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

JOHN DAVID DU WORS, an individual,

Plaintiff,

v.

JENNIFER SCHWEICKERT, an individual,

Defendants.

Case Number: 15-2-02482-7

DEFENDANT SCHWEICKERT'S MOTION TO DISMISS CR 12(b)(6)

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I. RELIEF REQUESTED

Defendant Jennifer Schweickert moves the court for dismissal of plaintiff's, attorney John Du Wors', complaint (the "Complaint) pursuant to CR 12(b)(6) of the causes of action for "abuse of process" and "malicious prosecution." Defendant further reserves the right to request CR 11 sanctions against attorney John Du Wors, for bringing suit frivolously against defendant without good cause or merit and in retaliation for defendant's filing of a bar complaint with the Washington State Bar Association ("WSBA").

II. ISSUES PRESENTED

1. Whether a cause of action for abuse of process can be made against a party for filing a bar complaint against an attorney?
2. Whether a cause of action for malicious prosecution can be made against a party for filing a bar complaint against an attorney?
3. Whether CR 11 sanctions are appropriate against the attorney for prosecuting those causes of action against a grievant who filed the bar complaint?

III. STATEMENT OF FACTS

Defendant filed suit against a company to which she had loaned money (Hunts Point Ventures, LLC, "HPV"), and against the attorney who represented that company at the time she made the loan (plaintiff Du Wors). While the claims against plaintiff Du Wors were dismissed on summary judgment, defendant obtained a $260 thousand judgment against HPV, and shorly thereafter acquired all the intellectual property (IP) owned by HPV from the receiver, Mr. Mark Calvert. While attorney for HPV, Mr. Du Wors was responsible for prosecuting actions for violations of the patents and for ensuring that the patents were maintained and valid. Following the purchase of the intellectual property agreement, defendant consulted with her attorneys regarding all of the associated documentation surrounding the IP and the IP litigation. On July

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8, 2015, defendant's attorney, Mr. Brandon Wayman, exchanged e-mails with Ms. Stephanie Lakinski, an attorney representing Mr. Calvert in his capacity as the receiver for HPV. The exchange was as follows:

Ms. Lakinski:	What IP litigation documents are you referring to? All of the court documents should be available to the public. Is there something else?
Mr. Wayman:	Any discovery related documentation on or any research done by Du Wors' firm to locate any potential Defendants. I can contact Du Wors' firm directly to attempt to obtain the documents, but I wanted to see if the receiver has anything as I assume it will be difficult to get anything from Du Wors.
Ms. Lakinski:	I do not believe we have received anything along those lines from Du Wors.

Based upon the representations of the attorney for the receiver, Ms. Lakinski, the defendant requested that her attorneys contact Mr. Du Wors to request full documentation from his firm's files regarding the IP. On July 13, 2015, defendant's attorneys, Mr. Mark Kimball and Mr. Wayman, wrote to Mr. Du Wors regarding defendant's request for files relating to the intellectual property she had acquired. Mr. Du Wors did not respond to this initial letter, not even to provide a courtesy response stating that he had provided the files to the receiver.

In September, 2015, defendant requested that her attorneys send a follow-up letter to Mr. Du Wors and if necessary to seek assistance from the receiver, Mr. Calvert. Mr. Calvert did respond, and provided an Authorization for Release of Legal Files directed specifically to Mr. Du Wors and his firm. The release, written by Mr. Calvert and/or his attorneys, was specific, stating:

> You are hereby authorized to release any and all documents, including but not limited to pleadings, discovery, correspondence, notes, records and reports, investigative reports, and all other information written or otherwise recorded, for Hunts Point Ventures, Inc. contained in the file of or relating to all legal proceedings involving the following intellectual property….

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The release listed all the intellectual property purchased by the defendant and directed Mr. Du Wors and his firm to release such information to her attorneys. Subsequently, on September 10, 2015, Ms. Schweickert's attorneys sent the follow-up letter to Mr. Du Wors stating:

> As of the date hereof, we have not received a response to our letter to you dated July 13, 2015.
>
> As I am sure you are aware, RPC 1.16 states that a lawyer must take reasonably practicable steps to return client property, including papers and documents, to the client at the termination of the representation. Attached please find an Authorization for Release of Legal Files executed by Cascade Capital Group, LLC on behalf of Hunts Points Ventures, Inc. We again demand that your firm provide a copy of all files, including but not limited to pleadings, discovery, correspondence, notes, records and reports, investigative reports, and all other information written or otherwise recorded, for Hunts Point Ventures, Inc. contained in the files of or relating to all legal proceedings involving the intellectual property listed on the attached Release. A hard drive can be provided upon request.
>
> Please contact my office if you have any questions or concerns.

