45880-2
No. 89884-7

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL AMES,

Appellant/Cross-Respondent,

v.

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

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT PIERCE COUNTY

Michael Patterson, WSBA #7976
Charles Leitch, WSBA #25443
Jason A. Harrington, WSBA #45120
Patterson Buchanan
Fobes & Leitch PS
2112 3rd Avenue, Ste. 500
Seattle, WA 98121
(206) 462-6714

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent/Cross-Appellant Pierce County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Other Cases

Constitutions

Statutes

Rules and Regulations

Other Authorities

A. INTRODUCTION

Respondent Ames filed a baseless lawsuit against Pierce County ("County") when the Pierce County Prosecutor's Office ("Office") acted well within its discretion, consistent with model *Brady*[1] standards promulgated by the Washington Association of Prosecuting Attorneys ("WAPA"), and under a constitutional imperative, to disclose potential impeachment evidence ("PIE") pertaining to Ames in a criminal case. Notwithstanding his arguments concerning a "name-clearing" hearing,[2] the relief Ames and his counsel specifically chose, either a writ of prohibition or declaratory relief under the Uniform Declaratory Judgment Act, RCW 7.24, was not available to him under well-developed principles of Washington law. The trial court ably documented why it dismissed Ames' baseless petition in its extensive memorandum opinion granting the County's CR 12(b)(6) motion.

Further, the trial court should have dismissed Ames' complaint under the special motion to strike procedure of Washington's anti-SLAPP statute, RCW 4.24.525(4), where Ames attempted to restrict the County's necessary communications with courts.

---

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

[2] This Court should be troubled by the fact that Ames' brief deliberately omits any reference to the fact that he had an opportunity to be heard in the one instance where his testimony was relevant, and his counsel *agreed* that the PIE should be disclosed.

Finally, the trial court should have awarded the County its attorney fees below and on appeal, either because Ames' theories for recovery were frivolous, or because the County was entitled to fees and damages under RCW 4.24.525(6).

B. ASSIGNMENTS OF ERROR

The County acknowledges Ames' assignments of error, br. of appellant at 3-5, but Ames' issue in this case is more appropriately formulated as follows:

> Where the request for relief in his petition would interfere with the Office's constitutionally-mandated obligation to disclose PIE in criminal cases, the Office had "jurisdiction" to consider and disclose PIE materials so that a writ of prohibition was improper, Ames lacked standing to obtain a general declaration that he was "truthful" in all future proceedings, and the court lacked the ability to afford Ames the amorphous future relief he requested, was the trial court correct in dismissing Ames' petition for a writ of prohibition and declaratory relief?

(1) Assignments of Error on Cross-Review

1. The trial court erred in entering its Memorandum Opinion/Order on December 31, 2013 in which it denied the County's motion to strike under RCW 4.24.525(4), and the attendant relief under RCW 4.24.525(6).

2. The trial court erred in entering its oral rulings and its July 23, 2014 order denying in part the County's motion to strike declarations submitted by Ames on reconsideration of the County's fee motion.

3. The trial court erred in entering its July 30, 2014 order reconsidering and revising its decision to impose CR 11 sections against Ames and his counsel.

(2) Issues Pertaining to Assignments of Error on Cross-Review

1. Where Ames filed the present action for the purpose of interfering with the Office's constitutional obligation to provide PIE materials to criminal defendants in judicial proceedings, did the trial court err in denying the County's motion to strike under RCW 4.24.525(4) and in failing to award the County penalties and fees under RCW 4.24.525(6)? (Assignment of Error on Cross-Review Number 1)

2. On reconsideration of the trial court's CR 11 decision, where Ames submitted belated declarations, most of which were form declarations, that contained factual misstatements and inadmissible evidence such as legal opinions and did not address the core question of whether existing Washington law supports an action for a writ of prohibition or declaratory relief on these facts, did the trial court abuse its discretion in admitting the declarations? (Assignment of Error on Cross-Review Number 2)

3. Where Ames' present action is without reasonable foundation in law or fact, and was not advanced in good faith for the purpose of extending or changing the law, and was brought for the purpose of harassing the Office and the Pierce County Sheriff's Department ("Department"), did the trial court err in refusing to award the County its fees and expenses against Ames? (Assignment of Error on Cross-Review Numbers 2 and 3)

C. STATEMENT OF THE CASE

Ames' statement of the case, br. of appellant at 5-10, is argumentative and deliberately omits critical facts in this case. For

example, in *State v. George*, the Office notified Ames of its intent to disclose PIE materials, and he was given the opportunity to submit his own materials, which he did. He appeared through counsel and attended the hearing. His attorney, Joan Mell, argued at the *George* hearing, ultimately conceding the propriety of disclosure. CP 41. This Court should disregard Ames' statement of the case.[3] A more complete factual background is provided below.

Michael Ames was a detective with the Department. CP 1-2, 768.[4] As such, as the trial court noted, he was a recurring government witness for the State in criminal prosecutions. CP 1198. The Office was constitutionally obligated to provide criminal defendants with any PIE relating to his testimony in such cases.

The present case arose out of Ames' desire to impose his views on PIE disclosure on Office attorneys, despite their complete discretion

---

[3] RAP 10.3(a)(5) mandates that the parties present a statement of the case that details the facts and procedure in the case, *without argument*. The rule also requires citations to the record "for each factual statement." Instead, Ames' "facts" in his statement of the case are too often unaccompanied by record citations. Ames also asserts that certain "facts" are true in his argument, again without record citations.

Ames' recitation of facts is so replete with statements that are simply *false* that it would require a considerable portion of the County's brief to address them item-by-item. Instead, the County provides a chart in the Appendix setting out the most egregious examples of Ames' misstatements in his brief. *See* Appendix A.

Ultimately, Ames' statement of the case is nothing more than a facet of his argument, is improper, and should be disregarded.

[4] Ames has retired from the Department. CP 1110-11.

regarding such disclosure. The Office determined that the State was required to disclose two separate instances of Ames-related PIE to the defense in *State v. George*, a case in which the defendant was on trial for murder, and Ames was a prosecution witness. The first instance related to a civil case in which the Office determined Ames made statements in a sworn declaration which were directly contradicted by a sworn declaration of the attorney of record in that case. *See generally*, CP 769,[5] 1594-1640 (declarations of DPAs Lewis and Kooiman who prosecuted Dalsing).

The *material* factual dispute between Ames and DPA Richmond in *Dalsing* was whether Richmond told Ames that an email would "exonerate" him in the *Dalsing* case and whether Richmond promised Ames that it would be turned over in discovery in *Dalsing*. Richmond adamantly denied any such assertions to Ames, as Richmond's July 17, 2013 declaration in *Dalsing* explained. CP 826-56, 1588-89.

The second PIE issue as to Ames related to the report of Jeffrey Coopersmith, an attorney retained by the County Human Relations Department to independently assess Ames' contentions that the Department and Office had retaliated against him after he submitted a written complaint to the Department's Under Sheriff asking for a state or

[5] The trial court mischaracterized DPA Richmond's actual testimony. DPA Richmond averred that he did not receive the email at a particular meeting. CP 826-56, 1587-89.

federal law enforcement investigation of alleged misdeeds by the Department and Office. CP 770, 975-1012 ("Coopersmith Report"). The County handled Ames' request for an investigation as a whistleblower complaint. CP 977. Coopersmith found in May, 2013 that the County did not retaliate against Ames and that the County properly conducted its investigation, describing his allegations of "corruption" as a "very slender reed" and "in fact...not a reed at all." CP 1002. The Office concluded this Report might be PIE, not because the Report found Ames dishonest, but because the Report described a detective who reached conclusions and made accusations without evidence.

On September 18, 2013, the Office's Assistant Chief Criminal DPA Stephen Penner sent a letter to Ames informing him that the Office had recently finalized a policy for disclosure of PIE, based on a model policy recently adopted by WAPA. CP 43-44, 858-59, 1592. Penner further informed Ames that the Office was in possession of documents that it was constitutionally required to disclose to criminal defendants as PIE in cases where Ames was expected to testify. CP 43.[6] The letter identified the documents to be disclosed as "declarations dated May 14,

[6] DPA Penner specifically advised Ames that the Office was fulfilling its constitutional obligation under *Brady* and it did not concede the materials were admissible. CP 1592-93. Faced with the developments in *Dalsing* and the findings of the independent investigator, the Office had no choice under *Brady* but to disclose what it did. To conceal such PIE would have constituted a constitutional violation under *Brady*.

2013, June 13, 2013, July 2, 2013, and July 19, 2013, signed by you and filed in the matter of *Dalsing v. Pierce County,* King County Superior Court Cause No. 12-2-08659-1 KNT, which contain assertions which are disputed in signed declarations filed by the civil DPAs assigned to that case" and "a report of investigation of allegations by you against numerous employees of the Pierce County Sheriff's Department and the Pierce County Prosecutor's Office, wherein it was found that there was 'no evidence' to support your allegations of misconduct, and your allegations had 'no merit.'" CP 43-44. The letter informed Ames:

> If you would like to provide our office with additional information which you believe is relevant before disclosure, please do so by 4:30 p.m. on September 23, 2013, in writing, and delivered to my attention at the Prosecutor's Office, room 946 of the County-City Building. Please be aware that such materials may also be disclosed to defense attorneys.

CP 44. Responding to this offer, Ames submitted additional materials and the Office then delivered the declarations referenced in the September 18, 2013 letter, plus the additional materials provided by Ames, to defense counsel in *State v. George*, a pending Pierce County Superior Court action in which Ames was listed by the State as a witness. CP 1592.

DPA Penner scheduled an *in camera* court hearing before the Pierce County Criminal Presiding Judge, Bryan Chushcoff, to determine whether the Coopersmith Report would be provided to the defense in

George as PIE. At that hearing, Penner appeared for the State, CP 219, and George was represented by attorney Barbara Corey, *id.* who argued that the materials should be disclosed to the defense. CP 223-27. Ames and his attorney, Joan Mell, were also present. CP 219, 221-22. Judge Chushcoff permitted Mell to speak on Ames' behalf regarding the proposed disclosure of the PIE to Corey. CP 229.[7] Judge Chushcoff questioned Ames' standing to complain about the Office's disclosure of PIE in criminal proceedings, noting that Ames' rights were not violated by any PIE disclosure: "Potential impeachment evidence is not the same thing as it is impeachment." CP 234. *See also*, CP 233. When Mell raised the idea of a writ of prohibition, Judge Chushcoff stated: "I'm not sure what the Writ of Prohibition will prohibit." CP 235. After hearing from Mell, Judge Chushcoff bluntly stated, "I don't think that you are right about the legal implications of any of this, Ms. Mell." CP 240. Ultimately, Ames agreed to the production of the PIE materials to Corey; the clerk's minutes for the hearing noted: "Ms. Mell ha[d] no objection for The [sic] State giving

[7] The WAPA model PIE policy does not include provisions for notification of officers like Ames, nor an opportunity to provide additional information. CP 46-52. Ames was actually afforded ample opportunity by the Office to provide additional information and to appear in *George*. This was a more robust opportunity to participate than contemplated by WAPA's policy.

defense counsel the possible impeachment information. CP 41. *See also,* CP 241-42.[8]

Ames filed the present action in the Pierce County Superior Court the following day, CP 1-12, and the case was assigned to the Honorable Kevin Hull, a visiting judge from Kitsap County. In his petition, Ames stated two grounds for relief. He first contended that a writ should issue to prohibit prosecutors from disclosing PIE material regarding him. (Some of this PIE material had already been disclosed, of course, with no objection from Ames in *George*). CP 8-9. Ames also asked the court to order the County to desist from proceedings that characterized or suggested that Ames was "untruthful," and to issue an order prohibiting the Office from claiming that the materials at issue constituted PIE. CP 8. Ames also sought an order prohibiting the Office from seeking an order from any other court that the subject materials (or others for that matter) constituted PIE. CP 9. He further sought to prohibit the Office from any further communications that the material DPA Penner indentified in the September 18, 2013 letter constituted PIE. CP 10.

In his second cause of action, Ames sought "an order declaring his statements to be truthful and not properly characterized under 'Brady' or any other doctrine as evidence that Det. Ames has been dishonest." CP

[8] Ames now argues to the contrary. Br. of Appellant at 27. ("...the Coopersmith Report has no potential impeachment value either.")

10.[9] Ames' petition was based on existing law and nowhere asked the trial court to extend or modify the law in order to grant him relief. CP 8-10.

The County filed a motion to dismiss Ames' petition arguing that he could not meet the statutory criteria for the issuance of either a writ of prohibition or declaratory relief. CP 13-31. Ames responded to the motion to dismiss by arguing that existing law supported his causes of action. CP 675-722.

The County also filed a motion to strike under RCW 4.24.525(4). CP 810-20. The trial court first addressed the anti-SLAPP motion. At a December 16, 2013 hearing on the RCW 4.24.525(4) special motion to strike, in Ames' presence, Mell was *repeatedly* unable to cite applicable supporting authority when questioned by the court. RP (12/16/13):18, 19, 20, 25-26. Mell *conceded* she had no authority regarding the PIE disclosure:

> THE COURT: Are you aware of any case that I can rely on or statutory authority that says a law enforcement officer is entitled to notice when a prosecutor determines that there's material that falls under Brady?
>
> MS. MELL: No, I am not.

[9] In effect, Ames sought a declaratory ruling for all future cases in which he was a witness that he was "truthful."

Id. at 24. Mell similarly had no authority for a writ of prohibition or declaratory relief on the facts here. *Id.* Mell responded: "There's no Brady case out there. There's name-clearing case law out there." RP (12/16/13):20. The trial court, however, denied the County's anti-SLAPP motion in a memorandum opinion/order entered on December 31, 2013. CP 739-51. *See* Appendix B. The County appealed this order to the Court of Appeals, Division II, on January 30, 2014. CP 752-67.[10]

The trial court then heard the County's previously-filed motion to dismiss Ames' complaint under CR 12(b)(6) on January 17, 2013 and granted it by a memorandum opinion/order entered on February 6, 2014. CP 768-776. *See* Appendix C. At that hearing, Ames continued to argue that existing law provided him a basis for relief. RP (1/17/14):19-20. He cited to the *Restatement (Second) of Torts* as authority for declaratory relief. *Id* at 13-15. His arguments opposing the motion to dismiss were based on existing law and not an extension of existing law on writs of

[10] Ames filed a motion to strike the County's notice of appeal, asserting that it was alternatively untimely or an appeal from an order that was not appealable as of right. Division II's Commissioner denied Ames' motion in a February 27, 2014 ruling, staying further proceedings in that court in light of Ames' appeal to this Court. Ames moved to modify the Commissioner's ruling, but a panel of Division II judges denied modification by an order entered on June 11, 2014. This Court's Deputy Clerk ordered that the Court of Appeals case was to be considered as part of this appeal and that the Court's file be transferred to this Court in her letter dated June 23, 2014. Ames' opening brief did not address the timeliness of the County's notice of appeal or whether the appeal from the trial court's anti-SLAPP decision was one of right, thereby waiving those issues.

prohibition or declaratory relief. RP (1/17/14):12-28. Ames appealed that order to this Court on February 7, 2014. CP 777-88.[11]

Subsequent to the parties' notices of appeal, the County filed a motion for attorney fees pursuant to CR 11, RCW 4.84.185, and the court's inherent authority, in which it asserted that Ames' petition was not supported by existing Washington law and was filed for illicit purposes. CP 1075-81. Ames responded specifically that his claims for a writ of prohibition and declaratory relief were supported by *existing Washington law*. CP 1093-1100.[12] When the trial court indicated that it saw no legal authority for Ames' petition, Mell asserted that "this is not a case where there's no legal authority whatsoever. There's an abundance of legal authority." RP (3/19/14):37. By a ruling entered on April 7, 2014, the trial court found that Ames' petition violated CR 11. CP 1198-1206. *See* Appendix D.

---

[11] In light of Ames' contention that the County's appeal to the Court of Appeals involved an order from which there was no appeal as of right under RAP 2.2, the County filed a notice of cross-appeal to this Court on February 19, 2014 seeking review of the anti-SLAPP memorandum/order. CP 789-804. Ames then filed a February 26, 2014 notice of cross-appeal as to the December 31, 2013 anti-SLAPP decision, claiming an entitlement to penalties and fees under that statute. CP 805-06. In effect, Ames sought "cross-review of a cross-review." By a June 23, 2014 ruling, this Court's Commissioner denied the respective motions to strike the notices of cross-appeal, but preserved the County's right to argue to this Court that Ames' "cross-appeal" on the anti-SLAPP penalties and fees is untimely. The County provides that argument *infra*.

[12] The County moved to strike various improper declarations submitted by Ames in connection with this motion. CP 2097-2107, 2114-24.

Ames then moved for reconsideration of the trial court's CR 11 decision. CP 1207-88. In that motion, Ames *for the first time* contended *both* that existing Washington law supported his position *and* that he was seeking in good faith an extension or change in Washington law. CP 1289-1402, 1411-79.[13] To support his position, Ames submitted 34 declarations, many of which were simply pre-printed forms that were likely prepared by his counsel. *E.g.*, CP 1414-22, 1426-73. The County moved to strike these declarations first submitted on reconsideration[14] because Ames did not explain why they could not have been obtained in time for the March 19 hearing, they contained legal opinions, and they contained no relevant evidence on the propriety of Ames' request for a writ of prohibition or declaratory relief. CP 2293-2313.[15]

---

[13] This was not unusual for Ames. As the record in this case reflects, Ames raised newly created arguments throughout the course of this case that he attempts to address on appeal as if they were argued from the outset of his case.

[14] As the record in this case reflects, the County has moved to strike materials submitted by Ames in violation of time deadlines in the Civil Rules or imposed by the trial court. CP 2097, 2236. Ames does not feel constrained to obey the rules for submitting materials, often prejudicing the County in the process because it was deprived of the chance to fairly address them.

[15] At or subsequent to the trial court's hearing on the reconsideration of the fee decision, two attorneys withdrew their declarations. RP (5/19/14):40-41 (Purtzer declaration); CP 1984-85.

Apart from the declarations submitted by Ames, an attorney, referencing his personal connection to the trial court, sent a letter to the trial court. CP 1405-10. Upon the County's motion to strike the letter, CP 2281-92, the trial court declined to consider the letter. RP (5/19/14):11-15; CP 2164.

At the May 19, 2014 hearing on reconsideration, the trial court observed that Ames' contentions regarding CR 11 had changed markedly from solely an argument that his petition was supported by existing Washington law to one in which he also argued that he was seeking an extension or change in Washington law. RP (5/19/14):23-24. The trial court denied the County's motion to strike Ames' belated declarations, although it allowed *the County* to submit supplemental declarations on an extension or change in Washington law. RP (5/19/14):39-40; CP 2270-71. It set a briefing schedule on the issue of whether Ames had sought a good faith extension or change in Washington law for consideration at a subsequent hearing. RP (5/19/14):79-82.

The parties presented their supplemental memoranda on CR 11 to the trial court. CP 1986-2008, 2166-2232. In his supplemental memorandum, Ames again argued that his position was supported *both* by existing Washington law and was a good faith request for an extension or change in the law. CP 2180-87.[16] Then, shortly before the Fourth of July holiday and contrary to a notice of unavailability she had filed, CP 2233-35, Ames' counsel filed a reply, a pleading not requested or authorized by the trial court on May 19, and two additional declarations. CP 2009-58.

[16] Ames' combined argument was itself contrary to the trial court's direction for supplemental briefing confined to that aspect of CR 11 pertaining to a good faith extension or change in the law. RP (5/19/14):79.

