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

IN THE MATTER OF

THE RECALL OF DALE WASHAM,  
Pierce County Assessor-Treasurer

NO. 10-2-14958-4

PETITIONER'S REPLY TO RESPONSE AND  
OBJECTIONS OF DALE WASHAM TO  
PETITIONER'S AMENDED RECALL  
PETITION

COMES NOW the Petitioner Robin Farris, by and through her attorneys of record, Jeffrey Paul Helsdon and Oldfield & Helsdon, PLLC, and submits this Reply to Response and Objections of Dale Washam to Petitioner's Amended Recall Petition.

1. *Mr. Washam's hypertechnical argument that a recall petition cannot be amended has been addressed previously.*

Petitioner has addressed this hypertechnical argument previously in her Supplemental Memorandum filed on December 2, 2010. However, Petitioner directs the Court to the following holding of the Washington Supreme Court in *Pederson v. Moser*, 99 Wash. 2d 456, 662 P.2d 866 (1983):

Pederson also raises several other claims. We find these of even less merit than the first, however. The first of these alternative claims is that Reitsma should not have been allowed to file amended recall demands. Pederson rightly points out

1 that RCW 29.82 nowhere provides for multiple or amended recall demands and  
2 argues that they are therefore not permitted.

3 On the other hand, nothing in RCW 29.82 *prohibits* filing multiple or successive  
4 recall demands, either. Indeed, RCW 29.82.010 permits “any legal voter” to  
5 demand recall “[w]hensoever [he or she] shall desire”, the only express limitation  
6 being that no such demand may be filed within 10 months of regular election  
7 (RCW 29.82.025). (Italics ours.) Moreover, the recall statute is to be construed in  
8 favor of the voter, not the elected official. See *McCormick v. Okanogan Cy.*,  
9 *supra*, 90 Wash.2d at 78, 578 P.2d 1303. While we are inclined to imply into the  
10 statute a requirement that a voter choose between or consolidate multiple recall  
11 demands, Reitsma did so here. We must therefore reject Pederson's claim.

12 *Pederson v. Moser*, 99 Wash. 2d 456, 461-62, 662 P.2d 866, 869-70 (1983).

13 Mr. Washam misapplies *In Re Recall of Wade*, 115 Wash. 2d 544, 799 P.2d 1179  
14 (1990) and *Chandler v. Otto*, 103 Wash. 2d 268, 693 P.2d 71(1984), in which amendment of a  
15 recall petition was not in issue.

16 2. *The Amended Petition is replete with acts by Mr. Washam that amount to  
17 misfeasance and malfeasance in office, as well as violation of his oath.*

18 Failing to address, and thereby conceding, that the Amended Petition describes numerous  
19 acts by Mr. Washam constituting misfeasance in office and violation of his oath, Mr. Washam  
20 concentrates on his interpretation of the definition of "malfeasance," claiming that "malfeasance"  
21 as defined in RCW 29.82.010<sup>1</sup> requires proof of conduct for which a civil fine or criminal penalty  
22 might be imposed, citing *In Re Recall of Hurley*, 120 Wash. 2d 378, 841 P.2d 756, (1992), for that  
23 proposition. He is not correct.

24 RCW 29A.56.110 states, in pertinent part:

25 For the purposes of this chapter:

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<sup>1</sup> RCW 29.82.010 has been recodified as RCW 29A.56.110.

1 (1) "Misfeasance" or "malfeasance" in office means *any* wrongful conduct that  
2 affects, interrupts, or interferes with the performance of official duty;

3 (a) Additionally, "misfeasance" in office means the performance of a duty in an  
4 improper manner; and

5 (b) *Additionally*, "malfeasance" in office means the commission of an unlawful act;

6 (2) "Violation of the oath of office" means the neglect or knowing failure by an  
7 elective public officer to perform faithfully a duty imposed by law.