Mr. Du Wors also chose to ignore this letter as well, making no response to defendant's attorneys or defendant. On November 1, 2015, having received no response from Mr. Du Wors, defendant filed a formal grievance with the WSBA based upon his non-communication, lack of diligence, and refusal to safeguard the property of a former client. Mr. Du Wors was informed of this grievance on November 8th. Mr. Du Wors then almost immediately served his Complaint against Ms. Schweickert on November 12th, as yet unfiled, for abuse of process and malicious prosecution, and, in addition, after filing the lawsuit on December 15, 2015, demanded defendant immediately be present at a deposition on December 23, 2015.

In response to the WSBA grievance, Mr. Du Wors finally provided a substantive request to the demand for the IP files. Mr. Du Wors provided a recent declaration (December 12th) from Mr. Calvert, the receiver for HPV, which stated that Mr. Du Wors had provided copies of files associated with patent litigation following termination of his representation of HPV and that he

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consented to Mr. Du Wors' disclosure of the files to defendant. The declaration stated that Mr. Du Wors need not "produce those files a second time, because they [Mr. Du Wors] had already produced a client copy to me [Mr. Calvert] earlier this year." Last, Mr. Calvert invited defendant to request the files from him as she had not requested them to date. Mr. Calvert signed the declaration which was prepared by Mr. Du Wors' own private counsel in the action brought against him by the receiver. Quite oddly, this recent declaration contradicted the prior statements made by the attorneys for Mr. Calvert, Mr. Calvert's own "Authorization," and the statements made by Mr. Calvert's office.[1]

Despite the anomalies, defendant accepted Mr. Calvert's declaration at face value. Accordingly, on December 21, 2015, defendant notified the WSBA of the new declaration and of the fact that the files could be obtained from Mr. Calvert, so that the WSBA could take appropriate steps with the grievance as it related to the request of client files. Mr. Du Wors was copied on this letter.

Since filing the Kitsap County lawsuit, Mr. Du Wors has been aggressively litigating the case. On December 9, 2015, he served interrogatories and requests for production, seeking to collect e-mails between defendant and her husband and mother. Mr. Du Wors informally threatened to depose defendant several times. He then noted defendant's deposition for December 23, 2015 without prior consultation or a courtesy call to check her availability during the holidays. In addition, he threatened to acquire 3rd party claims from other defendants from the HPV litigation in order to assert additional claims against defendant Schweickert.

The only factual basis asserted by Mr. Du Wors Complaint was that the bar complaint was filed in retaliation for the court's dismissal of a lawsuit defendant filed against Mr. Du Wors in federal court. That suit was brought against Mr. Du Wors for his role in inducing defendant's investment of $200,000 in HPV, the vast majority of which went to benefit Mr. Du Wors personally. However, that lawsuit was dismissed in January, 2015, long before the defendant's

[1] The Calvert declaration fails to explain why, if those documents had already been produced, he simply didn't provide them earlier to defendant, especially in light of the fact he provided defendant with a specific, written authorization for the files from Mr. Du Wors.

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bar complaint was ever filed; moreover, the bar complaint was due to circumstances completely unrelated to the dismissed lawsuit.

In summary, the WSBA *and* Mr. Du Wors have been notified regarding the change of circumstances arising from the new declaration from the Receiver. It appears that despite the contradicting statements made by the receiver under oath, the statements made by the receiver's counsel in email, and the receiver's signed Authorization For Release of Legal Files, there appears to be great resistance to furnishing the files.[2] Incredibly, this sequence of events is the basis for Mr. Du Wors' claim that defendant is retaliating against him to such a degree that it justifies the filing of this Complaint for abusive use of process and malicious prosecution.

IV. ARGUMENT

A. Standard of Review

1) The Allegations In The Complaint Do Not Satisfy *Twombly* and *Iqbal*

To survive a motion to dismiss under CR 12(b)(6), it is not enough that a claim for relief be merely "possible" or conceivable;" instead, it must be "plausible on its face." *Iqbal v. Ashcroft*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim for relief is plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*quoting Twombly*, 550 U.S. at 556). This standard is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* To cross the line from conceivable to plausible, a complaint must contain a sufficient quantum of "factual matter" alleged with a sufficient level of specificity to raise entitlement to relief above the speculative level. *Twombly*, 550 U.S. at 555. If "a complaint pleads facts that are 'merely consistent with' a defendant's

[2] As an aside, it may have something to do with the fact that Mr. Du Wors' billed $465,000 worth of legal work to HPV, took all of HPV's investment and settlement monies, and continues to undergo litigation related to his representation of HPV.