Attached to the Mell supplemental declaration was a lengthy newspaper article about the case that Ames now contends evidenced the "public import" of the case because of the alleged media interest in it. CP 2024-47. The County moved to strike the reply and the two additional belated declarations. CP 2236-43.[17]

At the July 10, 2014 hearing, the trial court granted the County's motion to shorten time, RP (7/10/14):2-3, but denied its motion to strike the reply and two additional declarations. RP (7/10/14):21-22; CP 2246-47. At the hearing Ames attempted again to contend that he could *simultaneously* argue that his complaint was supported by existing Washington law and was a good faith request for an extension or change in the law. *E.g.*, RP (7/10/14): 22-28.

The trial court granted Ames' motion for reconsideration on fees in a memorandum opinion dated July 30, 2014, reversing its earlier decision to award fees. CP 2065-72. *See* Appendix E. The County filed an amended notice of appeal to this Court to address that ruling. CP 2254-77.

D. SUMMARY OF ARGUMENT

Prosecutors have a constitutional duty under *Brady* and its progeny to disclose PIE information. Disclosure of PIE does not necessarily reflect

[17] Shortly before the hearing, again contrary to the trial court's directive, Ames filed another brief described as a "Supplemental Authority on Reconsideration." CP 2248-50. The County asked the trial court to strike it. CP 2251-52.

a prosecutor's conclusion that the witness is dishonest, incompetent, or otherwise not credible, or that the evidence is admissible, but is instead a fulfillment of a prosecutor's constitutional duty to protect the due process rights of a criminal defendant. Such evidence is only *potentially* impeaching and prosecutors usually resist the introduction of such evidence regarding State witnesses at trial.

Ames seeks to block prosecutors from performing their constitutional duty and to deprive criminal defendants of well-established discovery rights. The Office's decision on PIE here was appropriate and was constitutionally mandated. Moreover, though not entitled to such a hearing, Ames was actually heard on the PIE, when he was given the opportunity to submit additional materials, which he did, and his counsel argued on the disclosure of some of the PIE materials in *George*. In any event, his counsel did not object at the October 1, 2013 hearing to the disclosure of the Coopersmith Report.

As for the form of relief sought by Ames, he cannot establish his entitlement to a writ of prohibition or declaratory relief, under well-established principles of Washington law. Given *Brady* and its progeny, Ames cannot establish the necessary jurisdictionally-based grounds for a writ of prohibition because the Office acted well within its jurisdiction in disclosing PIE in *George*. Similarly, Ames' request for declaratory relief,

that he be declared essentially truthful in all *future* proceedings in which he might testify, was beyond the power of the trial court to provide. The trial court properly granted the County's CR 12 (b)(6) motion.

The trial court, however, erred in denying the County's motion to strike under RCW 4.24.525(4) where Ames' complaint was filed to interfere with the Office's communication with a court in fulfillment of its constitutionally-mandated obligation to provide *Brady* PIE materials to criminal defendants in cases where Ames might testify as a witness for the State. Ames' petition sought to restrict the Office's communications with the courts, conduct that constitutes a protected action involving public participation under RCW 4.24.525(2). The County was entitled to the relief provided in RCW 4.24.525(6) against Ames.

The trial court abused its discretion in denying the County its fees and expenses where Ames' petition was not well-grounded in law or fact. Ames could not "change horses mid-stream" to contend that his petition was justified by an extension or change in Washington law. Nor did he establish such a justification. Alternatively, the trial court's original fee decision is supported because Ames' petition was brought to harass the Department and the Office, likely as a precursor to an employment-related civil suit against the Department for damages.

E. ARGUMENT

(1) The Trial Court Was Correct in Granting the County's CR 12(b)(6) Motion Where Ames Failed to State Claims Upon Which Relief Could Be Given[18]

The trial court dismissed Ames' petition under CR 12(b)(6) because Ames failed to establish a basis for a writ of prohibition or an entitlement to declaratory relief. In specific, the court noted that the Office was not making a determination that Ames was untruthful in disclosing PIE to defense counsel; rather, it was fulfilling its constitutional obligation to provide PIE, an action exclusively within the Office's responsibility. CP 772-73. The court further concluded that Ames presented no justiciable controversy entitling him to seek declaratory relief. CP 774-75. The trial court was entirely correct in its ruling.

Rather than carefully discussing the specific forms of relief he pleaded in any detail, Ames tries to obscure his specific theories for relief by launching into a policy argument for a "name clearing hearing," claiming unstated issues of fact to be developed and suggesting,

---

[18] The County's motion was based on CR 12(b). Under CR 12(b)(6), dismissal of a claim is appropriate if the complaint alleges no facts which would justify recovery. *Reid v. Pierce County*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). In making such a decision, a court is generally confined to the complaint's allegations, but the court need not accept conclusory factual assertions or legal conclusions in the complaint as true. *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 101-02, 233 P.3d 861 (2010). A court may take judicial notice of matters of public record, as well as documents referenced in a complaint, *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008), in rendering a decision. This Court reviews a trial court's order of dismissal under CR 12(b)(6) de novo. *Futureselect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, ___ Wn.2d ___, 331 P.3d 29, 34 (2014).

wrongfully, that the County bore the burden of demonstrating that he had other viable remedies. Br. of Appellant at 1-3, 13-17. This Court should not accept Ames' effort to obfuscate the theories for relief he actually pleaded. He has failed to articulate any basis upon which he can obtain either a writ of prohibition or declaratory relief.[19] Before discussing the particular reasons why a writ of prohibition or declaratory relief are unavailable to Ames, it is important to put the Office's *Brady* obligation as to Ames' possible testimony in criminal cases in the appropriate context.

(a) Prosecutor's Duty to Provide PIE to Defense Counsel

It is a long-standing principle of constitutional law that a prosecutor *must* disclose potentially exculpatory evidence to a criminal defendant. *Brady, supra* at 87. The United States Supreme Court held there that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either as to the defendant's guilt or punishment, irrespective of good or bad faith of the prosecution. *Id.* In *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed.2d 104 (1972), and *United States v. Bagley,* 473 U.S. 667,

[19] Ames and his counsel made a *tactical decision* to seek a writ of prohibition and for declaratory relief under RCW 7.24. Ironically, it was *Ames* who submitted the declaration of James Cline referencing the case of a Mountlake Terrace police officer who filed an action under 42 U.S.C. § 1983 for a "name clearing proceeding" after that officer's testimony was subject to PIE disclosures under *Brady*. CP 1344. *See* CP 1310-42. Ames chose not to file a defamation action, or a § 1983 claim, just to name a couple of examples of other potential theories for relief he may have considered.

676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985), this principle was extended to evidence that has the potential to impeach a witness' credibility. The government is obligated to provide such information whether or not a defendant requests it. *Kyles v. Whitley*, 514 U.S. 419, 433, 15 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).[20]

A careful prosecutor is obligated to err on the side of caution because of the uncertainty as to exactly what information might become important later. The United States Supreme Court has mandated that *prosecutors* have the responsibility of gauging what must be disclosed and they must resolve any doubtful questions in favor of disclosure. *Kyles*, 514 U.S. at 437-40. "The prudence of the careful prosecutor should not therefore be discouraged." *Id.* at 440. *See also, United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013), *cert. den.*, 134 S. Ct. 2711 (2014) (Prosecutors should not limit the disclosure of PIE based upon their predictions of materiality "because it is just too difficult to analyze before trial whether particular evidence will ultimately prove to be 'material' after trial."). Further, the determination of whether PIE exists and must be disclosed falls within the *absolute discretion of the prosecutor*. *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003). Indeed, evaluating and

[20] This jurisprudence is well known to this Court and applied routinely by it. *See, e.g., State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011).

determining whether to disclose such information is clearly part of the presentation of the State's case, entitling the prosecutor to absolute immunity for its decision whether to turn over such evidence. *Id.* This is so because the presentation of such information is so related to the prosecutor's preparation to prosecute. *Id.*[21]

The prosecutor's duty is non-delegable and the courts are not entitled to "second guess" such a decision. *In re Brown*, 17 Cal.4th 873, 881, 952 P.2d 715, *cert. denied*, 525 U.S. 978 (1998), *United States v. Bland*, 517 F.3d 930, 935 (7th Cir. 2008) (a court is under no general independent duty to review government files to determine PIE material).

Thus, the Office here was under a constitutional imperative to disclose PIE. Ames' sworn statements in his *Dalsing* declarations were reviewed by the Office and were found to be directly contradicted by DPA Richmond's declaration in that case. Ames' complaints against the Department and the Office were reviewed by attorney Coopersmith and also found to be entirely meritless. CP 975-1012. Because a trial court might conclude that such material could be used to impeach Ames' testimony if he were called as a witness for the State, the Office had a

---

[21] This Court has recognized analogous prosecutorial discretion in certain key matters pertaining to the prosecutorial function. *See, e.g., State v. Monfort*, 179 Wn.2d 122, 312 P.3d 637 (2013) (special death penalty notice); *State ex rel. Hamilton v. Superior Court*, 3 Wn.2d 633, 101 P.2d 588 (1940) (prosecutor's authority to file quo warranto action).

constitutional duty to disclose the materials as PIE. To have failed to provide such materials in *George* would have violated George's due process rights.

(b) This Court Should Disregard Ames' Newly Minted Argument Regarding a Need for "Factual Development"

Ames contends in his brief at 13-17 *for the first time in this case* that the trial court should not have granted the County's CR 12(b)(6) motion because of a need for what he calls "factual development." Ames' argument is frivolous.

First, Ames had every opportunity to plead the facts necessary to sustain his theory of the case in his petition or even to raise hypothetical facts to support his position. The trial court correctly granted the County's motion precisely because, on his pleaded facts, Ames failed to assert claims sustainable as a matter of law.

Second, *at no time* prior to the trial court's decision on fees, and certainly not anywhere in his response to the County's motion, did Ames seek to convert the motion into a CR 56 motion or to file anything similar to a CR 56(f) motion asking this Court for additional time in which to acquire evidentiary support for his position.

Finally, Ames seems to argue that somehow the County bore an affirmative burden to demonstrate that Ames did not have other viable

claims before the trial court could dismiss his pleaded claims on CR 12(b)(6) motion. Br. of Appellant at 13-17. This argument is simply frivolous, having no basis of any sort in this Court's CR 12(b)(6) jurisprudence. The trial court here properly concluded the claims *Ames chose to plead* were unsustainable under Washington law.

(c) Ames Was Not Entitled to a Writ of Prohibition

Contrary to the argument in his brief at 41-47, Ames is not entitled to a writ of prohibition, as the trial court here noted, CP 771-73, because he cannot establish that the Office acted outside its jurisdiction. Rather, Ames essentially contended that the Office "erroneously exercised jurisdiction by disclosing this evidence as PIE." CP 772.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." RCW 7.16.290. This Court has characterized the writ as a "drastic measure," which is to be issued *only* when two conditions are met: (1) the absence or excess of jurisdiction, and (2) absence of a plain, speedy, and adequate remedy in the course of legal procedure. *Skagit County Public Hospital Dist. No. 304 v. Skagit County Public Hospital Dist. No. 1,* 177 Wn.2d 718, 722, 305 P.3d 1079 (2013). "The absence of either one

precludes the issuance of the writ." *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989). The law on writs of prohibition is clear.

Ames cannot demonstrate that the Office acted in excess of its jurisdiction in disclosing the PIE materials in *George* given the Office's broad constitutional obligation to disclose PIE to criminal defendants. Moreover, the Office provided Ames advance notice of the PIE disclosure in the September 18, 2013 Penner letter, and he had an opportunity to provide additional materials. CP 858-59. He submitted additional information which the Office included in the production to the defense in that case. CP 1592. He and his counsel appeared at the October 1, 2013 hearing on the materials. CP 219, 221-22. His counsel offered argument to the court and ultimately agreed that the Coopersmith Report should be turned over to defense counsel. CP 229. Ames cannot now be heard to claim he was deprived of due process. He had notice and an opportunity to be heard and affirmatively agreed to the disclosure of the Coopersmith Report about which he now complains. He is not entitled to more.[22]

[22] Arguably, Ames also had other avenues of relief available to him that he did not employ. If he truly believed the Office disseminated false information about him, he could have considered a claim for defamation. *See* RP (1/17/14):22 (Mell argues to court: "And it's also – I mean, it's just plain defamatory. Nobody has a duty to disseminate false information in any context.") Moreover, he might have considered a 42 U.S.C. § 1983 claim, as did a Mountlake Terrace officer. CP 1310-42.

The trial court correctly discerned that Ames was not entitled to the drastic remedy of a writ of prohibition.

(d) Ames Had No Right to Declaratory Relief

RCW 7.24 affords parties the opportunity to secure declaratory relief in appropriate controversies, but parties must still comply with the procedural requirements of the statute and they must demonstrate standing to claim declaratory relief. Ames did neither below, as the trial court correctly observed. CP 773-75.

(i) Ames' Petition Was Procedurally Defective

Although not addressed by the trial court in its CR 12(b)(6) ruling,[23] Ames' request for relief is procedurally defective. Under RCW 7.24.110 "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the rights of persons not parties to the proceeding." *Branson v. Port of Seattle*, 152 Wn.2d 862, 878, 101 P.3d 67 (2004). A trial court lacks jurisdiction if the necessary parties are not joined. *Treyz v. Pierce County*, 118 Wn. App. 458, 462, 76 P.3d 292 (2003), *review denied*, 1151 Wn.2d 1022 (2004). Ames did not join all persons who had an interest in his claims. For example, the

[23] This Court may affirm the trial court's ruling on any basis supported by the record. *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 493, 933 P.2d 1036 (1997)

defendant in *George*, and any present or future criminal defendant in any other case in which Ames may testify,[24] may have or claim an interest, which would be affected by Ames' relief request. At a minimum, George was a necessary party to Ames' action under CR 19. In fact, each defendant charged with a crime has the right to review PIE material to determine and argue its impact upon that defendant's case.

Moreover, as a matter of law, as the County noted below, CP 25-26, 733, a prosecutor in a criminal action is not a county official but a state officer.[25] Although Ames claimed in his complaint that the County was a defendant here, it is not a proper party, as Ames seemed to concede in his statement of grounds for direct review at 12-13. Ames should have joined the State, but failed to do so.

(ii) Ames Lacked Standing to Obtain Declaratory Relief for a Non-Justiciable Controversy

Ames is not entitled to declaratory relief. His request for a declaration that his statements are "truthful" and that they are "not

---

[24] So long as Ames remains a potential witness for the State, every individual who faces a criminal trial on facts gathered or developed by Ames is constitutionally entitled to PIE materials regarding him. *See Giglio, supra.*

[25] Wash. Const. art. IV § 27 (all prosecutions must be conducted in the State's name); *State v. Dupard*, 93 Wn.2d 268, 273, 609 P.2d 961 (1980) (State, and not county, is sovereign involved in criminal prosecutions brought by the prosecuting attorney); *Whatcom County v. State*, 99 Wn. App. 237, 250, 933 P.2d 273, *review denied*, 141 Wn.2d 1001 (2000); *State v. Cleveland*, 58 Wn. App. 634, 640, 794 P.2d 546, *review denied*, 115 Wn.2d 1029 (1990), *cert. denied*, 499 U.S. 948 (1991) (in criminal prosecutions, the State is "represented by the County Prosecuting Attorney").

properly characterized" is precisely the type of amorphous relief that is not justiciable in a declaratory judgment action. This Court has repeatedly noted that a justiciable controversy under RCW 7.24 requires:

> (1)... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interest, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *League of Education Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013). Ames cannot meet these standing requirements.

First, the proceedings at issue are not genuinely adversarial in character. In fact, it is plainly in the State's interest to *uphold* Ames' testimony in its criminal prosecutions, and the Office would vigorously seek to do so. Because disclosure of PIE does not reflect a conclusion that Ames committed misconduct or that he is not credible as witness, no real controversy is at issue here; only a theoretical right or interest is present.

Apart from *George,* where Ames' counsel did not object to disclosure and effectively *conceded* the PIE disclosure by the State there was proper, Ames' concerns essentially only pertain to *future* cases and do not involve a *present* controversy. *Walker v. Munro*, 124 Wn.2d 402, 412,

879 P.2d 920 (1994) (controversy over effect of initiative that was not yet in effect not justiciable).

Finally, the issue here is not one upon which a judgment could effectively operate because Ames seeks to dictate to other courts and juries – present and future – that some unidentified "statements" by him are truthful; he apparently seeks to bar prosecutors from ever treating the materials at issue here as PIE and barring their use by criminal defendants for impeachment, and stating that he must be deemed truthful whenever he testifies in criminal matters for the State. Neither RCW 7.24.010 nor any other law provides such extraordinary and unconstitutional relief. No authority supports a declaratory action stating for all time and in all cases that Ames is truthful. RCW 7.24.060 (refusal of declaration where judgment would not terminate controversy).

Under ER 104(a), the admissibility of evidence must be determined by each court addressing the evidence, and due process requires that litigants in each criminal case be heard concerning evidentiary issues. As the trial court noted, any one-time determination in a particular case by a particular court that Ames was or was not truthful does not bind another court in a criminal case in which Ames is called as a

witness for the State. CP 774.[26] The trial court lacked the ability to provide Ames the relief he sought.

Ames' assertion that a declaratory judgment action could dictate he was truthful particularly misses the point with respect to the Coopersmith Report. This Report was PIE because it described a detective who reached conclusions and made accusations without evidence. In his complaint that initiated Coopersmith's investigation, Ames asserted that a specific criminal investigation into child abuse was sabotaged in order to aid a high school friend of a detective; he alleged "officers at the executive command level" of the Department along with executive level officers of the Office "conspired to discredit the legitimacy of the criminal complaint filed by" the victim's parents. CP 976-77. After an extensive, thorough independent investigation, CP 977-78, Coopersmith found "there is no merit to Det. Ames' current allegations," rejecting any basis for claims of corruption or retaliation against Ames. CP 1011. Critically, Coopersmith noted the very weak basis for Ames' allegation of "corruption:"

> As an initial matter, there is no evidence that [the detective] has a personal friendship with Mr. Rosi (the suspect) or had any other motivation for trying to help Mr. Rosi. In fact, Det. Ames admitted during his DWT interview that he has no evidence of a personal friendship between [the detective] and Mr. Rosi. Det. Ames stated that he made the allegation only because he found it

[26] Article IV, § 5 of our Constitution specifically notes that in multi-judge counties, the authority of each judge is equivalent. *State ex rel. Campbell v. Superior Court for King County*, 34 Wn.2d 771, 775, 210 P.2d 123 (1949).

> odd that [the detective] took the step of mentioning to [Sheriff Pastor] that [the detective] went to high school with Mr. Rosi, although Det. Ames conceded that [the detective] could have just been mentioning it...in passing. This is a very slender reed with which to make an allegation of corruption, and in fact is not a reed at all.

CP 1002. Ames was a detective in the Department, and had the authority to arrest individuals and forward cases to the Office for charging; the Coopersmith Report documented that he could jump to ridiculous conclusions about the Department and therefore constituted PIE because it called into serious question Ames' skills and judgment as a detective. The Report also documented contradictory statements by Ames in his interview with Coopersmith.

Further, the "authorities" cited by Ames in his brief at 17-21 for the proposition that declaratory relief is available to him here simply do not support his contention. "Commentary" from the *Restatement* upon which Ames relies, br. of appellant at 18-19, is actually a reporter's note which includes the following:

> (1) *Declaratory relief.* In a jurisdiction where declaratory relief is available as a general remedy *and statutory provisions do not preclude it*, resort may be had to a suit for a declaratory judgment that the defamatory statement is untrue. This action would provide no compensation for injury but it could vindicate the plaintiff and aid in restoring his reputation. Libel or slander suits similar to this are those in which the plaintiff seeks only nominal damages or announces that he will donate to charity any award that he receives.