8 *(Emphasis Added).*

9 Malfeasance does not require the commission of an unlawful act. The use of the word  
10 "additionally" by the legislature demonstrates an intention that malfeasance may be based upon  
11 conduct other than the commission of an unlawful act. *In Re Recall of Hurley* does not support  
12 Mr. Washam's claim that "malfeasance" requires proof of conduct for which a civil fine or  
13 criminal penalty might be imposed. The Supreme Court in *In Re Recall of Hurley* says as much:

14 "Misfeasance" and "malfeasance" both mean any wrongful conduct that affects,  
15 interrupts, or interferes with the performance of official duty. RCW 29.82.010(1).  
16 Additionally, "misfeasance" includes the performance of an official duty in an  
17 improper manner, and "malfeasance" includes the commission of any unlawful act.  
18 RCW 29.82.010(1)(a), (b). " 'Violation of the oath of office' " means the willful  
19 neglect or failure to perform faithfully a duty imposed by law. RCW 29.82.010(2).

20 *Matter of Recall of Hurley*, 120 Wash. 2d 378, 380, 841 P.2d 756, 757 (1992).

21 In *In re Recall of Kast*, 144 Wash. 2d 807, 31 P.3d 677 (2001), the Washington Supreme  
22 Court held:

23 Kast also asserts that a violation of RCW 52.14.110 "does not result in a civil fine or  
24 a criminal penalty and is not, therefore, 'malfeasance' as that term is defined in  
25 RCW 29.82.010(1)(b)." *In re Recall of Hurley*, 120 Wash.2d 378, 381, 841 P.2d  
756 (1992). Nevertheless, his conduct would still be considered malfeasance under  
section (1) because his violation of the law was "wrongful conduct" and because his  
conduct "interfere[d] with the performance of official duty" by failing to promote  
the best interests of the fire district. RCW 29.82.010(1). As a result of his conduct,

1 the fire district could not be sure that it had received the best value or price for the  
2 culvert ditch project.

3 *In re Recall of Kast*, 144 Wash. 2d 807, 815 - 816, 31 P.3d 677, 682 (2001).

4 Mr. Washam makes much ado about a letter from Pierce County Chief Civil Deputy  
5 Douglas Vanscoy. Mr. Washam's argument can be summarized as follows: "I can retaliate against  
6 anyone I want because I was elected."

7 Several points are in order. First, violation of the Pierce County whistleblower ordinance  
8 may obviously result in the filing of a civil lawsuit by the employee against whom the retaliatory  
9 actions by Mr. Washam were leveled. In such event, the county is exposed to liability. Second, a  
10 finding by the Pierce County Human Resources Director that Mr. Washam unlawfully retaliated  
11 against an employee is, *a priori*, a sanction. Third, as noted by Mr. Vanscoy in his letter, an  
12 administrative law judge may impose penalties for unlawful retaliation. Fourth, Mr. Washam's  
13 reliance on Mr. Vanscoy's letter is misplaced, as the Supreme Court further held in footnote 2 in  
14 *In re Recall of Kast*. In that case, the elected official was a Fire Commissioner. He was alleged to  
15 have violated competitive bidding laws by attempting to circumvent them. The charge was not  
16 subject to civil or criminal sanctions. The Supreme Court held:

18 Moreover, his conduct may also be considered to be misfeasance in that he  
19 "perform[ed] a duty in an improper manner," . . . Kast also argues that his conduct  
20 was not misfeasance or malfeasance because the state auditor concluded that the fire  
21 district, and not Kast specifically, had violated the state competitive bidding law.  
22 See *In re Recall of Sandhaus*, 134 Wash.2d 662, 672, 953 P.2d 82 (1998)  
23 (considering weight to be assigned to the state auditor's opinion that he had "found  
24 nothing which in his opinion amounted to 'misfeasance, malfeasance or nonfeasance  
25 on the part of any official' "). However, *Sandhaus* does not appear to be applicable  
in this case because the state auditor did not make any conclusions regarding  
whether Kast's actions were unlawful or whether his actions would constitute  
grounds for recall.

*In re Recall of Kast*, 144 Wash. 2d 807, 819, 31 P.3d 677, 684 (2001).

1 Likewise, Mr. Vanscoy did not conclude that Mr. Washam's actions were not unlawful or  
2 that his actions did not constitute grounds for recall.  
3

4 3. *Mr. Washam's due process argument is unsustainable.*

5 Mr. Washam complains that the Court should not consider the investigative reports of Ms.  
6 Hess-Taylor, Mr. Nakamura or Mr. Heyrich. He protests that the process followed in each of the  
7 three independent investigations was biased. He bemoans a perceived inability to challenge their  
8 findings, which he refers to as "purported findings" of "purported investigations." He attempts to  
9 marginalize them by dismissively referring to these costly investigations as "nothing more than"  
10 administrative inquiries. He falsely charges that none of the investigations "made any specific  
11 finding of any specific violation of law. . ." Finally, he mischaracterizes his opinion about the  
12 findings in the investigations - as he does frequently - by starting the sentence with the words "[I]t  
13 is a fact that. . ."