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liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 557).

When reviewing a Rule 12(b)(6) motion, the Court is not bound to accept as true: labels, conclusions, formulaic recitations of the elements, or legal conclusions couched as factual allegations. *Twombly*, 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678. Rather, a plaintiff must plead sufficient "factual content [to] allow [ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Plaintiff Du Wors's complaint is legally conclusory and contains virtually no facts that support either of the Complaint's causes of action and must be dismissed. Both causes of action in attorney John Du Wors' Complaint simply parrot the common law elements that must be met to sustain those causes of action. The facts pleaded in the Complaint refer to prior litigation between the parties and between defendant's significant other and attorney John Du Wors; facts, which are irrelevant in the instant matter. The only facts actually pleaded in support of the Complaint are that defendant filed a bar complaint and "Ms. Schweickert has never been Mr. Du Wors' client." *See Complaint*, p. 5, para. 13. As discussed in greater detail below, Ms. Schweickert had a legitimate basis to file the bar complaint that had nothing to do with whether she had been attorney John Du Wors' prior client. Moreover, even if she had no basis to file a bar complaint, attorney John Du Wors' Complaint still fails as a matter of law, is frivolous on its face, and should be dismissed.

2) <u>Plaintiff's Complaint Fails To State Any Claims For Which Relief Can Be Granted Because, As A Matter Of Law, The Complaint Fails To Allege Facts That Could Satisfy The Elements Of Abuse Of Process And Malicious Prosecution</u>

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A trial court's ruling on a CR 12(b)(6) motion to dismiss for failure to state a claim is a question of law. *Berst v. Snohomish County*, 114 Wn.App. 245, 251, 57 P.3d 273 (2002). A court should grant a CR 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Bowman v. John Doe,* 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). For the purposes of such a motion, the plaintiff's factual allegations are presumed true." *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986). A complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the court could sustain the claim for relief. *Lawson*, 107 Wn.2d at 448; *Bowman*, 104 Wn.2d at 183; *Orwick*, 103 Wn.2d at 255. The court need not accept legal conclusions as correct. *See Orwick*, 103 Wn.2d at 254; *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 370, 274 P.2d 852 (1954).

3) Request For Judicial Notice

Generally, in ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings. *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 297, 545 P.2d 13 (1975) ("On a CR 12(b)(6) motion, no matter outside the pleadings may be considered ... and the court in ruling on it must proceed without examining depositions and affidavits which could show precisely what, if anything, the plaintiffs could possibly present to entitle them to the relief they seek."). But the trial court may take judicial notice of matters that are a part of the public record if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss. *See Berge v. Gorton*, 88 Wash.2d 756, 763, 567 P.2d 187 (1977). ER 201(b) authorizes the court to take judicial notice of a fact that is "not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Documents whose contents are alleged in a complaint but which are not physically

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attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss. *Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 717, 189 P.3d 168 (2008).

While the submission of extraneous materials by either party normally converts a CR 12(b)(6) motion to a motion for summary judgment, if the court can say that no matter what facts are proven within the context of the claim, the plaintiff would not be entitled to relief, the motion remains one under CR 12(b)(6). *See Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009, *review denied,* 82 Wn.2d 1011 (1973). In such a case, the presentation of extraneous evidence would be immaterial. *Loger*, at 924. In *Loger*, the trial judge considered matters outside the pleadings to enable him to understand the context of the CR 12 motion so as to rule on it as a matter of law, without reaching or resolving any factual dispute. *Id.* at 926.