> *There is presently no established practice for bringing suit to obtain a declaratory judgment that a defamatory statement about the plaintiff is false.* A number of questions will arise if the practice develops. . . .

Reporter's "Special Note on Remedies for Defamation Other Than Damages," *Restatement (Second) of Torts*, Div 5 Ch. 27 (emphasis added).

Johnson v. Lally, 887 P.2d 1262 (N.M. App. 1994), *cert. denied*, 888 P.2d 466 (N.M. 1994), cited by Ames in his brief at 20, actually *denied relief* against a prosecutor under the federal declaratory judgment statute, stating:

> Vindication alone is not the kind of constructive, "useful purpose" for which the declaratory judgment was created, and as best we can tell, no court has ever issued a declaratory judgment on that basis.

Id. at 801. The other reported case upon which Ames relies, br. of appellant at 20, *Lally v. Johnson City Cent. Sch. Dist.*, 962 N.Y.S.2d 508 (App. Div. 2013), involved a request for declaratory judgment by the plaintiff, who had been employed "in the tenured position of Assistant Superintendent for Instruction and Personnel" and who therefore had a property interest in continued employment. The court found that "petitioner's second cause of action seeking a name-clearing hearing should have been dismissed" because disciplinary charges were

subsequently filed against petitioner thereby affording him due process. *Id.* at 1130.

A law review article upon which Ames relies, br. of appellant at 19, Kraig J. Marton et al., *Protecting One's Reputation-How to Clear A Name in A World Where Name Calling Is So Easy*, 4 Phoenix L. Rev. 53 (2010), contains the following section that does not exactly constitute a ringing endorsement of Ames' position:

> Another way to possibly fix a damaged reputation is to file a declaratory judgment lawsuit in which a court declares the defamatory statement false. *This type of lawsuit is a controversial method and not yet widely used.*

Id. at 76 (emphasis added; footnotes omitted). The cases cited in the footnotes of the article involve allegations that the respondent engaged in defamatory speech and included a request for declaratory relief. None involved an effort to obtain a declaratory judgment to be used in other court proceedings (involving PIE or otherwise). Indeed, the last sentence of the quoted paragraph is supported by footnote 123, which provides as follows:

> Ariz. Rev. Stat. Ann. § 12-1841 (2010) ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.").

The quoted Arizona statute is identical to the first sentence of RCW 7.24.110 and, as the trial court in this case stated, the requested declaratory judgment would not be binding upon others and so would violate the requirements of a justiciable controversy. CP 1204. ("Making a judgment here would invade the rights of other judges, the prosecutor, and criminal defendants to use their own judgment in determining the admissibility of evidence and credibility of Ames in each case."). Moreover, the same article goes on, two subsections later, to address "G. Name Clearing Hearings" and says:

> The right to such a hearing arises *almost entirely from the employment context*, and generally occurs when the agency makes a defamatory statement upon terminating an employee. Additionally, this right arises only if infringement occurs upon a property or liberty interest of the employee.

(emphasis added; footnote omitted). Footnote 143 at the end of the quoted material cites *Bd. of Regents v. Roth*, 408 U.S. 564, 578, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 537, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), all of which addressed property rights created under state law in the employment setting.

But the Office is not Ames' employer, nor does he contend that the PIE material was ever placed in his personnel file at the Department. The

material was disseminated in a criminal case as PIE pursuant to *Brady* without comment as to its reliability or admissibility. The "name-clearing" cases involving employee rights cannot carry over into cases involving disclosure of PIE under *Brady* and its progeny where the overarching concern is due process for criminal defendants. As the trial court ruled: "Regardless, the public concern regarding PIE is a fair trial for criminal defendants." CP 1204. Ames did not have any property or liberty right to be free from PIE disclosures. In short, the Phoenix Law Review article did not support Ames' theory for recovery.

A second law review article upon which Ames relies, br. of appellant at 19-20, is Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment As an Option for Libel Suits*, 93 Dick. L. Rev. 265 (1989). Like the Phoenix Law Review article, it envisions a suit against the person alleged to have engaged in defamatory speech, and does not address an effort to obtain a declaratory judgment to be used as a comment upon witness credibility in other court proceedings (involving PIE or otherwise). Thus, the first sentence in a section involving remedies is, "A plaintiff should be barred from suing for damages if he elects the declaratory judgment." *Id.* at 295. The article does not address the elements of declaratory relief under the Uniform Declaratory Judgment Act, and indeed argues, "The declaratory

judgment should be created through federal rather than state legislation." *Id.* at 292. The article does not support Ames' claim that declaratory jurisprudence should be extended to PIE disclosures or that such a process would pass constitutional muster.

(iii) The Present Case Is Not One of Public Importance

Being unable to meet the general test for standing for declaratory relief Ames resorts to the contention in his brief at 32-34, 39-40 that declaratory relief is also merited here because this case involves one of public importance.[27] This Court has excused its strict standing rules for declaratory relief in certain critically important public controversies. For example, this Court in *Wash. Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County*, 77 Wn.2d. 94, 96, 459 P.2d 633 (1969) and *Vovos v. Grant*, 87 Wn.2d 697, 555 P.2d 1343 (1976), both extraordinary writ cases, indicated that standing requirements could be relaxed "where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct

[27] Ames only raised this issue in passing in response to the County's CR 12(b)(6) motion. CP 694. He actually made the argument in his pleadings on reconsideration of the trial court's CR 11 order, as attested to by his citation to the tardy declarations he adduced on reconsideration. Br. of Appellant at 34.

Moreover, as has been typical of Ames' conduct in this case, his counsel cited what is now his principal authority for his public importance argument for standing belatedly so that the County could not read the case, nor properly respond to it. RP (7/10/14):9-11, 15.

bearing on the commerce, finance, labor, industry or agriculture generally...." *Id.* at 701. Ames did not meet this test.

Moreover, this exception is not a justification to routinely circumvent the requirements of personal or representational standing. This Court has rejected this exception to general standing requirements in numerous instances even where significant public issues are present. *E.g.*, *Walker*, 124 Wn.2d at 414-26 (rejecting application of exception to allow challenge to initiative's constitutionality); *League of Education Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013) (same, noting that exception was also inapplicable where dispute was not ripe). *See also*, *Bercier v. Kiga*, 127 Wn. App. 809, 822, 103 P.3d 232 (2004), *review denied*, 155 Wn.2d 1015 (2005) (dispute over tobacco taxation by tribe as to member of another tribe not an issue of major public importance).

Ames relies principally upon the case of *Lane v. Frank*, ___ U.S. ___, 134 S. Ct. 2369, 189 L. Ed.2d 312 (2014) for his belated argument that declaratory relief standing rules do not apply to him. Br. of Appellant at 32. But, as in his practice in this case, he misstates the holding in the case. *Lane is not a standing case.* Rather, *Lane* is an employment case in which a college employee was compelled to testify at a trial involving criminal charges against a state representative under subpoena. The employee was later terminated and sued the college under 42 U.S.C. §

1983. At issue in the case was whether the employee's testimony constituted protected First Amendment speech, *i.e.* whether it was a comment in his professional or personal capacity on a matter of public concern.[28]

Here, Ames' activities do not meet the public importance test articulated by this Court in *WNG* or *Vovos*, nor is his dispute ripe as required by *Walker*, given his action in the *George* hearing before Judge Chushcoff. Ultimately, the real public importance of the case has little to do with Ames and more to do with the public policy of *Brady*, as the trial court concluded: "Ames alleges that the conduct of the Prosecutor is of major public concern. The major public concern does not have to do with Ames however. The public concern regarding PIE is a fair trial for criminal defendants, not the person whose credibility is being questioned." CP 775.

The trial court was correct in dismissing Ames' petition under CR 12(b)(6) because he did not state claims for a writ of prohibition or declaratory relief.

---

[28] Ames' citation to the *Noerr-Pennington* doctrine, br. of appellant at 39-40, is equally unavailing to him. Again, he never raised this argument below in resisting the County's CR 12(b)(6) motion. CP 692-95. That doctrine has nothing to do with standing, but instead deals with immunity from *antitrust liability*. *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000). Ames actually attempts to *mislead* this Court in the quotation from the case in his brief at 39 by omitting the reference to *antitrust liability*.

(2) The Trial Court Erred in Denying the County's Motion to Strike Ames' Petition under the Anti-SLAPP Statute[29]

The trial court here denied the County's RCW 4.24.525(4) motion to strike, finding the Office's decision to disseminate PIE materials as to Ames did not constitute an action involving public participation and petition under RCW 4.24.525(4). CP 747-49. The court treated public participation and petition as narrowly confined to First Amendment-type activities, ruling that Ames' effort to curtail the Office's dissemination of PIE materials did not meet that requirement. *Id.* The trial court was incorrect.

(a) The County Was Entitled to Relief Under RCW 4.24.525

RCW 4.24.525(4)(a)[30] provides that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the section. The legislative findings in connection with the enactment include the following:

> [L]awsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the

[29] The anti-SLAPP statute constitutes an alternate basis upon which this Court can affirm the trial court's decision to dismiss and award fees to the County. *See* n.23, *supra*. The County is also entitled to the penalties provided in RCW 4.24.525(6), including an award of attorney fees.

[30] The Washington statute "shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010, ch. 118, § 3; *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp.2d 1104, 1110 (W.D. Wash. 2010).

> defendants are put to great expense, harassment, and interruption of their productive activities;

Laws of 2010, ch. 118, § 1(b). The special motion to strike is designed to promote early termination of litigation without subjecting defendants to "great expense, harassment and interruption of their productive activities." *Id.* For this reason, the statute directs that discovery is stayed and the motion to strike be decided first.

The phrase "an action involving public participation" is specifically defined by RCW 4.24.525(2) and nowhere excludes government speakers, or governmental entities making constitutionally-protected expressions; that definition is broad.

When municipalities engage in internal investigations or make complaints about other municipal or county employees, the statute applies. *Henne v. City of Yakima*, 177 Wn. App. 583, 589, 313 P.3d 1188 (2013), *review granted*, 179 Wn.2d 1022 (2014); *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. 2010) (disciplinary proceedings including the investigation of allegations, the presentation of charges, pre-disciplinary meetings, the appeals process, internal emails to co-workers all constitute "proceedings").

California authority also supports the application of our anti-SLAPP law to government speakers.[31] In *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117, (Cal. App. 1996), *review denied*, (1997), the court held that a prosecutor's anti-SLAPP motion should have been granted against a sheriff's deputy who sued a prosecutor, after the prosecutor investigated the deputy's involvement in a drug arrest that culminated in the defendant's death. The prosecutor issued a report that questioned the deputy's veracity in connection with an affidavit filed in support of the search warrant. The California Supreme Court held that the anti-SLAPP statute applied to government speakers. *Id.*

While the purpose of RCW 4.24.525 is to prevent the filing of lawsuits designed "primarily to chill a defendant's exercise of First Amendment rights," *City of Seattle v. Egan*, 179 Wn. App. 333, 337, 317 P.3d 568 (2014), the trial court here too narrowly interpreted what constitutes an action involving public participation, focusing explicitly on the First Amendment basis for anti-SLAPP actions and failing to take cognizance of the statute's specific language. The trial court concluded

[31] California's SLAPP statute was the model for Washington's statute. *Aronson*, 738 F. Supp. 2d at 1110; *City of Longview v. Wallin*, 174 Wn. App. 763, 776 n.11, 301 P.3d 45, *review denied*, 178 Wn.2d 1020 (2013); *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 69 n.21, 316 P.3d 1119 (2014), *review granted*, 180 Wn.2d 1009 (2014).

that free speech or public participation was not implicated when PIE was involved:

> By labeling the evidence as "potential impeachment evidence," Pierce County is not making an assertion or speech as to the truthfulness or credibility of Ames; it is only satisfying the prosecution's constitutional duty to provide PIE to criminal defendants.
>
> The goals of the First Amendment are not infringed here. The information would still need to be disseminated based on *Brady*, thus leaving interpretation of the documents open to public opinion.

CP 748-49.

RCW 4.24.525(2)(a-c) specifically address any oral and written communications *in judicial proceedings*.[32] The written materials here that the Office ultimately concluded constituted PIE were communications *with a court* in *George* that Ames' lawsuit was designed to prevent.

The declarations of Ames and the deputy prosecutor in *Dalsing* (which were later provided in discovery in *George*) and the Penner letter were written statements submitted in connection with an issue under consideration in a judicial proceeding, namely the *Dalsing* fee hearing. Thereafter, the declarations as well as the Coopersmith Report (tendered for in camera review in *George*) were documents submitted in a judicial

---

[32] California authority specifically recognizes that communicative conduct in litigation such as the filing, funding, or prosecution of a lawsuit, and acts by attorneys in representing clients in court are subject to the anti-SLAPP statute. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056, 128 P.3d 713 (Cal. 2006).

proceeding under RCW 4.24.525(2). Ames' action was designed to chill their communication, *e.g.,* CP 2-6 (Petition (¶¶ 3.1, 3.2, 3.3, 3.8, 4.1, 4.3, 4.4, 5.2)), thus meeting the statutory definition of "an action involving public participation and petition."

As noted above, RCW 4.24.525(4)(a) provides that once a respondent meets its initial burden of showing that the claim is based on an action involving public participation and petition, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." Ames did not meet this burden because (1) the Office acted within its jurisdiction when making PIE disclosures, and a writ of prohibition does not apply to allegedly erroneous actions; (2) there is no justiciable controversy because the requested judgment would affect the rights of current and future defendants in criminal cases who are not parties here; (3) DPA Penner and others handling criminal felony cases represented the State, and the County was not a proper party to this writ action; and (4) the court lacked jurisdiction to bind other superior courts in which Ames might be called as a witness in a criminal case and where the relief sought would be inadmissible as an impermissible comment by the court on credibility. Wash. Const., art. IV, § 16.

The award of damages and sanctions under RCW 4.24.525(6)(a) is *mandatory* by its terms where it states that the court *shall award* fees, a penalty of $10,000, and:

> (iii) Such additional relief, *including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.*

(emphasis added). The trial court erred in failing to award the County its attorney fees and costs, as well as statutory $10,000 damages.

(b) RCW 4.24.525(3) Does Not Offer Ames a Defense

Apparently anticipating the County's argument that it is entitled to relief under RCW 4.24.525(4), Ames also asserts that the County was not entitled to relief under RCW 4.24.525(4) because prosecutors are specifically exempted from the anti-SLAPP law by RCW 4.24.525 (3). Br. of Appellant at 47-48. The trial court rejected this argument, noting that "none of the documents were created to enforce a criminal law and the dissemination of the documents is to protect a criminal defendant's constitutional rights, not the public." CP 745. Specifically, the *Dalsing* documents at issue in this case involved a fee request by Ames in a civil case and the Coopersmith Report was not the Office's product. CP 744.

California's anti-SLAPP law[33] contains a similar exemption to that of RCW 4.24.525(3). *See* Cal. Code Civ. Pro. § 425.16(d). Under that provision, prosecutors bringing criminal charges are exempted from anti-SLAPP liability. *Miller v. Filter,* 150 Cal. App. 4th 652, 671, 58 Cal. Rptr. 3d 671 (2007). *See also, Jones v. City of Yakima Police Dep't,* 2012 WL 1899228 (E.D. Wash. 2012) (routine law enforcement activities not protected by RCW 4.24.525). That provision has withstood scrutiny on equal protection grounds. *People v. Health Laboratories of N. Amer., Inc.,* 87 Cal. App 4th 442, 450-52, 104 Cal. Rptr. 2d 618 (2001).

Here, there was no action brought by the Office to "enforce laws aimed at public protection" for purposes of RCW 4.24.525. The trial court was correct in ruling that RCW 4.24.525(3) did not foreclose the County's motion under RCW 4.24.525(4).

(c) RCW 4.24.525 Is Constitutional

Ames finally contends that RCW 4.24.525 is unconstitutional under article II § 37.[34] Br. of Appellant at 48-50. His argument is

---

[33] As noted *supra*, California's case law on its anti-SLAPP statute is persuasive authority as to Washington's law.

[34] Ames argued below that RCW 4.24.525 violated his First Amendment rights to petition the government for redress of grievances. CP 69-70. Washington courts have rejected that constitutional argument in *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014), as have *numerous* other courts in upholding the constitutionality of their states' anti-SLAPP statutes. *See, e.g., Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 338 (Utah 2005) (bill of attainder); *Home-town Props., Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996) (numerous grounds, including separation of powers and access); *Sandholm v. Kuecker*,

meritless[35] and flies in the face of the strong presumption favoring constitutionality of legislative enactments.[36] RCW 4.24.525 does not violate article II, § 37.

It appears to be Ames' contention that SB 6395, enacted by the Legislature in 2010, failed to "cross-reference" RCW 4.24.510, RCW 7.16, or RCW 7.24 as to penalties. Br. of Appellant at 49-50. In allowing for the penalties in RCW 4.24.525(6), the Legislature was not required to amend every statute that created a cause of action that might be subject to those penalties, as Ames seems to suggest.

---

962 N.E.2d 418, 434-35 (Ill. 2012) (numerous grounds); *Lee v. Pennington*, 830 So.2d 1037 (La. App. 2002) *writ denied*, 836 So.2d 52 (La. 2003) (equal protection and due process); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995), *cert. denied*, 519 U.S. 809 (1996) (equal protection).

California's Supreme Court found that its anti-SLAPP statute "does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning" and "subjects to potential dismissal only those causes of action to which the plaintiff is unable to show a probability of prevailing on the merits." *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal 4th 53, 62-64, 52 P.3d 685 (Cal. 2002). The anti-SLAPP statute "provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiffs meritless claims." *Id.* It rejected an argument that a party must intend to chill the 1st Amendment rights of another.

Ames now confines his constitutional contentions to article II, § 37.

[35] Ames and Mell *knew* this argument was baseless as it had been advanced by Mell in another case and rejected. CP 1040-41.

[36] "[S]tatutes are presumed constitutional and [] a statute's challenger ... must prove that the statute is unconstitutional *beyond a reasonable doubt*." *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010) (emphasis added).

This Court rejected a similar argument as to Washington's "three strikes" law in *State v. Thorne,* 129 Wn.2d 736, 921 P.2d 514 (1996), *abrogated on other grounds by Blakley v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). The initiative provided for incarceration for life upon conviction for the third of certain enumerated felonies. The appellants contended that each of the statutes pertaining to the enumerated felonies had to be amended to reflect the potential for a life sentence upon the third conviction. *Id.* at 753. This Court rejected this contention, stating that the initiative was "complete in itself." *Id.* at 754.

RCW 4.24.525, the essence of SB 6395, is similarly self-contained. It defines the claims to which it applies in subsection (1)(a). Ames' assertion that every statute setting forth a cause of action must also be amended to satisfy article II, § 37 is simply frivolous in light of *Thorne.*

In sum, the trial court erred in denying the County relief under RCW 4.24.525, particularly in light of its decision on the County's CR 12(b)(6) motion, dismissing Ames' baseless complaint.

(3) Ames Failed to Timely Seek Review of the Trial Court's Decision to Deny Him Penalties/Fees Under RCW 4.24.525(6)(b)

Ames vaguely asserts in his brief at 48 that he is entitled to recover penalties and attorney fees under RCW 4.24.525(6)(b). If the Court reaches the issue,[37] Ames failed to preserve it by not timely seeking review of the trial court's December 31, 2013 anti-SLAPP ruling.[38]

Nothing prevented Ames from filing a notice of appeal as to the trial court's December 31, 2013 anti-SLAPP ruling to obtain penalties and fees afforded by that statute when he was aggrieved within the meaning of RAP 3.1 as to that ruling because he was denied penalties and fees under RCW 4.24.525(6)(b).

