor admissible.*  
20 Date and hour of issuance: June 7, 2013, at \_\_\_\_\_ a.m./p.m.

21  
22 

23 The Honorable Christine Schaller

24 Presented this 7th day of June, 2013.

25 By: III BRANCHES LAW, PLLC

26  
27  
28 

29 JOAN K. MELL, WSBA #21319

30 Attorney for Plaintiff

31 III BRANCHES LAW, PLLC

Joan K. Mell

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Approved as to form:

By: PATTERSON BUCHANAN  
FOBES & LEITCH, INC., P.S.

---

Michael A. Patterson, WSBA#7976  
Attorney for Defendants

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of Brief of Respondents in Court of Appeals Cause No. 45039-9-II to the following parties:

Joan K. Mell  
III Branches Law, PLLC  
1033 Regents Blvd, Suite 101  
Fircrest, WA 98466

Michael A. Patterson  
Michael. T. Kitson  
Patterson Buchanan Fobes & Leitch, Inc., P.S.  
2112 3<sup>rd</sup> Avenue, Suite 500  
Seattle, WA 98121

Original efiled with:

Court of Appeals, Division II  
Clerk's Office

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

DATED: January 24, 2014, at Tukwila, Washington.

  
\_\_\_\_\_  
C. Jones  
Talmadge/Fitzpatrick

# TALMADGE FITZPATRICK LAW

## January 24, 2014 - 2:14 PM

### Transmittal Letter

Document Uploaded: 450399-Respondents Cross-Appellants' Brief.pdf

Case Name: Nissen v. Pierce County

Court of Appeals Case Number: 45039-9

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondents Cross-Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

Sender Name: Ireliis E Colon - Email: [irelis@tal-fitzlaw.com](mailto:irelis@tal-fitzlaw.com)

A copy of this document has been emailed to the following addresses:  
[christine@tal-fitzlaw.com](mailto:christine@tal-fitzlaw.com)