Defendant Schweickert, accordingly, requests that the Court take judicial notice of the following documents, as either being within the public record, or are documents of which it would be proper for the court to take judicial notice, or are provided to aid the court in its understanding of CR 12 motion. Attached as Exhibits are:

A) Defendant's bar complaint against John Du Wors, dated November 1, 2015

B) Mr. Du Wors' response to bar complaint, dated December 7, 2015

C) Defendant's withdrawal of bar complaint, dated December 21, 2015

D) Declaration of Mark Calvert

E) Notice of Deposition; Letter to Meet and Confer

F) Interrogatories and Requests for Production

G) Letter to Mr. Du Wors from attorney Reed Yurchak and Response

B. Plaintiff's Complaint Fails to Plead Plausible Claims For Abuse Of Process

Under Washington law, a claim for abuse of process is defined as: "(1) the existence of an ulterior purpose - to accomplish an object not within the proper scope of the process, and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings. The

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mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process. *Fite v. Lee*, 11 Wn. App. 21, 27-28, 521 P.2d 964 (1974); *R.A. Hanson Co. v. Aetna Ins. Co*., 26 Wn. App. 290, 612 P.2d 456 (1980). It has also been described as:

> [T]he gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. ...
> The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort. The cases have involved such extortion by means of attachment, execution, garnishment, or sequestration proceedings, or arrest of the person, or criminal prosecution, or even such infrequent cases as the use of a subpoena for the collection of a debt. The ulterior motive or purpose may be inferred from what is said or done about the process, but the improper act may not be inferred from the motive.
> *Batten v. Abrams*, 28 Wn. App. 737, 746-7, 626 P.2d 984 (1981) (*citing B.W. Prosser, Torts* § 121, at 856-58 (4th ed. 1971)).

There are very few case law decisions in the country that are on point with the facts in the instant action. That is, can a party maintain an action against another for abuse of legal process when the only process is the filing of a bar complaint with the regulatory agency (in this instance, the WSBA). One court has interpreted such facts in the context of both a bar complaint being filed and a subsequent filing of a legal complaint for malpractice. Unequivocally, the court held that a plaintiff is entitled to absolute immunity for statements made in connection with a bar grievance. *See Field v. Kearns*, 43 Conn. App. 265 (1996). The court based its reasoning upon the fact that statements in judicial or quasi-judicial proceedings are entitled to absolute immunity for the content of statements made therein. *Id*. at 271. In addition, the court held that bar proceedings, as *sui generis* proceedings, are *quasi-judicial* in nature. *Id*. at 273.

The Rules for Enforcement of Lawyer Conduct ("ELC") in Washington also state that bar proceedings are neither criminal, nor civil, but are sui generis in character. ELC 10.14(a). As a

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general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony. *Bruce v. Byrne-Stevens & Associates Engineers, Inc*., 113 Wn.2d 123, 125 (1989). The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings is well established in English common law. *Cutler v. Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q.B. 1585); *Anfield v. Feverhill*, 2 Bulst. 269, 80 Eng. Rep. 1113 (K.B. 1614); *Henderson v. Broomhead*, 4 H. & N. 569, 578, 157 Eng. Rep. 964, 968 (Ex. 1859); *see Dawkins v. Lord Rokeby*, 4 F. & F. 806, 833-834, 176 Eng. Rep. 800, 812 (C.P. 1866); *Briscoe v. LaHue*, 460 U.S. 325, 330-31, 75 L.Ed.2d 96, 103 S.Ct. 1108 (1983). The rule is equally well-established in American common law. *See Lawson v. Hicks*, 38 Ala. 279, 285-88 (1862); *Myers v. Hodges*, 53 Fla. 197, 208-10, 44 So. 357, 357-61 (1907); *Smith v. Howard*, 28 Iowa 51, 56-57 (1869); *Gardemal v. McWilliams*, 43 La. Ann. 454, 457-58, 9 So. 106, 108 (1891); *Burke v. Ryan*, 36 La. Ann. 951, 951-52 (1884); *McLaughlin v. Cowley*, 127 Mass. 316, 319-20 (1879); *Cooper v. Phipps*, 24 Or. 357, 363-64, 33 P. 985, 986-87 (1893); *Shadden v. McElwee*, 86 Tenn. 146, 149-54, 5 S.W. 602, 603-05 (1887); *Cooley v. Galyon*, 109 Tenn. 1, 13-14, 70 S.W. 607, 610 (1902); *Chambliss v. Blau*, 127 Ala. 86, 89-90, 28 So. 602, 603 (1900).

Plaintiff's claim for abuse of process fails as a matter of law. First, a proceeding instituted by the filing of a bar complaint is a sui generis proceeding that is quasi-judicial in nature. It is not legal process as contemplated by an action for abuse of process. Second, even if a bar complaint is a legal process, Washington State law makes clear that a witness who gives testimony in the form of filing a complaint is entitled to witness immunity. Certainly, the WSBA did not envision that a complaining witness of ethical misconduct should potentially be subjected to retributive action by the attorney who receives the complaint, due to the potentially severe limiting affect on witnesses to freely report potential misconduct.