Although Ames' effort to secure review of the December 31 memorandum/order was denominated a notice of cross-appeal, that is a misnomer. Review of orders denying a motion to strike under RCW 4.24.525(4) is of right because that statute specifically provides for expedited appellate review in subsection (5). Washington courts have treated such review as of right. *E.g., City of Longview, supra; City of Seattle, supra.*

---

[37] This Court need not reach this issue, of course, if the Court agrees with the County that the County was entitled to relief against Ames under the anti-SLAPP statute.

[38] The County's ability to raise this issue was preserved in Commissioner Pearce's June 23, 2014 ruling.

California law[39] is crystal clear that review of orders denying special motions to strike under California's analogous statute to RCW 4.24.525(4) is *of right. Varian Medical Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 193-94, 106 P.3d 958 (2005). As the California Court of Appeals observed in *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317-18, 9 Cal. Rptr.3d 844, (Cal. App. 2004):

> The right to appeal has a certain logic to it. After all, what use is a mechanism to allow you to get out of a case *early* if it is undercut by an erroneous decision of the trial judge? The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights. The right to appeal a denial of an anti-SLAPP motion is important because it protects the interest validated by the anti-SLAPP statute.

(emphasis in original). Review here is of right. RAP 2.2(a).

Ames' "notice of cross-appeal" on that issue, filed on February 25, 2014, 56 days after the December 31, 2013 ruling, is untimely. RAP 5.2(a). *Nowhere* in Ames' February 7, 2014 notice of appeal to this Court is any reference made to the December 31 ruling. CP 777. *Nothing*

[39] As noted *supra*, Washington courts interpret RCW 4.24.525 consistently with California law. *City of Longview*, 174 Wn. App. at 776 n.11. *Dillon*, 179 Wn. App. at 58-59 (applying de novo standard of review). In *Dillon*, Division I reviewed the denial of a motion to strike as of right.

prevented Ames from seeking review of that ruling in his original notice of appeal.[40]

It is well-understood under Washington appellate procedure that a party cannot remain idle when it has received a favorable trial court ruling, but then fails to take steps to preserve its right to obtain further relief on appeal. RAP 5.2(a); *Mackey v. Champlin,* 68 Wn.2d 398, 413 P.2d 340 (1966) (failure to timely appeal deprives the appellate court of jurisdiction). When he was aggrieved by the trial court's December 31, 2013 anti-SLAPP ruling, it was incumbent upon Ames to file a notice of appeal. His obligation to file a notice of appeal was not tolled by his contention that the December 31, 2013 ruling was not an appealable order under RAP 2.2(a).

Ames' attempt to seek penalties and fees under RCW 4.24.525(6)(b) was not properly preserved.

In any event, on the merits, Ames was not entitled to relief under RCW 4.24.525(6)(b). That statute does not allow a party responding to a motion to strike to recover fees unless the motion is frivolous or designed

---

[40] Ames may not argue that his February 25, 2014 notice of cross-appeal, prompted by the County's February 18, 2014 notice of cross-appeal, somehow "amended" his earlier February 7 notice of appeal. No provision is made in the Rules of Appellate Procedure for a party to file what amounts to an amended notice of appeal, seeking review of a ruling on which review is time-barred, and permitting the amended notice to "relate back" to the date of the filing of the original notice of appeal. Relation back is sometimes permitted as to trial court pleadings. *See* CR 15(c).

for delay. Ames cannot meet this requirement. First, his contention that the County is foreclosed under RCW 4.24.525(3) from seeking relief under RCW 4.24.525 is baseless for the reasons enumerated *supra*. Moreover, as the trial court correctly discerned, CP 749-50, the County's filing of a special motion to strike under RCW 4.24.525(4) was not frivolous or designed for delay. In fact, Ames offers no coherent argument that the trial court's analysis was incorrect. The trial court's ruling should be affirmed.

(4) The Trial Court Abused Its Discretion in Reconsidering and Reversing Its CR 11 Decision Involving Ames' Filing of a Frivolous Petition[41]

The trial court initially awarded the County its fees under CR 11 against Ames and his counsel in an extensive memorandum opinion, where it concluded that had Ames' counsel undertaken a reasonable inquiry into the facts and law in this case, she would have understood that a writ of prohibition was unavailable to Ames, and that his complaint for declaratory relief presented no justiciable controversy. CP 1198-1206. But the trial court then abused its discretion in reconsidering and reversing its fee decision, concluding that Ames and his counsel engaged in a good faith effort to extend

[41] The trial court's decision on CR 11 is entrusted to its discretion and is reviewed by this Court for its abuse. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

or change the law. CP 2269-76. The trial court misapplied CR 11 based on improperly admitted evidence.

CR 11 provides that a person signing a pleading impliedly warrants that it asserts legitimate positions and is not filed for an illegitimate purpose.[42] Ames complained that the trial court's sanctions decision would have a "chilling effect." CP 2170, 2172. But CR 11 *was intended to have a chilling effect.* The rule is designed to deter baseless filings, thereby curbing abuse of the judicial process and leaving the courts available to handle legitimate claims. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).[43]

---

[42] RCW 4.84.185 also 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).

[43] The United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990), stated with respect to the counterpart federal rule:

> It is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts...Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, *ibid.*, any interpretation must give effect to the Rule's central goal of deterrence.

As Judge Stanley Worswick wrote over 20 years ago, "Starting a lawsuit is no 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 Development Bd.*, 61 Wn. App. 615, 617, 811 P.2d 697 (1991). In *Watson v. Maier*, 64 Wn. App. 889, 891, 901, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992), where the court affirmed a

CR 11 prohibits two types of filings: (1) baseless filings; and (2) those that are interposed for any improper purpose; *Bryant,* 119 Wn.2d at 217; *Miller v. Badgley*, 51 Wn. App. 285, 300-01, 753 P.2d 530, *review denied,* 111 Wn.2d 1007 (1988); *Stiles v. Kearney*, 168 Wn. App. 250, 261, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012). Baseless filings are those that are either unsupported factually or not supported under existing law or a good faith argument for an extension or change in the law. *Stiles,* 168 Wn. App. at 261. 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).

The *subjective* intentions of counsel are irrelevant to CR 11. Washington employs an *objective* test when measuring whether an attorney or party violated CR 11. *Bryant*, 119 Wn.2d at 220; *Miller*, 51 Wn. App. at 299-300 (no good faith defense to CR 11 sanctions). This means the conduct of counsel must satisfy a reasonable third party's assessment of the actions of the lawyer or party. In this case, it must have been reasonable for Ames and Mell to choose relief under a writ of

---

CR 11 award for "misuse of the system," former Chief Justice Gerry Alexander wrote: "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.'"

prohibition or declaratory relief as the basis for a "name clearing" proceeding. It was not.

(a) Ames' Petition Was Not Warranted by Existing Law or a Good Faith Extension or Change in the Law

"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). Here, Ames had no legitimate basis to contend that a writ of prohibition or declaratory relief was available to him, given the Office's constitutionally-mandated duty on PIE disclosure. *See McDonald v. Korum Ford,* 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). (attorney's filing of employment discrimination case sanctionable).

Ames was familiar with *Brady* and PIE as a law enforcement officer for over 25 years. CP 86, 114, 176. He was also familiar with the Model Washington Association of Sheriffs and Police Chiefs *Brady* Policy for Law Enforcement. CP 110, 487-91. Despite his knowledge, including the knowledge that the Office was obligated to disclose PIE information, Ames and Mell brought this action attempting to bar the Office from performing its constitutional duty.

At the October 1, 2013 hearing before Judge Chushcoff in *George*, Ames' counsel announced they were prepared to file a petition for a writ of

prohibition and declaratory relief so there could be an action to determine whether the material about Ames being labeled as PIE was, in fact, potential impeachment evidence. CP 229-30. Yet, *at that same hearing*, Mell *agreed* on Ames' behalf that the Coopersmith Report at issue should be given to George. CP 230-31. As noted *supra,* Judge Chushcoff questioned the validity of Ames' legal theories.

Despite a superior court judge's admonishment that such claims were likely not well-founded in the law, Ames and Mell filed this action the very next day, October 2, 2013. CP 1-12. Thus, Ames and Mell were warned that their claims were baseless, but intentionally chose to proceed anyway.[44]

Despite being confronted with many legal reasons why the action was improper, Ames and Mell failed to withdraw the petition and instead filed a memorandum opposing the motion to dismiss. CP 675-722.[45] The response failed to provide any authority rebutting the County's argument that a prosecutor has exclusive jurisdiction to decide what constitutes PIE; it failed to address a prosecutor's obligations to make such disclosures to

---

[44] The County sent Ames and his counsel a detailed warning in an October 17, 2013 letter that it would seek CR 11 sanctions if the petition was not withdrawn. CP 1088-89.

[45] The County's CR 12(b)(6) motion to dismiss also expanded upon the reasons set forth in the County's October 17, 2013 letter, providing ample authority establishing that Ames' complaint failed to state any claim upon which relief could be granted. CP 13-31.

criminal defendants; it provided no authority that a declaratory judgment action could provide the type of relief Ames sought. *Id.* In fact, the trial court's initial CR 11 decision clearly documented that the Office acted within its jurisdiction under *Brady*. CP 1201-04.

Facing sanctions, Ames' arguments morphed on reconsideration, as the trial court noted. CP 2271-72. The trial court abused its discretion by granting reconsideration of its CR 11 decision where Ames contended for the first time that his petition was supported by an extension or change in Washington law.

An attorney must make a choice between arguing that existing law supports her position or arguing for an extension or change in the law in good faith. To argue *both* is improper, as Ames has attempted to do here. Plainly, Ames and Mell modified the entire thrust of their argument when the trial court initially rejected their analysis of the writ of prohibition and declaratory relief. Ames was obliged to advise the court that his position was based on existing Washington law or that he was seeking an extension or change in law. He *could not have it both ways.*

Federal law[46] recognizes that a party cannot argue simultaneously that existing law supports its position *and* that it is advocating for an extension or change in the law. In *Golden Eagle Distributing Corp. v.*

[46] Federal law interpreting Rule 11 may be employed as the Washington rule and its federal counterpart are similar. *Bryant*, 119 Wn.2d at 221.

Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), the Ninth Circuit noted "The Rule on its face requires that the motion *be one or the other.*" *Id.* at 1539 (emphasis added). Washington law is in accord. *Doe v. Spokane and Island Empire Blood Bank*, 55 Wn. App. 106, 122, 780 P.2d 853 (1989).

Rooted in the duty of candor toward the tribunal, RPC 3.3, an argument for the extension of existing law disguised as one based on existing law "misrepresents existing law." *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert denied*, 479 U.S. 851 (1986). A party cannot "accurately describe the law and then call for change." *Id.* Some courts have held that such conduct is itself sanctionable either as a misrepresentation or as a failure to perform a reasonable pre-filing inquiry to ascertain the law. *De Sisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990). As one court stated: "Counsel either are trying to buffalo the court or have not done their homework." *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987), *cert. denied*, 485 U.S. 901 (1988).

In addition to his ultimately contradictory positions, on the merits, Ames' theories did not constitute a good faith argument for extension or change in the law, and the trial court erred in believing that merely labeling an issue as one of "first impression" is sufficient to evade CR 11

sanctions. Simply because a party or lawyer denominates a theory as one of "first impression" does not mean it satisfies the *objective* good faith test for seeking an extension or change in the law. That would insulate every baseless argument described as one of "first impression" advanced by a party or lawyer from CR 11, something that has never been true under Washington law.[47] Simply stated, merely raising a harebrained argument and calling it an argument of "first impression" does not automatically insulate an attorney or a party from CR 11 sanctions.

---

[47] For example, Washington courts imposed sanctions in cases of "first impression" in *Trohimovich v. Director, Dep't of Labor & Industries*, 21 Wn. App. 243, 584 P.2d 467 (1978), *review denied*, 91 Wn.2d 1013 (1979) and *Shutt v. Moore*, 26 Wn. App. 450, 613 P.2d 1188 (1980). In the former, the Court of Appeals sanctioned Trohimovich, who asserted he was entitled to pay worker compensation premiums in "legal" dollars based on gold rather than the pseudo or "paper" dollars generally in circulation. *Trohimovich*, 21 Wn. App. at 471. In the latter, Shutt filed a civil rights complaint for damages against tax officials and their attorneys for collecting taxes from him; he also filed "common law liens" against the property of many of those same defendants. The trial court's dismissal of Shutt's complaint was affirmed. In imposing sanctions, the court stated:

> The plaintiff in this case had ample and appropriate legal avenues open to him to test the propriety of the tax assessed against him, the amount assessed and the constitutionality of the tax law involved. He chose not to avail himself of these, but instead endeavored to use civil legal process as a bludgeon to be wielded indiscriminately against state employees, officials, lawyers and the trial judge for having done no more than discharge their official duties. The plaintiff brought a frivolous damage action against them seeking $75 million and, in addition, endeavored to lien their own real property. A lawsuit is not a game.

Id. at 456-57. *See also, Madden v. Foley*, 83 Wn. App. 385, 922 P.2d 1364 (1996) (sanctions for tort claims amounting to alienation of affections, a tort not recognized in Washington law, upheld).

The Court of Appeals in *Hicks v. Edwards*, 75 Wn. App. 156, 876 P.2d 953 (1994), *review denied*, 125 Wn.2d 1015 (1995) addressed the good faith extension or change facet of CR 11, albeit without extensive discussion. There, an attorney in a shareholders' derivative action attempted to represent both the corporation and its majority shareholders. The trial court disqualified the lawyer and imposed CR 11 sanctions due to his conflict of interest. The attorney testified that he consulted other attorneys in his office, attorneys outside his firm, and the Washington State Bar Association. He also presented expert testimony from a University of Washington ethics law professor. The minority shareholder who filed suit offered the testimony of John Strait who opined that the attorney should be sanctioned.

The Court of Appeals reversed the sanctions ruling.[48] The Court concluded that the attorney's opposition to the disqualification motion was not "baseless" because no clear Washington authority controlled, foreign law was not uniform, the ABA's Model Rule of Professional Conduct did not bar the representation, and Washington experts were divided. The court stated: "...we hold that the trial court abused its discretion in finding that Hicks' opposition to Edwards' motions was 'baseless' in the

[48] The attorney did not appeal his disqualification.

sense of not being supported by a good faith argument for an extension of existing law." *Id.* at 166.[49]

This is not a case where there is a legitimate basis to argue for a good faith extension or change in the law. There is *no question* about the law on writs of prohibition or declaratory relief. That law is *clear*, and it does not support Ames' position.

The writ and declaratory actions are creatures of statute. The statutes establish the elements of the causes of action. Efforts to alter the elements of statutory causes of action should be directed to the Legislature.[50] Any argument seeking a good faith extension of the law based upon the scope or applicability of a statutory cause of action would have to be based upon the existing language of the statute, be consistent with legislative intent, and must address controlling law on that statute. Ames studiously avoids discussing the statutory language in all of his briefing, tacitly conceding that no argument can be made that his claim met the elements under existing law and no good faith argument can be raised that a court could expand or eliminate the statutory elements the

---

[49] *See also, Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 304 P.3d 914, *review denied*, 178 Wn.2d 1022 (2013), (the trial court declined the defendant municipalities' request for CR 11 sanctions in a case where the plaintiff asserted that fluoride was illegally added to their drinking water; plaintiff acted in good faith to seek a change in the law, in the face of two 5-4 Supreme Court decisions).

[50] A court cannot expand the scope of a statutory cause of action contrary to the terms of the statute without invading the province of the Legislature. *State v. Rochelle*, 11 Wn. App. 887, 890, 527 P.2d 87 (1974), *review denied*, 85 Wn.2d 1001 (1975).

Legislature established. Indeed, neither Ames, nor the trial court on reconsideration, articulated precisely how the statutory elements could be met, or altered, to allow the case to proceed.

As noted *supra,* a writ of prohibition is a drastic remedy available only where an entity is *acting without or in excess of its jurisdiction.* RCW 7.16.290. The Office was clearly acting within its jurisdiction in determining what PIE to disseminate. Any reasonable lawyer researching the law on writs of prohibition would have come to that conclusion before filing. There is no good faith argument for the extension of existing law when the relief sought runs afoul of the very nature of the statutory cause of action as here.

Similarly, the law on a declaratory judgment under RCW 7.24.110 holds that it is available only when there is a justiciable controversy or an issue of major public importance. In his petition, Ames never alleged that this was an issue of major public importance, but averred that he was "an interested person under the Act who [sic] rights, status, and other legal relations are affected...." CP 10. The trial court found that Ames had failed to present a justiciable controversy as required by the statute and expressly found no issue of major public concern. CP 775 ("The public

concern regarding PIE is a fair trial for criminal defendants, not the person whose credibility is being questioned.").[51]

Simply stated, Ames needed to decide which facet of CR 11 supported his position that his claims were non-frivolous. He did not do so. In fact, his claims lacked merit and he did not legitimately, or timely, sustain a request for a change in Washington law.

(b) Ames' Petition Was Filed for Improper Purposes

The trial court failed to address the County's argument that Ames' action was vexatious. CP 1081-83. CR 11 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. 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).[52]

---

[51] On reconsideration, Ames largely abandoned any attempt at showing that he presented a justiciable controversy under the statute, but argued that he should not be sanctioned because he raised an issue of major public concern.

[52] The trial court also possessed inherent power to assess attorney fees against an attorney for bad faith conduct in litigation. *Rogerson Hiller Corp. v. Port of Port*

The extreme rancor of Ames and his counsel toward the County, the Department, and the Office is manifested in Ames' repeated effort to treat this case as an action against the prosecutor personally rather than the County (or more properly, the State). CP 2.[53] Further, Ames and his counsel engaged in baseless and gratuitous *ad hominem* attacks, which show a harassing purpose aimed at undermining public trust in the Department, the Office, and the legal system. *E.g.,* CP 4-8 (Petition at ¶ 3.4, 3.9, 3.10, 3.11, 3.12, 3.13, 4.1).

At the December 16, 2013 hearing, Ames' counsel repeatedly accused DPA Richmond of "not telling the truth" in a legal proceeding. RP (12/16/13):19, 23. Ames and his counsel persisted in this improper conduct when they responded to the County's motion to dismiss. *See, e.g.* CP 675-722.

Ames and his counsel had no objective evidence of their defamatory accusations and groundless conspiracy theories. In fact, the

---

Angeles, 96 Wn. App. 918, 927-30, 982 P.2d 131 (1999), *review denied,* 140 Wn.2d 1010 (2000) (discussing prelitigation misconduct, procedural bad faith, and substantive bad faith as grounds for awarding fees). Procedural bad faith, vexatious conduct in litigation, is a valid basis for a fee award. *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).

[53] This rancor is repeated in Ames' opening brief with its attacks on the Department, the Office and its loose, undocumented assertions of corruption. *See* Appendix A.

extensive findings in the Coopersmith Report undermine their accusations. CP 981-1011. Rather than focus on the issues relevant to PIE in a criminal case, Ames and his counsel violated CR 11 with baseless *ad hominem* attacks, which show a harassing purpose aimed at undermining public trust in the Department, the Office, and the legal system. This was a misuse of the legal system, subject to CR 11 sanctions.