14  
15 In her Supplemental Memorandum filed December 2, 2010, Petitioner provided this Court  
16 with authority to consider the investigative reports in determining that the Amended Petition is  
17 factually and legally sufficient for recall. As Mr. Washam has failed to address that authority (or  
18 any other authority set forth in her Supplemental Memorandum) the Court should consider it  
19 unchallenged. Petitioner rests on the weight of that authority.

20 The investigations found extensive violations of law, Mr. Washam's assertion to the  
21 contrary notwithstanding, including the following example by Ms. Hess-Taylor:

22 "based upon her participation in complaints against him based on religion (1/22/09),  
23 and discrimination and retaliation (3/11/09). Washam may have had mixed motives  
24 for the retaliation, but complainant's participation in complaints of discrimination  
25 and retaliation were a substantial factor motivating the actions outlined below. . .

1 c. Gretchen Borck, and Dale Washam violated the Pierce County Policy  
2 requiring that employees 'participate in and cooperate fully in the investigation of  
3 complaints. . .' by refusing to participate in an interview (Washam and Borck),  
4 refusing to provide requested documents (Washam and Borck), and refusing to  
5 permit a tour of the office (Washam)."

6 The investigative report of Mr. Kent Nakamura issued the following findings:

7 [F]rom the outset, it should be noted that Mr. Washam, significantly, is in violation  
8 of Chapter 3.14 Pierce County Code, as well as state or federal EEO laws, through  
9 his failure to take remedial action relating to Sally Barnes. Ms. Barnes' status has not  
10 been addressed by Mr. Washam and, as per the previous finding of retaliation by  
11 HR, he continues to be in violation of state or federal law or Pierce County  
12 Ordinance through the continuing nature/effects of such retaliation. See  
13 3.14.010(A)(1), - .080. . .

14 Mr. Washam has abused his authority. . ."

15 *Nakamura report, pp. 7 - 8.*

16 And so on. As to Mr. Washam's contention that he is unable to challenge the findings of  
17 the investigations, his contention is incorrect. Once a special election for his recall is scheduled,  
18 Mr. Washam will have ample time to convince the citizens of Pierce County that all three  
19 independent investigators are wrong and he, alone, is right.

20 4. *Petitioner's Amended Petition is advanced for proper reasons.*

21 In his Response, Mr. Washam asks the following rhetorical question:

22 "Is the petitioner's motivation in filing a recall petition against the Pierce County  
23 Assessor-Treasurer a calculated strategy to draw attention to herself because she  
24 wants to run for that elective office in 2012?"

25 Petitioner submits the following reply:

It is a fact that she does not.<sup>2</sup>

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<sup>2</sup> Moreover, Petitioner fully expects the office to be vacant in 2011.

1  
2 5. *Mr. Washam's responses to the charges set forth in the Amended Petition merely reiterate his prior submittals.*

3 Mr. Washam merely repeats conclusory denials, previously set forth in his pleadings, that  
4 the charges in the Amended Petition are factually and legally sufficient to warrant his recall.  
5 Petitioner rests on her own submittals to challenge his conclusions.

6  
7 6. *Mr. Washam continues to falsely represent to the Court that he was not served with the Amended Petition. His representation constitutes sanctionable conduct under CR 11.*

8  
9 In his declaration filed with his response, Mr. Washam states:

10 That it is a fact, (*sic*) the petitioner never served a copy of her proposed amended Recall petition to me, as it was her duty to do pursuant to state and local court rules.

11 Mr. Washam was personally served at the direction of the Pierce County Auditor with the  
12 Amended Petition at his home on Sunday, November 21, 2010.<sup>3</sup> He was then personally served in  
13 court by Mr. Oldfield immediately after the hearing on November 22.<sup>4</sup> His representation to this  
14 Court in his Response filed December 10, 2010 that he was “never served a copy” is a violation of  
15 his obligation under CR 11.