(c) The Trial Court Erred in Failing to Strike Ames' Belated Declarations in Support of His Motion For Reconsideration[54]

In his motion for reconsideration of the trial court's CR 11 decision, Ames belatedly offered 34 new declarations. Six declarations accompanied his motion, 28 additional declarations, many of which are merely form declarations signed by attorneys, were then submitted after the filing of the motion for reconsideration. Two new tardy declarations later accompanied Ames' supplemental reply on reconsideration, CP 2019-58, declarations that were improperly allowed by the trial court and should have been excluded because they contained false, improper, and inadmissible evidence. Moreover, Ames offered no legitimate explanation as to why his counsel could not have procured the declarations earlier and

[54] This Court reviews the admissibility of declarations accompanying a summary judgment motion de novo. *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Farrow v. Alfa Laval, Inc.,* 179 Wn. App. 652, 660, 319 P.3d 861 (2014). It should review the trial court's decisions on the declarations here under a similar standard of review.

presented them to the trial court with his original response to the County's fee motion. *None* of the declarations constituted newly discovered evidence.

The County filed its motion for fees and expenses on February 14, 2014,[55] and it was ultimately heard on March 19, 2014. Ames' response to the County's fee motion was accompanied only by declarations from Ames and Mell. The trial court abused its discretion in taking this tardy new evidence. *Chen v. State*, 86 Wn. App. 183, 191-92, 987 P.2d 612, *review denied*, 133 Wn.2d 1020 (1997) (court upheld the decision of the trial judge who struck an affidavit and a declaration that contained no new evidence and failed to create an issue of material fact in the case); *Fishburn v. Pierce County Planning & Land Services Dep't*, 161 Wn. App. 452, 472-73, 250 P.3d 146, *review denied*, 172 Wn.2d 1012 (2011); *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, *review denied*, 133 Wn.2d 1012 (1997). (Information that was within the possession of the moving party when the underlying motion was heard cannot be considered on reconsideration.)

---

[55] The trial court's CR 12(b)(6) memorandum opinion was filed on February 7, 2014. Ames was on notice *long before* the entry of that decision that the County would seek fees and expenses if he persisted in his petition. In particular, the October 17, 2013 letter of Michael Patterson put Ames on notice. CP 1088-89

Ames *never denied* that the testimony in the various reconsideration declarations was available to him at the time of his response to the County's fee motion; Ames and his counsel should have recognized the need for such declarations then and submitted them in response to the County's fee motion. *See, e.g., Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (plaintiff's realization that her expert's first declaration was insufficient to establish prima facie case did not qualify second declaration as newly discovered evidence that would warrant reconsideration of order granting summary judgment).

Ames and his counsel should not have had a second bite at the apple. The many tardy declarations were simply not "newly discovered," and could have been provided before the initial hearing on fees. Indeed, *Mell essentially admitted in her declaration* that the declarations could have been obtained earlier. Mell admits, for example, that she "sought out the guidance of Professor Strait," on more than one occasion. CP 1307. This is even clearer as to the two new declarations from Mell and David Boerner, an expert witness, submitted with Ames' supplemental pleadings.

Declarations submitted in connection with motions must also conform to the requirements of the Rules of Evidence. ER 1101. The declarations submitted by Ames were inadmissible for a variety of reasons. Under ER 701 or ER 702, a witness, lay or expert, may not

testify to legal opinions as such opinions intrude on the authority of the court. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993). ("Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony.") (Court's emphasis). Further, ER 802 forbids the admission of hearsay, testimony regarding statements by another designed to prove the truth of the matter asserted. Finally, ER 402 requires that any evidence offered by a witness be relevant to the issues in the case.

The various declarations submitted by Ames were replete with false assertions, self-serving legal opinions, and contained hearsay. Ames even sought to introduce a newspaper article on the case for the truth of its contents. CP 2024-47.[56]

Most critically, Ames' belated declarations were irrelevant under ER 402. *None* of these declarations referenced the applicable law on writs of prohibition or declaratory relief so as to acknowledge the elements Ames would have to show in order to succeed in obtaining the relief he sought. John Strait, for example, did not claim to be an expert on writs of prohibition or declaratory relief. CP 1347-50. In addition, Strait listed

---

[56] When offered for the truth of their contents, newspaper articles are hearsay. *State ex rel. Pierce County v. King County*, 27 Wn.2d 37, 45, 185 P.2d 134 (1947). Not only does Ames cite to the contents of that article as "evidence" of the public importance of this case, he even resorts to referencing the "blog" comments to the article as further evidence of the public importance of this controversy. Br. of Appellant at 5-6. Such "evidence" is clearly hearsay.

materials he reviewed in order to render his opinion, but nowhere did he list the applicable statutes or case law on writs of prohibition and declaratory judgments. CP 1350-51. He appeared to rely heavily on Mell's claims about her own research. CP 1351-52. The trial court erred in admitting the declarations referenced herein.

In sum, Ames' filing here was sanctionable, whether under CR 11, RCW 4.84.185, or the courts' inherent authority. Ames filed a baseless complaint for his own illicit motives. Not only were the County, its Department, and its Office, harmed, but the taxpayers who pay the bills were harmed as well.

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

If the County is correct that the trial court erred in failing to grant its special motion to strike, it is entitled to penalties and fees under RCW 4.24.525(6)(a). The County would be entitled to its fees on appeal as well. RAP 18.1; *Bevan v. Meyers*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 4187803 (2014) at *6; *Davis*, 180 Wn. App. at 551.

Ames' appeal is also frivolous under RAP 18.9(a).[57] Washington appellate courts award fees on appeal to parties who have abused the appellate

[57] RAP 18.9(a) states:

rules or filed frivolous appeals.[58] *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 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). Thus, an appellate court may impose sanctions for a party's recalcitrance or obstructionism, as this Court acknowledged in *In re Adoption of B.T.*, 150 Wn.2d 409, 421, 78 P.3d 634 (2003).

> 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.

[58] 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).

Here, Ames' appeal is frivolous, insofar as he cannot establish a basis for the relief sought – a writ of prohibition or declaratory relief, given the Office's exclusive *Brady* authority. His appeal represents a continuation of the vexatious conduct by Ames and his counsel. Appellate sanctions are appropriate.

F. CONCLUSION

Ames' complaint regarding the Office's decision to provide PIE materials to defense counsel in *George* and other cases is ultimately baseless in light of the broad constitutional obligation of the Office to provide such materials to criminal defendants and their counsel. The trial court correctly determined that Ames failed to state a claim against the County on the theories he pleaded, dismissing his petition under CR 12(b)(6).

The Court should also have granted the County's RCW 4.24.525(4) motion to strike, and should have awarded it the statutory penalties and fees under RCW 4.24.525(6). Finally, the trial court was initially correct in determining that Ames' petition was frivolous under CR 11 and abused its discretion in reconsidering that decision.

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

DATED this 26th day of September, 2014.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Michael Patterson, WSBA #7976
Charles Leitch, WSBA #25443
Jason A. Harrington, WSBA #45120
Patterson Buchanan Fobes & Leitch PS
2112 3rd Avenue, Ste. 500
Seattle, WA 98121
(206) 462-6714
Attorneys for Respondent/Cross-Appellant
Pierce County

Res/Cross-App

APPENDIX

RCW 4.24.525:

(1) As used in this section:

(a) "Claim includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim.

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in the subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or any written statement or other document submitted in a place open to the public or in a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in this action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be a necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

CR 11:

(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) 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.

APPENDIX A

Statement in Ames' Brief	Actual Facts	Cite
Pierce County Prosecuting Attorney's Office (PCPAO) adopted a potential impeachment policy ("PIE") without the equivalent procedural due process promises contained in Sheriff's department policies and procedures. P.1	The Prosecutor Office's PIE policy was adopted to comply with the PCPAO's obligation to protect the constitutional trial rights of individual criminal defendants, to safeguard the integrity of any convictions obtained on those cases, and to follow the case law mandate that the "prudent prosecutor will resolve doubtful questions in favor of disclosure." Kyles v. Whitley, 514 U.S. 419, 439, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The PIE policy provides notification to the witness of the PIE and provides him/her with an opportunity to provide additional information.	-Penner Declaration, CP 1590-1593 -Supplement: Exhibits to Patterson Declaration of 10-17-13, Exhibit C (WAPA Model PID policy), CP 46-52 *-PCPAO PIE Policy, CP ___?*
The Prosecutor's Office has labeled Ames a "Brady" officer. P. 1	Ames has <u>not</u> been labeled a "Brady" officer. The PCPAO provided PIE material to the criminal defense in the murder case of *State v. George*, where Ames was listed as a potential witness for the State. Ames was advised he was not added to any "Brady list."	-Penner Declaration, CP 1590-1593 - Supplement: Exhibits to Patterson Declaration of 10-17-13, Exhibit B (Penner Letter of 9-18-13), CP 43-44 -Ames Declaration of 12-12-13, Exhibit 10 (Penner Letter of 9-20-13), CP 214
PCPAO has labeled Ames a "Brady" officer based on an unfounded whistleblower investigation report involving the Prosecutor and the declaration of a single civil deputy prosecutor who has since revised his testimony in a subsequent declaration. P. 1	Ames filed a complaint with the PCSD, alleging misconduct by the PCSD and PCPAO. Jeffrey Coopersmith, an independent investigator hired by the county to conduct the investigation, interviewed numerous witnesses and filed a report concluding Ames' allegations were "totally lacking in merit." The Civil Deputy Prosecutor whom Ames references is DPA James Richmond. DPA Richmond has not revised his testimony. Ames filed a declaration in the *Dalsing* civil case dated 7/13/13 wherein he falsely included the following at paragraph 1.5: "Mr. Richmond told me that the email I turned over to him from Lori Kooiman in October 2012 was 'exculpatory' regarding my involvement in this case. He also told me that it would clear me of any wrong doing in the case and he would see to it that it was turned over as part of discovery." In response to this falsehood, DPA Richmond's declaration states, "I was astonished to read this as I had never told Ames any such thing."	-Richmond Declaration, CP 1587-1589 -Patterson Declaration of 11-27-2013, Exhibit D (Coopersmith Report), CP 976-1011

Ames reported his concern about the Prosecutor abusing the power of the PCPAO, which became the subject of a whistleblower investigation report referred to as the Coopersmith Report. P. 1	The neutral fact-finder, Jeffrey Coopersmith concluded that there was "no merit" to Ames' allegations. The report was critical of Ames for making baseless accusations, at one point noting, "This is a very slender reed with which to make an allegation of corruption, and in fact is not a reed at all."	-Patterson Declaration of 11-27-2013, Exhibit D (Coopersmith Report), CP 976-1011
Ames blew the whistle on deputy prosecutors withholding exculpatory evidence in related criminal and civil proceedings involving a local citizen, Lynn Dalsing. P. 1-2	Deputy prosecutors did not withhold exculpatory evidence in the criminal case or civil case.	-Lewis Declaration, CP 1594-1616 -Kooiman Declaration, CP 1617-1640 -Richmond Declaration, CP 1587-1589
The prosecutor's office is conflicted, it wants Ames credible in criminal cases, and it wants to discredit him in *Dalsing* to protect the prosecutors' exposure to civil liability. P. 2	This statement betrays a lack of understanding of the PCPAO's obligations re: PIE, and attributues an ill intention where none exists. When the PCPAO provided PIE material to the criminal defense in the murder case of *State v. George*, where Ames was listed as a potential witness for the State, the Prosecutor's Office was fulfilling its obligation under the constitution and case law that mandates disclosure of PIE.	-Penner Declaration, CP 1590-1593 - Supplement: Exhibits to Patterson Declaration of 10-17-13, Exhibit B (Penner Letter of 9-18-13), CP 43-44 -Memorandum of Journal Entry, October 1, 2013 (State v. George). CP 40-41 *-George Transcript, CP ___?*
The Prosecutor claims his deputies cannot be challenged over their use of the "Brady" label. P. 2	County's position is that Ames cannot use a writ or declaratory relief under the facts of this case. Judge Hull agreed.	-Pierce County's Answer and Counterclaim, CP 53-63 -Judge Hull's Opinion and Order on Defendant's Motion to Dismiss, CP 768-776
Prosecutors contend they have absolute discretion to include knowingly false accusations of dishonesty to disseminate for retaliatory reasons. P. 2	The County makes no such contention. The PCPAO has a non-delegable constitutional obligation to disclose PIE to criminal defendants.	-Pierce County's Answer and Counterclaim, CP 53-63
On September 18, 2013, Ames received a letter from the prosecutor's office labeling him a "Brady" officer under the prosecutor's new PIE policy. P. 5	Not true. On September 18, 2013, following adoption of the PCPAO's PIE policy, and in conformity with the policy, Chief Criminal Deputy Stephen Penner sent Ames a letter informing him of the PCPAO's intent to disclose PIE and inviting him to submit additional materials if he so chose. Ames did so choose, and the original PIE as well as Ames' additional materials were provided to defense counsel on a pending murder case, *State v. George*, where Ames was expected to be called as a witness. Ames and his attorney, Joan Mell, appeared before the criminal court in the *George* case and informed the trial court that Ames had no objection to the Coopersmith report being turned	-Penner Declaration, CP 1590-1593 - Supplement: Exhibits to Patterson Declaration of 10-17-13, Exhibit B (Penner Letter of 9-18-13), CP 43-44 -Ames Declaration of 12-12-13, Exhibit 10 (Penner Letter of 9-20-13), CP 214 -Memorandum of Journal Entry, October 1, 2013 (State v. George), CP 40-41 *-PCPAO Policy, CP ___?* *-George Transcript, CP ___?*

	over to the defense in the *George* case.	
Ames never had probable cause to link Dalsing to the photograph that formed the basis of criminal charges against her. P. 6	Lynn Dalsing was criminally charged in December of 2010 based upon police reports provided to DPA Kooiman as well as verbal representations by PCSD personnel.	-Kooiman Declaration, CP 1617-1640
Ames documented in an email that Dalsing could not be linked to the photograph, and prosecutors failed to immediately release Dalsing upon receipt of the email. P. 6	Ames mentioned in the June 9, 2011 email the difficulty of identifying Lynn Dalsing in the pornographic photograph because the face in the photo was not visible. This was apparent from the photograph itself, which the defense attorney knew because he was in possession of the photograph at the time of the June 9 email. After Ames failed to follow up on the photograph in question, DPA Kooiman contacted the Tacoma Police Department and asked them to send the photograph to the National Center for Missing and Exploited Children to determine whether it was from a known series of child pornography. On July 13, 2011, the day that DPA Kooiman received notification that the photograph was from a known series of child porn and therefore did not depict Lynn Dalsing, the case was dismissed without prejudice. On March 28, 2014, after further investigation and evidence in the case, Lynn Dalsing was charged with two counts of rape of a child in the first degree, three counts of child molestation in the first degree, and three counts of sexual exploitation of a minor.	-Lewis Declaration, CP 1594-1616 -Kooiman Declaration, CP 1617-1640
Lynn Dalsing remained incarcerated for approximately seven months on charges the prosecutors could not prove. P. 6	Lynn Dalsing currently charged with two counts of rape of a child in the first degree, three counts of child molestation in the first degree, and three counts of sexual exploitation of a minor arising out of the same incident.	-Lewis Declaration, CP 1594-1616 -Kooiman Declaration, CP 1617-1640
After entry of the 12(b)(6) order, Richmond filed a new declaration substantially modifying his previous *Dalsing* declaration to now admit he did indeed get the emails. P. 7	Not true. DPA Richmond never denied receiving the June 9, 2011 email from Ames. Instead, he stated that it was not given to him at the October 12, 2012 meeting between Richmond and Ames.	-Richmond Declaration, CP 1587-1589
Many other local attorneys, fearful of the chilling effect of this case, believe the emails were "positive exculpatory	The declarations that were filed alleging that the email was possibly "dispositive exculpatory evidence,"	-Various Attorney Declarations, 1414-1479

evidence" or "Brady" material. P. 7	were form declarations signed by criminal defense attorneys, with no personal knowledge about the case and many of them admitted as much.	
Ames requested an outside criminal investigation, Pierce County chose to keep Ames' complaint in house and treat it as a whistleblower complaint. P. 8	Ames' filed a complaint with the PCSD alleging misconduct by the PCSD and PCPAO. The Pierce County Human Resources Department sent the complaint to an outside, independent investigator, Jeffrey Coopersmith. Coopersmith, in turn, interviewed numerous witnesses and filed a report finding that "there is no merit to Det. Ames' current allegations." Coopersmith was critical of Ames for making baseless accusations, at one point noting, "This is a very slender reed with which to make an allegation of corruption, and in fact is not a reed at all."	-Patterson Declaration of 11-27-2013, Exhibit D (Coopersmith Report), CP 976-1011
The County hired Jeff Coopersmith, a Seattle attorney, who prepared an expensive report. P. 8	Ames made numerous allegations against the PCSD and the PCPAO, which required Coopersmith to interview numerous witnesses.	-Patterson Declaration of 11-27-2013, Exhibit D (Coopersmith Report), CP 976-1011
Coopersmith did not conclude that Ames was dishonest. P. 8	Coopersmith filed a report finding that "there is no merit to Det. Ames' current allegations." Coopersmith was critical of Ames for making baseless accusations, at one point noting, "This is a very slender reed with which to make an allegation of corruption, and in fact is not a reed at all."	-Patterson Declaration of 11-27-2013, Exhibit D (Coopersmith Report), CP 976-1011
Prosecutor involved in a "surreptitious" examination of Ames' email. P. 8	Baseless accusation. No finding in record	
Prosecutors limited Ames' case assignments. P. 9	Baseless accusation. No finding in record	
Prosecutors scrutinized Ames' reports, looking for any means to damage his favorable reputation. P. 9	Baseless accusation. No finding in record	
Gratuitously states prosecutors "know Det. Ames' reported it correctly." P. 31	Baseless accusation. No finding in record	
"Corruption in a public office or program like the Prosecutor's implementation of his PIE policy...." P. 35	Baseless accusation. No finding in record. Further, the PCPAO PIE policy is designed to implement public policy and was based on a model policy by the Washington Prosecuting Attorneys Association.	-Supplement: Exhibits to Patterson Declaration of 10-17-13, Exhibit C (WAPA Model PID policy), CP 46-52 *-PCPAO PIE Policy, CP ___?*
Ames sought redress from Judge Andrus in the *Dalsing* matter when he was attempting to fulfill his duties under "Brady."p. 40	Duties under "Brady" apply to criminal cases. Ames was a witness in a civil case, afraid that his deficient work would be uncovered. He concluded in the	-Lewis Declaration, CP 1594-1616 -Kooiman Declaration, CP 1617-1640

	criminal *Dalsing* case that Lynn Dalsing could not be connected to the computers with child porn. Ability Systems hired by the County in the civil case determined that Lynn Dalsing could be connected to the computers with child porn.	

APPENDIX B

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

MICHAEL AMES,

Plaintiff,

v.

PIERCE COUNTY

Defendant.

No. 13-2-13551-1

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant Pierce County's Special Motion to Strike the entire complaint, brought pursuant to Washington statutes designed to discourage strategic lawsuits against public participation ("Anti-SLAPP statutes"). Ames has responded in opposition to Pierce County's motion, and Pierce County has replied. On December 16, 2013, Ames and Pierce County both appeared through counsel for oral argument.

FACTUAL HISTORY

Plaintiff Michael Ames is a detective with the Pierce County Sheriff's Office who is often called as a State witness in criminal matters. The Pierce County Prosecutor's Office recently implemented a procedure for providing potential impeachment evidence ("PIE") to defense counsel in criminal cases. Ames was provided notice that the Prosecutor's Office was going to provide defense attorneys PIE regarding Ames in cases in which Ames was scheduled to testify. Ames objects to this evidence being disclosed and filed a petition for a

writ of prohibition and declaratory relief. Specifically, Ames' primary objections are to evidence stemming from the following:

Dalsing declarations[1]

Ames was an investigator in a criminal matter against Lynn Dalsing. Dalsing was arrested and charged with child molestation in the first degree and the sexual exploitation of a minor. After the criminal charges were dismissed on the eve of trial, Dalsing sued Pierce County alleging the Prosecutor's Office delayed disclosing an exculpatory photograph to defense counsel and continued the prosecution despite knowledge of this exculpatory evidence. Ames alleges he had in his possession emails exculpating Dalsing, indicating there was no probable cause that she was involved or had possessed any child pornography. Civil deputy prosecuting attorney Jim Richmond, Ames's counsel at the time, instructed Ames to not answer certain questions at a deposition and claimed the emails were attorney work product. Ames later asserted there was a conflict of interest and retained independent counsel in the matter.

Ames alleges he provided the emails to the prosecutor in the criminal matter prior to the trial. Ames alleges he was told in an email from the criminal prosecutor on June 9, 2011 that she would disclose the emails to defense counsel. The emails were not disclosed.

Ames also says he provided the emails to civil deputy prosecutor Richmond on October 18, 2012 during the discovery process for the civil matter. Ames alleges Richmond told him that the emails would be disclosed. When the emails were not disclosed, Ames provided copies to the judge. Ames made a motion for attorney's fees and in his supporting declaration alleged that he provided the emails to Richmond and was told the emails would be disclosed. Richmond disputes this in his own declaration, claiming he never received the emails and never told Ames the emails would be disclosed. Attorney's fees were awarded to Ames. The Prosecutor's Office was found to be "not justified" in its instructions to Ames. The award of attorney's fees to Ames has been appealed by Pierce County.

---

[1] Case facts taken from the Order Granting in Part and Denying in Part Plaintiff's Motion to Compel After *In Camera* Review entered in *Dalsing v Pierce County*, case no: 12-2-08659-1. ?

Ames alleges the declarations countering his statements were made in retaliation for bringing forward the exculpatory emails. He claims these were created intentionally so that there would be PIE to discredit him as a State witness and undermine the ability to do his job and affect his employability.

Coopersmith report

The other piece of evidence Ames takes exception to being labeled PIE is known as "The Coopersmith Report." According to Ames, in July 2012 he took a mandatory child abuse report regarding a bullying and child neglect case in Gig Harbor. In October 2012, Ames was told there was a potential misconduct investigation against him into his conduct in that case. A lieutenant advised him there would be no investigation because the lieutenant found no problem with Ames's actions in that case, which according to Ames, were limited to creating the report.

In November 2012, Pierce County Prosecutor Mark Lindquist issued a press release indicating that the case would not be prosecuted because of a detective's improper relationship with the attorney representing the victim's family. Ames took this as an implication that the detective was in an attorney-client relationship in another civil case and that somehow it was improper for him to take the report. Ames believes the press release was referring to him and denies being in an attorney-client relationship with any attorney at the time he took the report.

In December 2012, Ames says he discovered a misconduct investigation did take place against him, despite the assurances by the lieutenant. Ames believes he should have been afforded due process and made aware of the investigation. Ames then requested an outside investigation be conducted into the handling of that case.

On March 27, 2013, Ames was informed that Jeff Coopersmith, an outside investigator, would be conducting the investigation of Ames's complaints. On May 24, 2013, Ames was informed that the investigation into his complaint had been completed and it had been determined that there was no merit to his allegations that he had been a victim of retaliation. Coopersmith's investigation also concluded that the misconduct investigation

against Ames concerning the bullying and child neglect incident had been conducted properly.

Ames seeks a writ of prohibition to prevent the Prosecutor's Office's dissemination of the above-referenced material as PIE to criminal defense counsel. He claims the Prosecutor's Office overstepped its jurisdiction by creating PIE and invaded the domain of the sheriff's office to conduct investigations when an officer's integrity was questioned. He is also seeking declaratory relief and a fact-finding hearing so he can cross-examine Richmond and obtain relief declaring Ames as truthful and declare the evidence is not PIE.

ANALYSIS

I. Legal background of Washington's Anti-SLAPP statutes

RCW 4.24.500–.525 (collectively Washington's Anti-SLAPP [Strategic Lawsuits Against Public Participation] statutes) provide a mechanism to protect individuals engaging in First Amendment activities regarding matters of public interest from nuisance lawsuits designed to discourage those First Amendment activities.[2] A SLAPP suit, in general terms, is one that is without substantive merit, but is intended to drag the defendant into expensive and lengthy litigation so as to intimidate that person and others similarly situated from engaging in public participation in the first place.[3] To give full effect to the purpose behind the Anti-SLAPP statutes, they are to be construed liberally and in favor of the defendant public participant.[4]

The Anti-SLAPP statutes, rather than merely protecting the SLAPP defendant from ultimate liability, are designed to protect such a defendant from the litigation itself.[5] To that end, the Anti-SLAPP statutes provide a mechanism for an expedited, special motion to strike part or all of a complaint near the outset of litigation.[6] Discovery is stayed pending an

---

[2] Bruce E.H Johnson & Sarah K. Duran, *A View from the First Amendment Trenches. Washington State's New Protections for Public Discourse and Democracy*, 87 Wash. L Rev. 495, 497 (2012) [hereinafter "*A View from the Trenches*"].
[3] *Id* at 496–97
[4] *Id* at 521
[5] *Id* at 519
[6] *Id.* at 518; RCW 4.24.525(5)(a) ("The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper")

Anti-SLAPP motion,[7] and all parties have the right to expedited appeal from the trial court's Anti-SLAPP decision.[8] A decision on such a motion must be rendered "no later than seven days after the hearing is held."[9]

The analysis for an Anti-SLAPP special motion to strike is clearly set forth in the statute. First, the moving party (defendant in the underlying action) "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition."[10] If that initial burden is met, the responding party (plaintiff in the underlying action) has the burden "to establish by clear and convincing evidence a probability of prevailing on the claim."[11] To meet their respective burdens, the parties may rely on pleadings, briefing, and factual affidavits.[12] If the responding party meets its burden, such that the Anti-SLAPP motion must be denied, that fact may not later be admitted into evidence, and does not in any way change the burden of proof on the plaintiff's underlying claims.[13]

RCW 4.24.525 provides that a successful moving party in Anti-SLAPP litigation is entitled to costs, reasonable attorney fees, a statutory penalty,[14] and any additional relief or sanctions "as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated."[15] If, on the other hand, the trial court determines the special motion to strike "is frivolous or is solely intended to cause unnecessary delay,"[16] the successful responding party is entitled to costs, fees, a statutory penalty, and any necessary additional relief.[17]

The Court of Appeals recently held that a government entity is a "person" as defined in RCW 4.24.525(1)(e).[18] The Court of Appeals was careful to note that this is true

---

[7] RCW 4.24.525(5)(c).
[8] RCW 4 24.525(5)(d)
[9] RCW 4 24.525(5)(b).
[10] RCW 4 24 525(4)(b).
[11] *Id*
[12] RCW 4.24 525(4)(c)
[13] RCW 4.24.525(4)(d).
[14] RCW 4.24.525(6)(a)(i)–(ii).
[15] RCW 4 24 525(6)(a)(iii).
[16] RCW 4 24 525(6)(b)
[17] RCW 4 24 525(6)(b)(i)–(iii)
[18] *Henne v City of Yakima*, 2013 WL 5946528, __ Wn App ___, ¶ 14(Div 3 Nov 7, 2013)

Pierce County Superior Court
930 Tacoma Avenue South, Room 334
Tacoma, Washington 98402

under RCW 4.24.525 and not 4.24.510 based on the broader scope of 4.24.525.[19] While in *Henne* it was a city given protection under the statute, the court relied on *Bradbury v. Superior Court*[20] when making a determination that Washington's Anti-SLAPP statutes applied to government speakers. Since the statutes apply to government speakers, Pierce County via its prosecuting attorneys would be afforded protection if it meets its burden.

II Preliminary Anti-SLAPP issues

Prior to analyzing the merits of Pierce County's Special Motion to Strike under RCW 4.24.525, the Court will address certain threshold issues.

A 4 24 525 as applied to Prosecutors

Ames believes RCW 4.24.525(3) prevents Anti-SLAPP protection of prosecutors. RCW 4.24.525(3) provides: "This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection." Ames interprets this to mean that protection does not apply to the prosecutors here because they are taking action in disseminating material under *Brady v. Maryland*[21], claiming that to be a law aimed at public protection.

There is only one case interpreting RCW 4.24.525(3). *Jones v. City of Yakima Police Department*[22] held that a police officer preparing a routine police report is akin to a public prosecutor enforcing laws of public protection.[23]

While it is true that the *Dalsing* declarations were created in the prosecutor's official capacity as part of his work, similar to a police officer creating a report, the declarations were filed to oppose a civil motion for attorney's fees made by Ames. The "Coopersmith Report" also does not fall into this category. It was not created by a prosecutor. The report was made by an outside civil attorney at the request of Pierce County based on complaints made by Ames.

---

[19] *Id*
[20] 49 Cal.App 4th 1108, 1117, 57 Cal.Rptr.2d 207 (1996)
[21] 373 U.S. 83 (1983).
[22] 2012 WL 1899228 (E D Wash.) (2012)
[23] *Id* at 3

This case is distinguishable from *Jones* because the officers in that situation were enforcing criminal laws to protect the public. Here none of the documents were created to enforce a criminal law and the dissemination of the documents is to protect a criminal defendant's constitutional rights, not the public. RCW 4.24.525(3) does not apply to this situation.

B. *Special Motion to Strike does not interfere with Ames's First Amendment Rights*

Ames alleges this special motion to strike unconstitutionally interferes with his ability to seek redress and a name clearing hearing through petition to the court for relief. This would only apply to his action for declaratory relief, not his action for writ of prohibition. Ames supports his claim under the *Noerr-Pennington Doctrine*. This doctrine protects people petitioning the government for redress of grievances from liability for statutory violations.[24] The protection applies as long as the lawsuit is not a "sham."[25] A "sham" is defined as an action that is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[26]

RCW 4.24.525 has provided for this situation. The responding party has the burden to "to establish by clear and convincing evidence a probability of prevailing on the claim."[27] If a responding party can prove this, it provides protection under *Noerr-Pennington* as it would not be considered a "sham" lawsuit.

C. *Henne is not erroneous*

Ames alleges that *Henne* is an erroneous decision. That is for the Supreme Court to decide, not a trial court. Ames mentions that *Segaline v State Dept of Labor and Industries*[28] specifically holds that a governmental entity is not a person because governmental agencies do not have free speech rights to protect.[29] The court in *Segaline*

---

[24] *White v. Lee*, 227 F 3d 1214, 1231 (9th Cir 2000)
[25] *Id.*
[26] *Id.*
[27] RCW 4.24.525(4)(b)
[28] 169 Wn 2d 467, 238 P 3d 1107 (2010)
[29] *Id* at 473.

was interpreting RCW 4.24.510, as distinguished from the *Henne* court which was interpreting RCW 4.24.525, the statute applicable to this situation.

D. Constitutionality of RCW 4.24.525[30]

"The party challenging a statute's constitutionality 'must prove that the statute is unconstitutional beyond a reasonable doubt.'"[31] Ames argues RCW 4.24.525 violates const. art. II, §37 of the Washington State Constitution.

> Determining whether the constitution prohibits a particular legislative action requires the court to first examine the plain language of the constitutional provision at issue. The court gives the words their common and ordinary meaning, as determined at the time they were drafted. The court may look to the constitutional history for context if there is ambiguity.[32]

Const. art. II, §37 reads, in its entirety: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." Ames argues that RCW 4.24.525 amends RCWs 4.24.510 without specifically referencing it, in violation of const. art. II, §37. Ames is incorrect.

RCW 4.24.525 does not revise RCW 4.24.510—that statute remains in effect, but applies only to good-faith reports to government agencies. RCW 4.24.525 creates an additional cause of action for public participation not involving reports to government agencies.[33]

Ames has not met his burden of showing beyond a reasonable doubt that RCW 4.24.525 is facially unconstitutional under const. art. II, §37 of the Washington State Constitution.

III Analysis of the merits under RCW 4.24 525

A. Pierce County's initial burden

---

[30] Plaintiff makes arguments regarding the constitutionality of the statute as applied to this situation Based on the court's decision here, the court has determined not to address this issue.

[31] *League of Educ Voters v State*, 176 Wn 2d 808, 820, 295 P 3d 743 (2013) (quoting *Sch Dists.' Alliance for Adequate Funding of Special Educ v State*, 170 Wn 2d 599, 605, 244 P.3d 1 (2010)).

[32] *Id* at 821 (internal citations and quotations omitted).

[33] *See A View from the Trenches, supra* n.2, at 509 ("Washington State now has both a narrow *and* a broad statute. One law protects communications made directly to government officials, which is useful but limited in its ability to protect speech. The second law protects statements on matters of public concern . ") (underlining added, italics in original).

As noted above, Pierce County, as the moving party, "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition."[34] To determine whether Pierce County has met this burden with respect to each of Ames's claims, two questions must be answered: (1) what is "an action involving public participation and petition"? and (2) what does it mean for a claim to "based" on it?

1 Action involving public participation and petition

This phrase is defined in the statute,[35] and includes oral or written statements, documents submitted, or "other lawful conduct in furtherance of the exercise of the constitutional right of free speech" where such statements, documents, or conduct are done:

> (1) "in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law";
>
> (2) "in connection with an issue under consideration or review" by such a proceeding;
>
> (3) in a manner "reasonably likely to encourage or enlist public participation in an effort to effect consideration or review of an issue" in such a proceeding;
>
> (4) "in a place open to the public or a public forum in connection with an issue of public concern"; or
>
> (5) "in connection with an issue or public concern, or in furtherance of the exercise of the constitutional right of petition."

The *Dalsing* declarations were submitted as part of a judicial proceeding, specifically Ames's Motion for Attorney's fees, fitting the definition under RCW 4.24.525(2)(a). The "Coopersmith Report" is something which is a matter of public concern, namely the conduct of the prosecutor's office in handling a potential criminal case.

The only potential free speech and public participation issues here are with regard to Pierce County's creation of the declarations in the *Dalsing* matter and in the creation of the "Coopersmith Report." Therefore, Pierce County can meet its initial burden if Ames's

---

[34] RCW 4.24.525(4)(b)
[35] RCW 4 24.525(2)(a)–(e).

claims are based on the submission of the *Dalsing* declarations and the creation of the "Coopersmith Report."

2. Bases for claims

The Anti-SLAPP statutes apply to "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief."[36] It is irrelevant how the claim is characterized because "[t]he focus is on whether the plaintiff's cause of action itself is based on an act in furtherance of the defendant's right of free speech."[37] The court in *Jones*[38] mentions that a court reviewing a special motion to strike under the Anti-SLAPP statutes should consider whether the moving party's conduct falls within the "heartland" of First Amendment activities the statute is designed to protect. The purpose of the First Amendment is "to protect the free formation of public opinion that is the sine qua non of democracy."[39]

A writ of prohibition to prohibit the prosecutor from disclosing the material as "PIE" infringes on its constitutional duty, but is not based on its right to free speech. A criminal defendant has a constitutional right to "PIE" material, therefore disclosure is required. While the prosecutor is making a discretionary decision on which material to disclose, he is not making any assertions other than this is something the defendant may be entitled to under *Brady*. A writ of prohibition here would not infringe on speech the Anti-SLAPP statutes are designed to protect.

A fact-finding hearing and declaration of truth would not prevent the prosecutor's office from making declarations in future cases nor would it prevent the creation of investigative reports.

Ames's claims are not based on free speech or public participation. Ames's causes of action are based on the dissemination of that information as "potential impeachment evidence". By labeling the evidence as "potential impeachment evidence", Pierce County is

---

[36] RCW 4.24 525(1)(a).
[37] *Aronson v Dog Eat Dog Films, Inc*, 738 F.Supp 2d, 1104, 1110 (2010); *see also* RCW 4 24.525(2) ("This section applies to any claim, however characterized, that is based on an action involving public participation and petition.");
[38] 2012 WL 1899228, at ¶ 3
[39] *A View from the Trenches*, *supra* n 2, at 499

not making an assertion or speech as to the truthfulness or credibility of Ames; it is only satisfying the prosecution's constitutional duty to provide PIE to criminal defendants.

The goals of the First Amendment are not infringed here. The information would still need to be disseminated based on *Brady*, thus leaving interpretation of the documents open to public opinion. Pierce County has not met its initial burden to show that Ames's claims are based on actions which infringe on a defendant's free speech rights.

IV Attorney fees, costs, and statutory penalties

RCW 4.24.525(6) contains explicit guidance regarding attorney fees, costs, and statutory penalties related to Anti-SLAPP motions. Both parties requests fees, costs, and penalties.

A Pierce County's fees, costs, and penalty

"[A] moving party who prevails, in part or in whole, on a special motion to strike" is entitled to:

> (i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;
>
> (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and
>
> (iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.[40]

Pierce County has not prevailed under the Anti-Slapp statutes, and therefore any motion for sanctions under Anti-Slapp is denied.

B Ames's fees, costs, and penalty

If a special motion to strike "is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole,"

> (i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;
>
> (ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

[40] RCW 4 24 525(6)(a)

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.[41]

A motion is frivolous if it "is one that cannot be supported by any rational argument on the law or facts."[42] Pierce County's Special Motion to Strike as to Ames's claims for writ of prohibition and declaratory relief, though unsuccessful, is not frivolous. It was not until further clarification of Ames's claims at oral argument and a determination that the material would still be disclosed in future criminal cases involving Ames regardless of the outcome herein that Pierce County could have realized that its free speech rights would not be infringed by this action. Pierce County made a rational argument based on a reasonable interpretation of the law. Therefore Ames is not entitled to recover the statutory penalty of $10,000.

CONCLUSIONS AND ORDERS

Based on the foregoing, it is hereby,

ORDERED that Pierce County's Special Motion to Strike brought pursuant to Washington's Anti-Slapp statutes is **DENIED;**

It is further, **ORDERED** that neither party is entitled to the $10,000 Anti-Slapp statutory penalty because while Pierce County's motion was not successful, it was not frivolous;

It is further, **ORDERED** the case be set for further hearing on Pierce County's CR 12(b) Motion to Dismiss Petition.

Dated this 20th day of December, 2013.

Visiting Judge Kevin D. Hull
Pierce County Superior Court

[41] RCW 4 24.525(6)(b)
[42] *Goldmark v McKenna*, 172 Wn 2d 568, 582, 259 P 3d 1095 (2011).

CERTIFICATE OF SERVICE

I, Chris Jeter, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Joan Mell III Branches Law PLLC 1033 Regents Blvd Ste 101 Fircrest, WA 98466-6089 joan@3brancheslaw.com; jonathan@3brancheslaw.com	☒ Via U.S. Mail ☒ Via Email
Michael Patterson Patterson Buchanan Fobes Leitch PS 2112 3rd Ave Ste 500 Seattle, WA 98121-2391 map@pattersonbuchanan.com; jah@pattersonbuchanan.com cpl@pattersonbuchanan.com;	☒ Via U.S. Mail ☒ Via Email
Cristina Platt cplatt1@co.pierce.wa.us	☒ Via Email

In addition, I caused the original of the foregoing document to be sent for filing in the manner noted on the following:

Cristina Platt, Judicial Calendar Coordinator Pierce County Superior Court 930 Tacoma Avenue South, Room 334 Tacoma, Washington 98402	☒ Via U.S. Mail

DATED this 20th day of December, 2013, at Port Orchard, Washington.

Chris Jeter
Judicial Law Clerk

APPENDIX C

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

MICHAEL AMES,

Plaintiff,

v.

PIERCE COUNTY

Defendant.