16  
17 CR 11 provides, in pertinent part, as follows:

18 (a) . . .The signature of a party or of an attorney constitutes a certificate by the  
19 party or attorney that the party or attorney has read the pleading, motion, or legal  
20 memorandum, and that to the best of the party’s or attorney’s knowledge,  
21 information, and belief, formed after an inquiry reasonable under the  
22 circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law  
or a good faith argument for the extension, modification, or reversal of existing  
law or the establishment of new law; (3) it is not interposed for any improper

23 <sup>3</sup> See *Declaration of Service of Amended Request for Adjudication to Petition for Recall of the Pierce County Assessor-Treasurer; Letter dated November 18, 2010*, filed December 13, 2010. The Auditor has the statutory  
24 obligation to serve Mr. Washam.

25 <sup>4</sup> See *Declaration of Thomas H. Oldfield* filed November 29, 2010.

1 purpose, such as to harass or to cause unnecessary delay or needless increase in  
2 the cost of litigation; and (4) the denials of factual contentions are warranted on  
3 the evidence or, if specifically so identified, are reasonably based on a lack of  
4 information or belief. . . If a pleading, motion, or legal memorandum is signed in  
5 violation of this rule, the court, upon motion or upon its own initiative, may  
6 impose upon the person who signed it, a represented party, or both, an appropriate  
7 sanction, which may include an order to pay to the other party or parties the  
8 amount of the reasonable expenses incurred because of the filing of the pleading,  
9 motion, or legal memorandum, including a reasonable attorney fee.

10 CR 11 was adopted “to deter baseless filings and to curb abuses of the judicial system.”  
11 *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). CR 11 is violated in  
12 any one of three ways in the case law. (1) Failure to conduct a reasonable inquiry into the facts  
13 supporting the paper; (2) failure to conduct a reasonable inquiry into the law to ensure that the  
14 pleading filed is warranted by existing law, or a good faith argument for the extension,  
15 modification, or reversal of existing law; and (3) filing the pleading for any improper purpose,  
16 such as delay, harassment or increasing the costs of litigation. *Miller v. Badgley*, 51 Wn. App.  
17 285, 300, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). A filing is baseless if it is not  
18 well grounded in fact, or not warranted by existing law or a good faith argument for altering  
19 existing law. *Blair v. GIM Corp.*, 88 Wn. App. 475, 482-83, 945 P.2d 1149 (1997).

20 The rule’s mandate is ongoing throughout the litigation. *Doe v. Spokane and Inland*  
21 *Empire Blood Bank*, 55 Wn. App. 106, 114, 780 P.2d 853 (1989); *MacDonald v. Korum Ford*,  
22 80 Wn. App. 877, 912 P.2d 1052 (1996). Washington courts apply an objective standard for  
23 the basis for the pleading in law and fact to evaluate compliance with CR 11. *Bryant*, 119  
24 Wn.2d at 220. Good faith belief about the pleading is irrelevant. *Miller*, 51 Wn. App. at 299 -  
25 300. If the pleading is filed for an improper purpose, sanctions under CR 11 are appropriate.  
In *Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993); *Skilcraft Fiberglass, Inc. v.*

1 *The Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993). The Washington courts are not  
2 reluctant to impose sanctions under CR 11 and its counterparts. *In re Guardianship of Lasky*,  
3 54 Wn. App. 841, 854-56, 776 P.2d 695 (1989). The “improper purpose” ground is a separate  
4 and independent justification for an award of sanctions under CR 11. *Harrington*, 67 Wn. App.  
5 at 912-13. The court “retains broad discretion to tailor an ‘appropriate sanction’ and to  
6 determine against whom such a sanction should be imposed.” *Miller v. Badgley*, 51 Wn. App.  
7 285, 303, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988).

8  
9 This Court must make a record for its sanctions decision. *Burnet v. Spokane*  
10 *Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Rivers v. Wash. State Conf. of Mason*  
11 *Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002).