No. 13-2-13551-1

OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant Pierce County's Motion to Dismiss pursuant to CR 12(b)(1) and CR 12(b)(6). Plaintiff Michael Ames responded in opposition to Pierce County's motion. On January 17, 2014, Ames and Pierce County both appeared through counsel for oral argument.

FACTUAL HISTORY

Plaintiff Michael Ames is a detective with the Pierce County Sheriff's Office. He is often called as a witness for the prosecution in criminal matters. The Pierce County Prosecutor's Office has a written procedure for providing potential impeachment evidence ("PIE") to defense counsel in criminal cases. The prosecutor's office provided notice to Ames that it was going to provide defense attorneys PIE regarding Ames in cases in which Ames was scheduled to testify. Ames objects to this evidence being disclosed as PIE. He

Pierce County Superior Court
930 Tacoma Avenue South, Room 334
Tacoma, Washington 98402

has filed a petition for a writ of prohibition and declaratory relief. Specifically, Ames' primary objections are to evidence stemming from the following:

Dalsing declarations

Ames was an investigator in a criminal matter against Lynn Dalsing. Dalsing was arrested and charged with child molestation in the first degree and sexual exploitation of a minor. After the criminal charges were dismissed on the eve of trial, Dalsing sued Pierce County alleging the Prosecutor's Office delayed disclosing an exculpatory photograph to defense counsel and continued the prosecution despite knowledge of this exculpatory evidence. Ames states he had in his possession emails exculpating Dalsing, indicating there was no probable cause that she was involved or had possessed any child pornography. Civil deputy prosecuting attorney Jim Richmond, Ames' counsel at the time, instructed Ames to not answer certain questions at a deposition and claimed the emails were attorney work product. Ames later asserted there was a conflict of interest and retained independent counsel in the matter.

Ames alleges he provided the emails to the prosecutor in the criminal matter prior to the trial. Ames alleges he was told in an email from the criminal prosecutor on June 9, 2011 that she would disclose the emails to defense counsel.

Likewise, Ames states he provided the emails to civil deputy prosecutor Richmond on October 18, 2012 during the discovery process for the civil matter. Ames alleges Richmond told him that the emails would be disclosed. When the emails were not disclosed, Ames provided copies to the judge. Ames made a motion for attorney's fees and in his supporting declaration alleged that he provided the emails to Richmond and was told the emails would be disclosed. Richmond disputes this in his own declaration, claiming he never received the emails and never told Ames the emails would be disclosed. Attorney's fees were awarded to Ames. The Prosecutor's Office was found to be "not justified" in its instructions to Ames. Pierce County has appealed the award of attorney's fees.

Ames alleges the declarations countering his statements were made in retaliation for bringing forward the exculpatory emails. He claims these were created intentionally so that

there would be PIE to discredit him as a State witness and undermine his employment and ability to do his job.

Coopersmith report

The other piece of evidence Ames takes exception to being labeled PIE is known as "The Coopersmith Report." According to Ames, in July 2012 he took a mandatory child abuse report regarding a bullying and child neglect case in Gig Harbor. In October 2012, Ames was told there was a potential misconduct investigation against him regarding his conduct in that case. A lieutenant advised him there would be no investigation because the lieutenant found no problem with Ames' actions in that case, which according to Ames, were limited to creating the report.

In November 2012, Pierce County Prosecutor Mark Lindquist issued a press release indicating that the case would not be prosecuted because of a detective's improper relationship with the attorney representing the victim's family. Ames took this as an implication that the detective was in an attorney-client relationship in another civil case and that somehow it was improper for him to take the report. Ames believes the press release was referring to him and denies being in an attorney-client relationship with any attorney at the time he took the report.

In December 2012, Ames says he discovered a misconduct investigation did take place against him, despite the assurances by the lieutenant. Ames believes he should have been afforded due process and made aware of the investigation. Ames then requested an outside investigation be conducted into the handling of that case.

On March 27, 2013, Ames was informed that Jeff Coopersmith, an outside investigator, would be conducting the investigation of Ames' complaints. On May 24, 2013, Ames was informed that the investigation into his complaint had been completed and it had been determined that there was no merit to his allegations that he had been a victim of retaliation. Coopersmith's investigation also concluded that the misconduct investigation against Ames concerning the bullying and child neglect incident had been conducted properly.

Ames seeks a writ of prohibition to prevent the Prosecutor's Office's dissemination

of the above-referenced material as PIE to criminal defense counsel. He claims the Prosecutor's Office overstepped its jurisdiction by creating PIE and invaded the domain of the sheriff's office to conduct investigations when an officer's integrity was questioned. He is also seeking declaratory relief and a fact-finding hearing so he can cross-examine Richmond and obtain relief declaring Ames as truthful and that the information is not PIE.

STANDARD

Dismissal under CR 12(b)(6) is only appropriate when accepting plaintiff's factual allegations in the complaint as true, it appears that beyond doubt there is no set of facts or hypothetical facts which justify plaintiff's recovery.[1] This should be granted sparingly and only when on the face of the complaint, plaintiff's allegations show an insuperable bar to relief.[2]

ANALYSIS

I. Writ of Prohibition

According to the complaint, Ames seeks a writ of prohibition ordering the Pierce County Prosecutor's Office cease and desist with any further communications that the evidence is impeachment evidence or potential impeachment evidence and with any communications that label him as untruthful. He alleges the prosecutor's office has acted in excess of its jurisdiction by creating and fabricating its own impeachment evidence to discredit Ames.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."[3] "Prohibition is a drastic remedy and may only be issued where (1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does

---

[1] *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn.App. 630, 635, 128 P.3d 627 (2006), *rev. denied*, 158 Wn.2d 1029 (2007).
[2] *Id.*
[3] RCW 7.16.290

not have a plain, speedy, and adequate legal remedy."[4] "If either of these factors is absent, the court cannot issue a writ of prohibition."[5] It is not a proper remedy where the only allegation is that the actor is exercising jurisdiction in an erroneous manner.[6]

Ames believes that the lack of statutory authority to disclose PIE means the prosecutor has acted without jurisdiction. He does concede that the prosecutor has a mandatory duty to disclose impeachment evidence under *Brady v. Maryland.*[7] He believes that defendant has stepped beyond this duty by creating and then deciding which evidence to disclose.

Kyles v. Whitley provides that the prosecutor is the only person who knows of undisclosed evidence and therefore is charged with the responsibility to gauge which evidence should be disclosed.[8] The prosecutor is to decide this in favor of disclosure when he is unsure.[9] This means that it is in a prosecutor's sole discretion as to which evidence he discloses as potential impeachment evidence under his mandatory duty. Ames is alleging that by including the "Dalsing Declarations" and the "Coopersmith Report" as PIE, defendant is acting in excess of jurisdiction. This is not correct. At best, plaintiff's contention is that defendant has erroneously exercised jurisdiction by disclosing this evidence as PIE.

Even accepting Ames' idea that a prosecutor would jeopardize his own career and future criminal cases by creating false declarations undermining his own witness, a prosecutor still has jurisdiction to create declarations in civil matters to defend against the allegations made by Ames in his motion for attorney's fees. The hearing was an adversarial proceeding and at that moment, the prosecutor's office was an adversary of Ames. Therefore the prosecuting attorney could act within its duties as an advocate for the State by creating an opposing declaration. Whether the statements in those declarations are true

---

[4] *Brower v. Charles*, 82 Wn.App. 53, 57, 914 P.2d 1202 (1996), *rev. denied*, 130 Wn.2d 1028 (1997).
[5] *Id* at 57-58.
[6] *Id* at 59.
[7] 373 U.S. 83 (1983).
[8] 514 U.S. 419, 437 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.")
[9] *Id* at 439 *quoting* U.S. v. Agurs, 427 U.S. 97, 108 (1976).

or not is not within this court's jurisdiction, but rather the court which heard the motion for attorney's fees.

Ames' other contention is that defendant has invaded the jurisdiction of the Sheriff's office by making a ruling on the credibility of Detective Ames without an internal investigation. As noted above, the prosecutor has the discretion to decide what he should disclose to the defense as potential impeachment evidence. This evidence does not determine the credibility of the witness and makes no assertion as to truthfulness of the witness. The disclosure is precautionary as evidence which possibly could impact the credibility of the witness. The ultimate determination on credibility is properly made by the fact-finder at trial.

Ames has requested relief that defendant cease and desist from characterizing and suggesting that Ames is untruthful. Even when accepting plaintiff's facts as true, defendant does not make any assertions that Ames is untruthful when disclosing PIE, only that a defense attorney may consider the "Dalsing Declarations" and "Coopersmith Report" as potential impeachment evidence. Defendant acted within its jurisdiction, both when creating the "Dalsing Declarations" and providing the declarations and "Coopersmith Report" to defense counsel as potential impeachment evidence. Since defendant is acting within its jurisdiction, plaintiff is not entitled to a writ of prohibition and thus this cause of action must be dismissed.

II. Declaratory Relief

Ames seeks declaratory relief in the form of an order stating that he was truthful in his declarations, that the evidence disclosed by the prosecutor is not PIE, and a determination of his rights under the Pierce County Policy on PIE.

Ames argues that he should be afforded a name-clearing hearing as due process. Ames does not provide case law, legal authority or method for how to determine whether he is being truthful in his declarations. He has provided a number of cases from other jurisdictions which recognize the potential use of a declaratory action for the purpose of name clearing, but offer little guidance on how to implement such a procedure. He also

provides commentary from the Restatement of Torts and a law review article discussing the theory.

A declaratory judgment is only available when there is a justiciable controversy or an issue of major public importance.[10] A justiciable controversy is "(1) an actual, present, and existing dispute; (2) between parties having genuine and opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive."[11]

While there is a dispute regarding the disclosure of the evidence, it is questionable as to whether the parties have genuine opposing interests. This is potential impeachment evidence of a prosecution witness. It is in the State's interest that the witness be credible. The prosecutor's office is disclosing the evidence because of its duty under *Brady*.

As to the third element, the interests here are theoretical. Ames does not provide case law or legal authority in which someone has been definitively determined to be truthful in a declaration. The only assertion made when disclosing potential impeachment evidence is that a criminal defendant could view it as something which questions the credibility of Ames. It is therefore difficult to clarify Ames's rights because even if he is declared truthful, the evidence would still need to be turned over if the prosecutor believes it should be disclosed.

Finally, any judicial determination would not be conclusive. The rights of criminal defendants are central to the matter. The admissibility of such evidence is decided by the trial judge and it is up to the defense on whether to use or seek admission of the PIE in each case. The prosecutor has a duty to turn over evidence that in his discretion could be considered PIE. Making a judgment here would invade the rights of other judges, the prosecutor, and criminal defendants to use their own judgment in determining the admissibility and credibility of Ames in each case.

---

[10] *Bercier v. Kiga*, 127 Wn.App. 809, 822, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005).
[11] *Id.*

Ames alleges that the conduct of the prosecutor is of major public concern. The major concern does not have to do with Ames however. The public concern regarding PIE is a fair trial for criminal defendants, not the person whose credibility is being questioned.

Even when accepting Ames' facts as true, there is no justiciable controversy and no major public concern with regard to the disclosure of potential impeachment evidence and creation of declarations in a civil matter. Additionally, declaratory relief here would do nothing to help Ames as the evidence would still need to be disclosed to defense counsel and a determination made on its admissibility by the individual trial court. This cause of action should be dismissed as well.[12]

CONCLUSION AND ORDERS

Even when accepting the facts in Ames's complaint as true, he has not proven any that justify the relief requested. As such, the complaint should be dismissed.

Based on the foregoing, it is hereby,

ORDERED that defendant's motion to dismiss pursuant to CR 12(b)(6) is **GRANTED** and the case is dismissed with prejudice.

Dated this 3rd day of February 2014.

Visiting Judge Kevin D. Hull
Pierce County Superior Court

FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB 06 2014 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

[12] Because both causes of action can be dismissed under 12(b)(6), there is no need to consider defendant's motion pursuant to 12(b)(1).

2/7/2014 161031 2

CERTIFICATE OF SERVICE

I, Chris Jeter, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Joan Mell III Branches Law PLLC 1033 Regents Blvd Ste 101 Fircrest, WA 98466-6089	☒ Via U.S. Mail
Michael Patterson Patterson Buchanan Fobes Leitch PS 2112 3rd Ave Ste 500 Seattle, WA 98121-2391	☒ Via U.S. Mail

In addition, I caused the original of the foregoing document to be sent for filing in the manner noted on the following:

Cristina Platt, Judicial Calendar Coordinator Pierce County Superior Court 930 Tacoma Avenue South, Room 334 Tacoma, Washington 98402	☒ Via U.S. Mail

DATED this 20 day of February 2014, at Port Orchard, Washington.

Chris Jeter
Judicial Law Clerk

APPENDIX D

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

MICHAEL AMES,

Plaintiff,

v.

PIERCE COUNTY

Defendant.

No. 13-2-13551-1

OPINION AND ORDER ON ATTORNEY'S FEES AND EXPENSES

THIS MATTER comes before the Court on Defendant Pierce County's Motion for Attorney's Fees and Expenses. Plaintiff Michael Ames responded in opposition to Pierce County's motion. On March 19, 2014, Ames and Pierce County both appeared through counsel for oral argument.

FACTUAL HISTORY

Plaintiff Michael Ames is a detective with the Pierce County Sheriff's Office. He is often called as a witness for the prosecution in criminal matters. The Pierce County Prosecutor's Office has a written procedure for providing potential impeachment evidence ("PIE") to defense counsel in criminal cases. The prosecutor's office provided notice to Ames that it was going to provide defense attorneys PIE regarding Ames in cases in which Ames was scheduled to testify. Ames objected to this evidence being disclosed as PIE. He

filed a petition for a writ of prohibition and declaratory relief on October 2, 2013. Specifically, Ames' primary objections are to evidence stemming from the following:

Dalsing declarations

Ames was an investigator in a criminal matter against Lynn Dalsing. Dalsing was arrested and charged with child molestation in the first degree and sexual exploitation of a minor. After the criminal charges were dismissed on the eve of trial, Dalsing sued Pierce County alleging the Prosecutor's Office delayed disclosing an exculpatory photograph to defense counsel and continued the prosecution despite knowledge of this exculpatory evidence. Ames states he had in his possession emails exculpating Dalsing, indicating there was no probable cause that she was involved or had possessed any child pornography. Civil deputy prosecuting attorney Jim Richmond, Ames' counsel at the time, instructed Ames to not answer certain questions at a deposition and claimed the emails were attorney work product. Ames later asserted there was a conflict of interest and retained independent counsel in the matter.

Ames alleges he provided the emails to the prosecutor in the criminal matter prior to the trial. Ames alleges he was told in an email from the criminal prosecutor on June 9, 2011 that she would disclose the emails to defense counsel.

Likewise, Ames states he provided the emails to civil deputy prosecutor Richmond on October 18, 2012 during the discovery process for the civil matter. Ames alleges Richmond told him that the emails would be disclosed. When the emails were not disclosed, Ames provided copies to the judge. Ames made a motion for attorney's fees and in his supporting declaration alleged that he provided the emails to Richmond and was told the emails would be disclosed. Richmond disputes this in his own declaration, claiming he never received the emails and never told Ames the emails would be disclosed. Attorney's fees were awarded to Ames. The Prosecutor's Office was found to be "not justified" in its instructions to Ames. Pierce County has appealed the award of attorney's fees.

Ames alleges the declarations countering his statements were made in retaliation for bringing forward the exculpatory emails. He claims these were created intentionally so that

there would be PIE to discredit him as a State witness and undermine his employment and ability to do his job.

Coopersmith report

The other piece of evidence Ames takes exception to being labeled PIE is known as "The Coopersmith Report." According to Ames, in July 2012 he took a mandatory child abuse report regarding a bullying and child neglect case in Gig Harbor. In October 2012, Ames was told there was a potential misconduct investigation against him regarding his conduct in that case. A lieutenant advised him there would be no investigation because the lieutenant found no problem with Ames' actions in that case, which according to Ames, were limited to creating the report.

In November 2012, Pierce County Prosecutor Mark Lindquist issued a press release indicating that the case would not be prosecuted because of a detective's improper relationship with the attorney representing the victim's family. Ames took this as an implication that the detective was in an attorney-client relationship in another civil case and that somehow it was improper for him to take the report. Ames believes the press release was referring to him and denies being in an attorney-client relationship with any attorney at the time he took the report.

In December 2012, Ames says he discovered a misconduct investigation did take place against him, despite the assurances by the lieutenant. Ames believes he should have been afforded due process and made aware of the investigation. Ames then requested an outside investigation be conducted into the handling of that case.

On March 27, 2013, Ames was informed that Jeff Coopersmith, an outside investigator, would be conducting the investigation of Ames' complaints. On May 24, 2013, Ames was informed that the investigation into his complaint had been completed and it had been determined that there was no merit to his allegations that he had been a victim of retaliation. Coopersmith's investigation also concluded that the misconduct investigation against Ames concerning the bullying and child neglect incident had been conducted properly.

Ames alleged two causes of action as part of his petition. He requested a writ of

prohibition to prevent the Prosecutor's Office's dissemination of the above-referenced material as PIE to criminal defense counsel. He also sought declaratory relief and a fact-finding hearing so he could cross-examine Richmond and obtain relief declaring Ames as truthful and that the information is not PIE. The action was dismissed by this Court on February 6, 2014.

STANDARD

CR 11 allows sanctions when there is a "baseless" filing or filing for an improper purpose.[1] A filing is "baseless" if it is not well grounded in fact or not warranted by existing law or a good faith argument for altering existing law.[2] The Court has discretion to impose sanctions when the attorney who signed and filed the "baseless" motion failed to conduct a reasonable inquiry into the factual and legal basis of the claim.[3] The reasonableness of the inquiry is judged on an objective standard.[4] The trial court has broad discretion under CR 11 in determining the appropriate sanction and against whom the sanction is to be imposed.[5]

RCW 4.84.185 provides that a non-prevailing party in a civil action pay for the attorney's fees and other costs of the prevailing party when the action is frivolous and advanced without reasonable cause. An action is frivolous when, considered in its entirety; there is no rational basis in law or fact for the action.[6]

ANALYSIS

I. Writ of Prohibition

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal,

---

[1] *Stiles v. Kearney*, 168 Wn.App. 250, 261, 277 P.3d 9 (2012), *rev. denied* 175 Wn.2d 1016, 287 P.3d 11(2012).
[2] *Id.*
[3] *Id.*
[4] *Id* at 261-62.
[5] *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.2d 530 (1988) *rev. denied*, 11 Wn.2d 1007 (1988).
[6] *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 218, 304 P.3d 914 (2013), *rev denied* 178 Wn.2d 1022, 312 P.3d 651 (2013).

corporation, board or person."[7] "Prohibition is a drastic remedy and may only be issued where (1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does not have a plain, speedy, and adequate legal remedy."[8] "If either of these factors is absent, the court cannot issue a writ of prohibition."[9] It is not a proper remedy where the only allegation is that the actor is exercising jurisdiction in an erroneous manner.[10]

To obtain a writ of prohibition, a state actor must be acting outside of his or her jurisdiction. Ames conceded that the prosecutor has a mandatory duty to disclose impeachment evidence under *Brady v. Maryland*.[11] *Kyles v. Whitley* provides that the prosecutor is the only person who knows of undisclosed evidence and therefore is charged with the responsibility to gauge which evidence should be disclosed.[12] The prosecutor is to decide this in favor of disclosure when he is unsure.[13] This means that it is in a prosecutor's sole discretion as to which evidence he discloses as potential impeachment evidence under his mandatory duty. A reasonable inquiry into the law would have discovered that a writ of prohibition is not a proper remedy when a person is acting within his or her jurisdiction and the only allegation is that he is exercising that discretion erroneously.

Additionally, the only relief offered by a writ of prohibition is an arrest of proceedings. Ames and his counsel failed to identify which proceedings they wanted to prohibit. To the extent that he wished to arrest the prosecutor from disclosing evidence, this would not be a proper remedy based on the mandatory duty under *Brady* discussed above. If Ames wished to have any proceedings in which he was scheduled to testify arrested until a determination could be made regarding the evidence, this would also not be a proper remedy. Under both Washington law[14] and the United States constitution[15], a criminal

---

[7] RCW 7.16.290
[8] *Brower v. Charles*, 82 Wn.App. 53, 57, 914 P.2d 1202 (1996), *rev. denied*, 130 Wn.2d 1028 (1997).
[9] *Id* at 57-58.
[10] *Id* at 59.
[11] 373 U.S. 83, 83 S.Ct. 1194 (1983).
[12] 514 U.S. 419, 437, 115 S.Ct. 1555 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.")
[13] *Id* at 439 *quoting* U.S. v. Agurs, 427 U.S. 97, 108 (1976).
[14] CrR 3.3; Wash. Const. art. I §22.
[15] U.S. Const. amend. VI

defendant has a right to speedy trial. If the Court were to grant Ames a writ of prohibition arresting the criminal proceedings at which he was scheduled to testify, it could potentially violate the criminal defendant's speedy trial rights.

A reasonable inquiry into the law and the available relief pursuant to a writ of prohibition would have discovered that the relief requested in this situation is not warranted by law. If the relief requested were to be granted, it would violate a criminal defendant's right to potential impeachment evidence as well as his or her right to speedy trial. Without this reasonable inquiry in this case, a baseless and frivolous action was filed in violation of CR 11 and justifies an award of attorney's fees pursuant to RCW 4.84.185.

II. Declaratory Relief

A declaratory judgment is only available when there is a justiciable controversy or an issue of major public importance.[16] A justiciable controversy is "(1) an actual, present, and existing dispute; (2) between parties having genuine and opposing interests; (3) that involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic; and (4) a judicial determination will be final and conclusive."[17]

It is in Pierce County's interest that its witnesses are considered credible. This is evident from Ames' Declaration Opposing Defendant's Special Motion to Strike. He indicates that in subsequent cases, the prosecutor's office has moved to not admit the evidence because it is irrelevant[18] and has defended against a motion for new trial by asserting that the evidence is not helpful for impeachment because two competing declarations do not assert that one party or the other is telling the truth, it just presents competing recollections of events.[19] This evidence indicates that the parties do not have genuine opposing interests, which is a requirement of a declaratory relief action. This alone is enough to indicate that there is no justiciable controversy.

If there had been a reasonable inquiry, Ames and his counsel would have discovered that a "name-clearing" hearing in this situation would not be conclusive. As

---

[16] *Bercier v. Kiga*, 127 Wn.App. 809, 822, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015 (2005).
[17] *Id.*
[18] Decl. of Det. Mike Ames Opposing Def's Special Mot. to Strike 11:19-31.
[19] *Id* at 12:26-31; 13:3-7

previously stated, he rights of criminal defendants are central to the matte of PIE. The admissibility of such evidence is decided by the trial judge and it is up to the defense on whether to use or seek admission of the PIE in each case. The prosecutor has a duty to turn over evidence that in his discretion could be considered PIE. Making a judgment here would invade the rights of other judges, the prosecutor, and criminal defendants to use their own judgment in determining the admissibility of evidence and credibility of Ames in each case.

Furthermore, the resolution of who was truthful in the declarations is best left with the court that is hearing the matter. In this situation, the court hearing the motion for attorney's fees made its judgment on credibility of the declarations when it decided in his favor. Another hearing on a matter that has essentially been decided would be useless as the evidence still creates a competing recollection which a criminal defendant could potentially view as impeachment evidence. Regardless of a declaration that Ames is truthful or considering the ruling in his favor in the *Dalsing* matter, the evidence still needs to be disclosed to the defense and the issue will continue to arise in cases Ames is scheduled to testify.

Ames alleges that even if there is no justiciable controversy, the action is not baseless because the issue of officers being subjected to the "Brady" officer label is a major public concern. In making a determination on whether there is an issue of major public importance, the Court looks to the public interest represented and whether the public interest would be enhanced by a court review.[20] Here, Ames was not asking the court to make a declaration regarding due process rights of police officers in the disclosure of "Brady" evidence; he is asking for a declaration that he was personally truthful. Regardless, the public concern regarding PIE is a fair trial for criminal defendants.

A reasonable inquiry into the facts and applicable law would have discovered that declaratory relief was not proper in this situation. Based on the facts available to Ames, there was no justiciable controversy. The procedure and law behind the application of a prosecutor's duty under *Brady* is clear. The prosecution's interest is for Ames to be

[20] *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994).

credible, which is the same interest he is trying to protect. A reasonable inquiry would have also discovered that any declaration would not be a final and conclusive determination of his credibility. Finally, a reasonable inquiry would have discovered that the public concern here is with regards to a criminal defendant's right to evidence he or she could potentially use for impeachment. A name-clearing hearing would not resolve any issues related to PIE. This is a baseless cause of action which is in violation of CR 11 and justifies attorney's fees pursuant to RCW 4.84.185.

CONCLUSION AND ORDERS

A reasonable inquiry into the law in this case would have discovered that the causes of action here cannot be supported.

Based on the foregoing, it is hereby,

ORDERED that defendant's motion for attorney's fees and expenses is **GRANTED**.

It is further,

ORDERED that the case be set for hearing to determine the amount of the award for fees and expenses.

Dated this 7th day of April 2014.

Visiting Judge Kevin D. Hull
Pierce County Superior Court

Pierce County Superior Court
930 Tacoma Avenue South, Room 334
Tacoma, Washington 98402

CERTIFICATE OF SERVICE

I, Chris Jeter, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Joan Mell III Branches Law PLLC 1033 Regents Blvd Ste 101 Fircrest, WA 98466-6089	☒ Via U.S. Mail
Michael Patterson Patterson Buchanan Fobes Leitch PS 2112 3rd Ave Ste 500 Seattle, WA 98121-2391	☒ Via U.S. Mail

In addition, I caused the original of the foregoing document to be sent for filing in the manner noted on the following:

Cristina Platt, Judicial Calendar Coordinator Pierce County Superior Court 930 Tacoma Avenue South, Room 334 Tacoma, Washington 98402	☒ Via U.S. Mail

DATED this 17th day of April 2014, at Port Orchard, Washington.

Chris Jeter
Judicial Law Clerk

APPENDIX E

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

MICHAEL AMES,

Plaintiff,

v.

PIERCE COUNTY

Defendant.

No. 13-2-13551-1

OPINION AND ORDER ON RECONSIDERATION ON CR 11 SANCTIONS

THIS MATTER comes before the Court on plaintiff Michael Ames' Motion for Reconsideration of the Court's ruling on Attorney's Fees and Expenses filed April 7, 2014. On May 19, 2014, the parties appeared through counsel for oral argument and the Court requested supplemental briefing. Further hearing on the matter took place on July 10, 2014.

FACTUAL HISTORY

The facts regarding this case are well established and need not be repeated here. The relevant factual and procedural history as it pertains to this motion follows:

Detective Michael Ames filed a petition for a writ of prohibition and declaratory relief on October 2, 2013. After denying Pierce County's Motion to Strike as an Anti-SLAPP action in December 2013, the action was ultimately dismissed by this Court on

February 6, 2014. Pierce County's Motion for Attorney's Fees and Expenses pursuant to CR 11 followed. That motion was granted in a decision and order filed on April 7, 2014. The decision to impose sanctions was based on Detective Ames submitting the case as one which was well grounded in existing Washington law. The Court disagreed.

Detective Ames filed a Motion for Reconsideration of the attorney's fees decision on April 17, 2014, citing CR 59(a)(1), (7), (8), and (9). The Court issued a briefing order and heard oral argument on May 19, 2014. Following oral argument, the Court requested supplemental briefing on the issue of argument identification as it relates to CR 11. Further oral argument was heard on July 10, 2014.

CR 59

CR 59 allows a party to make a motion within 10 days of judgment to ask the Court to reconsider or vacate its previous order upon one of nine reasons listed in the statute. Ames bases the motion on CR 59(a)(1), (7), (8), and (9), specifically that there is an irregularity amounting to abuse of discretion, there is no evidence or reasonable inference to justify the decision, there is an error of law, and substantial justice has not been done.

CONSIDERATION OF DECLARATIONS ON RECONSIDERATION

As an initial matter, Pierce County filed a motion to strike the declarations Ames submitted with the motion for reconsideration and supplemental briefing on reconsideration. Pierce County argued that the declarations were untimely and Ames had no excuse for not presenting these declarations during the initial CR 11 hearing.

The decision to consider new or additional evidence presented with a motion for reconsideration is within the trial court's discretion.[1] Nothing in CR 59 prohibits the submission of new or additional materials on reconsideration.[2] The Court used its discretion and denied the motions to strike and considered the declarations while also providing Pierce County the opportunity to present declarations of its own on

[1] *Martini v. Post*, 178 Wn.App. 153, 162, 313 P.3d 473 (2013).
[2] *Id.*

reconsideration. Pierce County declined to submit any declarations and made further motions to strike declarations submitted with the supplemental briefing on reconsideration. The Court again used its discretion and permitted the evidence.

CR 11

CR 11 allows sanctions when there is a "baseless" filing or filing for an improper purpose.[3] A filing is "baseless" if it is not well grounded in fact or not warranted by existing law or a good faith argument for altering existing law.[4] The Court has discretion to impose sanctions when the attorney who signed and filed the "baseless" motion failed to conduct a reasonable inquiry into the factual and legal basis of the claim.[5] The reasonableness of the inquiry is judged on an objective standard.[6] The purpose behind the rule is to deter baseless filings and curb abuses of the judicial system.[7] The rule is not intended to chill an attorney's enthusiasm or creativity in advocating for her client's position.[8] Both of these factors must be taken into consideration by the Court.[9] The trial court has broad discretion under CR 11 in determining the appropriate sanction and against whom the sanction is to be imposed.[10]

ANALYSIS

At the outset of the case, Ames warranted that his position was supported by existing law. The Court, relying on this position, entered sanctions against Ames and his counsel after finding there was no rational basis in existing law for the relief sought by Ames. In his motion for reconsideration, Ames concedes that there is no controlling precedent and that this was a case in which he wanted to extend the facts of this case to the two statutes, writ of prohibition and declaratory judgment. Ames now presents this as a

---

[3] *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992)
[4] *Id.*
[5] *Id* at 220.
[6] *Id.*.
[7] *Id* at 219.
[8] *Id.*
[9] *Id.*
[10] *Miller v. Badgley*, 51 Wn.App. 285, 303, 753 P.2d 530 (1988) *rev. denied*, 11 Wn.2d 1007 (1988).

case of first impression and one for which a good faith argument for extension of the law could be made to support his position.

The Court made it clear in the initial ruling on sanctions that there is no existing law to support Ames' position. The question on reconsideration is whether there is a good faith argument to extend a writ of prohibition and declaratory relief to this case. If so, sanctions are precluded.

Ames filed this complaint seeking a remedy where none currently exists. While Pierce County stated that he potentially had a remedy pursuant to a union contract or could have filed a defamation or retaliation suit, there are issues which prevented Ames from filing such actions. There had been no adverse employment action taken[11], so a retaliation suit would not have survived. A defamation action would have been difficult to maintain as well, as absolute privilege could be asserted to defeat the action because the statements were made during the course of a judicial proceeding.[12] Additionally, in a defamation action, one must prove damages.[13] Ames proposed remedy was only seeking a declaration of truth as he was not intending to recover any damages from defendant. Finally, no evidence was presented on whether the union contract offers a remedy for Ames. Without other legal recourse, Ames attempts to extend these two statutory remedies to his situation based on inquiries by his counsel with colleagues in the legal community.

Pierce County argues that despite this being a case of first impression, that fact alone does not automatically preclude sanctions. While true, the cases cited by the County are distinguishable. In *Trohimovich v. Director of Dept. of Labor and Indus.*[14] appellant argued that he could pay for his worker's compensation premiums with a converted dollar amount based on the London market price for gold rather than the U.S. currency in circulation.[15] The Court of Appeals imposed sanctions on appellant, as it was a frivolous

---

[11] *Hollenback v. Shriner's Hospital for Children*, 149 Wn.App. 810, 821, 206 P.3d 337 (2009) (To establish a claim under this statute, the Plaintiff first has the burden to establish a prima facie showing that: (1) plaintiff engaged in a statutorily protected activity (2) employer took some adverse employment action against her and (3) there is a causal connection between the opposition and the adverse action.)

[12] *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 475, 564 P.2d 1131 (1977).

[13] *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

[14] 21 Wn.App. 243, 584 P.2d 467 (1978) *rev. denied* 91 Wn.2d 1013 (1979).

[15] *Id* at 245.

appeal brought only to delay.[16] There was case law in other jurisdictions explicitly rejecting the arguments made by appellant.[17]

In *Shutt v. Moore,*[18] the second case cited by Pierce County, appellant filed actions against officials who attempted to collect taxes from him and also filed "common law" liens against the property of these officials.[19] The Court imposed sanctions for a frivolous appeal.[20] The Court indicated that appellant had several legal options, yet failed to take any of them, and instead abused the civil process by using it as a bludgeon to those acting within their official duties.[21]

Here, there is no case law explicitly rejecting Ames' arguments. A name clearing hearing has not been used before, but there is some existing support for its potential use. There are law review articles, case law from other jurisdictions, and comments in the Restatement (Second) of Torts which discuss a name clearing hearing as a potential remedy. The articles and cases do not necessarily place the potential remedy into the context of Ames' case, but the fact that there are discussions in law review articles and case law makes the argument for the extension of such a remedy to this situation plausible. Additionally, while the prosecutor was acting within his official duty, unlike the appellant in *Shutt,* Ames had little legal recourse here and chose to proceed on a novel theory. Finally, Ames' counsel's research into the situation indicates she made a reasonable inquiry into the potential use of such a remedy and made her argument that these facts in particular support the adoption of this remedy.

Upon reconsideration, the Court is satisfied that Ames and his counsel made a reasonable inquiry into potential causes of action to fit the facts in this situation. The facts of this case are particularly unique and while the remedies sought by Ames do not currently exist in Washington law, his counsel has made a good faith argument for extension of two existing statutes to this unique situation.

---

[16] *Id* at 249.
[17] *Id* at 247-49.
[18] 26 Wn.App. 450, 613, P.2d 1188 (1980).
[19] *Id* at 452.
[20] *Id* at 457.
[21] *Id* at 456.

Having found that there is a good faith argument for extension of the law to the facts of this case, the next issue is whether the shift in argument identification still warrants CR 11 sanctions. When interpreting CR 11, this Court may look to Federal Court interpretations for guidance, but is not bound by these interpretations.[22] A case out of the Ninth Circuit provides guidance on the issue of argument identification.

Golden Eagle Distributing Corp. v. Burroughs Corp.[23] involves an appeal from the Northern District of California which had imposed sanctions on an attorney for implying that its position was warranted by existing law when it should have stated that its position was a good faith argument for the extension of existing law.[24] The Court noted that this "argument identification" requirement the District Court used to impose sanctions created a conflict between a lawyer's duty to zealously advocate for her client and the lawyer's own interest in avoiding sanctions.[25] Therefore sanctions should not be imposed if "a plausible good faith argument can be made."[26]

In this case, while Ames probably should have positioned the case as a good faith attempt to extend the law at the outset, or at least some time before reconsideration, there is no such argument identification requirement imposed by State or Federal law. As long as there is a plausible argument for the extension of the law, sanctions are not warranted. The Court finds that while the statutes do not provide these remedies, there is at least a plausible argument that such remedies should extend to police officers to challenge a perceived wrong and harm to his reputation. Furthermore, this action is not an abuse of the judicial system, so imposing sanctions would only go against the stated policy of CR 11 to not chill the zealous advocacy of attorneys. The Court is willing to grant reconsideration and reverse its initial decision on CR 11 sanctions.

///

///

---

[22] *Madden v. Foley*, 83 Wn.App. 385, 392, 922 P.2d 1364 (1996).
[23] 801 F.2d 1531 (9th Cir. 1986)
[24] *Id* at 1534.
[25] *Id* at 1540.
[26] *Id* at 1541 quoting *Zaldivar v. City of Los Angeles*, 780 F.2d 823,832 (9th Cir. 1986).

CONCLUSION AND ORDERS

While Ames should have positioned his argument as a good faith extension of the law to the facts at the outset, the Court nevertheless finds that bringing the case was not an abuse of the judicial system.

Based on the foregoing, and pursuant to CR 59(a)(9), it is hereby,

ORDERED that plaintiff's motion for reconsideration of CR 11 sanctions is **GRANTED** and the previous order of CR 11 sanctions is **REVERSED.**

Dated this 30th day of July, 2014.

Visiting Judge Kevin D. Hull
Pierce County Superior Court

8/4/2014 02:26 2276

CERTIFICATE OF SERVICE

I, Chris Jeter, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Joan Mell III Branches Law PLLC 1033 Regents Blvd Ste 101 Fircrest, WA 98466-6089	☒ Via U.S. Mail
Michael Patterson Patterson Buchanan Fobes Leitch PS 2112 3rd Ave Ste 500 Seattle, WA 98121-2391	☒ Via U.S. Mail
Philip Talmadge Talmadge/Fitzpatrick 18010 Southcenter Pkwy Tukwila, WA 98188-4630	☒ Via U.S. Mail
Brett Purtzer 1008 Yakima Ave Ste 302 Tacoma, WA 98405-4850	☒ Via U.S. Mail

In addition, I caused the original of the foregoing document to be sent for filing in the manner noted on the following:

Cristina Platt, Judicial Calendar Coordinator Pierce County Superior Court 930 Tacoma Avenue South, Room 334 Tacoma, Washington 98402	☒ Via U.S. Mail

DATED this 30th day of July, 2014, at Port Orchard, Washington.

Chris Jeter
Judicial Law Clerk

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 the Motion to file Over-Length Brief of Respondent and the Brief of Respondent/Cross-Appellant Pierce County in Supreme Court Cause No. 89884-7 to the following:

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

Charles Leitch
Michael Patterson
Jason A. Harrington
Patterson Buchanan Fobes & Leitch PS
2112 3rd Avenue, Suite 500
Seattle, WA 98121

Original Emailed for filing with:

Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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: September 26th, 2014, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Roya Kolahi
Cc: joan@3brancheslaw.com; cpl@pattersonbuchanan.com; map@pattersonbuchanan.com; jah@pattersonbuchanan.com; mark.lindquist@co.pierce.wa.us; Kelly Kelstrup
Subject: RE: Michael Ames v. Pierce County Cause No. 89884-7

Rec'd 9/26/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Roya Kolahi [mailto:Roya@tal-fitzlaw.com]
Sent: Friday, September 26, 2014 11:36 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: joan@3brancheslaw.com; cpl@pattersonbuchanan.com; map@pattersonbuchanan.com; jah@pattersonbuchanan.com; mark.lindquist@co.pierce.wa.us; Kelly Kelstrup
Subject: Michael Ames v. Pierce County Cause No. 89884-7

Good Afternoon:

Attached please find the Motion for Leave to File Over-Length Brief of Respondent and the Brief of Respondent/Cross-Appellant Pierce County in Supreme Court Cause No. 89884-7 for today's filing. Thank you.

Sincerely,

Roya Kolahi
Legal Assistant
Talmadge/Fitzpatrick, PLLC
206-574-6661 (w)
206-575-1397 (f)
roya@tal-fitzlaw.com