12 The following facts constitute grounds for sanction:

- 13 • November 21, 2010: Mr. Washam was served with the Amended Petition at his  
14 residence.
- 15 • November 22, 2010: Two times, Mr. Washam explicitly represented to the  
16 Court that he had not been served with the Amended Petition. A third time, he  
17 let slip that he had been served, but immediately tried to re-characterize it as  
18 non-service.
- 19 • November 22, 2010: Mr. Oldfield personally served Mr. Washam again with the  
20 Amended Petition in the courtroom immediately after the hearing.
- 21 • November 29, 2010: Mr. Oldfield filed his Declaration of Service.
- 22 • December 2, 2010: Petitioner filed her Supplemental Memorandum. In it,  
23  
24 Petitioner attached an affidavit of service demonstrating that Mr. Washam had,  
25

1 in fact, been served on November 21, quoting Mr. Washam from the transcript  
2 of the November 22 hearing telling the Court that he had not been served, and  
3 informing the Court that Mr. Oldfield had also served him.

- 4 • December 10, 2010: Mr. Washam again represented to the Court that he had not  
5 been served.
- 6 • December 13, 2010: Affidavit of Service on November 21, 2010 was filed.

7 This Court should sanction Mr. Washam for his continuing false statements to this  
8 Court that he has not been served with the Amended Petition. Petitioner did not request in her  
9 Supplemental Memorandum that the Court sanction Mr. Washam for his statements in open  
10 court on November 22 that he had not been served. In that pleading, Petitioner clarified the  
11 record for the Court that Mr. Washam's representation to the Court that he had not been served  
12 was not correct, going so far as to tell the Court that "Petitioner will refrain from any comment  
13 about this assertion beyond pointing out that it is wrong."  
14

15 However, after the filing of Mr. Oldfield's Declaration of Service and Petitioner's  
16 Supplemental Memorandum - both of which together should be, and are, dispositive of the  
17 question - Mr. Washam returns to the same misrepresentation to the Court, compounded now by  
18 the fact that he has been served *a second time*. The Court should sanction him for repeatedly  
19 making false claims about his service, even after having been served in the courtroom.  
20

21 //

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1           7.     *Conclusion.*

2           Mr. Washam raises hypertechnical objections to the amendment of the Petition. Now that  
3 the shoe has dropped, this self-described servant of the people seems to have conveniently  
4 forgotten his previous position on hypertechnical objections to recall of an elected official,  
5 submitted by him in a brief to the Supreme Court in 1999:

6           Recall is a political decision, an exercise of political will on the behalf of the  
7 entire electorate.

8           The Courts should not continue to require recall petitioners' charges to be hyper  
9 technical. Instead, this Court should rule that recall is political pursuant to Article  
10 I Sections 33 and 34 of the Washington State Constitution. . . If a recall petitioner  
11 was to get a recall charge and a recall ballot synopsis approved by the Superior  
12 Court, which, nowadays is an extremely remote possibility, the recall petitioner  
13 will then have to face with certainty a delay in the recall process while the elected  
14 official whom the recall is against files a costly appeal to the Washington State  
15 Supreme Court, that, most of the time, will be paid by taxpayers pursuant to RCW  
16 4.96.030. All the while the recall petitioner has to pay for his own legal expenses  
17 when a recall action is heard in the state Supreme Court. It is now a fact, a recall  
18 of an elected official in Washington State is going to cost a lot of money and be  
19 nearly impossible.

20           This Court should return the recall process back to where it began, a simple  
21 process pursuant to Article I Sections 33 and 34 of the Washington State  
22 Constitution. RCW 29.82.023 is an election statute for recall which is nothing  
23 more than a political process given to the voters by the State Constitution to hold  
24 elected officials accountable to the voters for their actions The electorate hires  
25 politicians with its votes to do a job. The state constitution provides an avenue by  
which the electorate can fire an elected official prior to the term of the  
employment contract expiring and the Washington State Legislature and the  
Supreme Court has usurped that right. Recall is not in the Legislature, recall is not  
in the Courts, recall is a pure and simple political issue and process.

21           *Appellant's Brief, In Re Recall of Cathy Pearsall-Stipek, the Pierce County Auditor, filed*  
22 *August 27, 1999 by Dale Washam.*

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3 “L'hypocrisie est un hommage que le vice rend a la vertu” (“Hypocrisy is the homage vice  
4 pays to virtue”) - Francois de La Rochefoucauld.

5 This Court should enter an order establishing that a sufficient factual and legal basis exists  
6 for the recall of Dale Washam and approving for that purpose a proper ballot synopsis.  
7

8  
9 DATED this 13th day of December, 2010.

10 Oldfield & Helsdon, PLLC

11  
12 

13 By: Jeffrey Paul Helsdon  
14 of Attorneys for Petitioner Robin Farris