Second, a claim for abuse of process requires that two elements be met: (1) the existence of an ulterior purpose - to accomplish an object not within the proper scope of the process, and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.

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As the record plainly shows, when construed in a light most favorable to the non-moving party, the defendant had no ulterior purpose in the filing of her bar complaint. The complaint was filed in good faith in order to receive the files pertaining to IP litigation that defendant purchased from HPV that attorney John Du Wors, and him alone, represented at all relevant times. Defendant had no other ulterior purpose, and attorney John Du Wors' Complaint does not plead any facts in support of such a purpose.

Next, attorney John Du Wors' Complaint pleads no facts to support that defendant committed an act that was not proper in the regular prosecution of the proceedings. The Complaint simply alleges an earlier action filed by defendant in the Western District Court of Washington that was dismissed on summary judgment, and which has absolutely no relevance to the matter at hand. Again, to sustain a cause of action for abuse of process, the Complaint must at least facially plead facts that support that the defendant committed an act *within* the prosecution of *that* proceeding that was not proper. No such facts were and cannot be pleaded in the context of defendant's filing of the bar complaint.

C. Plaintiff's Complaint Fails to Plead Plausible Claims For Malicious Prosecution

Malicious prosecution actions are not favored in law. *Bender v. Seattle*, 99 Wn.2d 582, 602-03, 664 P.2d 492 (1983); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 496, 125 P.2d 681 (1942). Washington courts strictly limit the right to bring suit for malicious prosecution, "reasoning that such suits intimidate prospective litigants and that the public policy favors open courts in which a plaintiff may fearlessly present his case." *Gem Trading Co. v. Cudahy Corp.*, 22 Wash.App. 278, 283, 588 P.2d 1222 (1978), *aff'd*, 92 Wash.2d 956, 603 P.2d 828 (1979).

In order to maintain an action for malicious prosecution, a plaintiff must plead and prove the following elements: (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through

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malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned (though the a malicious prosecution claim can be raised as a counterclaim under RCW 4.24.350); and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wash.2d at 558, 852 P.2d 295 (*quoting Peasley*, 13 Wash.2d at 497, 125 P.2d 681); *Bender v. City of Seattle,* 99 Wash.2d 582, 593, 664 P.2d 492 (1983); *Banks v. Nordstrom, Inc*., 57 Wash.App. 251, 255-56, 787 P.2d 953 (1990).

While actions for malicious prosecution began as a remedy for unjustifiable criminal proceedings, Washington law also recognizes this remedy where a civil suit has been wrongfully initiated. RCW 4.24.350(1); *see, e.g., Hanson v. Estell*, 100 Wash.App. 281, 286-87, 997 P.2d 426 (2000); *Gem Trading Co. v. Cudahy Corp.*, 92 Wash.2d 956, 964, 603 P.2d 828 (1979); *accord* Prosser and Keeton on the Law of Torts § 120 at 889 (W. Page Keeton ed., 5th ed. 1984) ("The action of malicious prosecution, which began as a remedy for unjustifiable criminal proceedings, has been undergoing a slow process of extension into the field of the wrongful initiation of civil suits.").

In Washington a malicious prosecution claim arising from a civil action requires the plaintiff to prove two additional elements: (6) arrest or seizure of property and (7) special injury (meaning injury which would not necessarily result from similar causes of action). *Gem Trading*, 92 Wash.2d at 963-64, 603 P.2d 828; *see also Petrich v. McDonald,* 44 Wash.2d 211, 216-22, 266 P.2d 1047 (1954). Although the malicious prosecution plaintiff must prove all required elements, malice and want of probable cause constitute the gist of a malicious prosecution action. *Hanson*, 121 Wash.2d at 558. As such, proof of probable cause is an absolute defense to a claim of malicious prosecution. *Brin v. Stutzman*, 89 Wash.App. 809, 819, 951 P.2d 291 (1998); *Hanson*, 121 Wash.2d at 558.

Looking at each element in turn, plaintiff cannot meet any of the seven elements of a malicious prosecution action; and, moreover, defendant can demonstrate she had probable cause for the filing of her bar complaint:

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(1) That the prosecution claimed to have been malicious was instituted or continued by the defendant

The defendant had a good faith basis to file the bar complaint against Mr. Du Wors. Attorney Mr. Du Wors' refusal to acknowledge defendant's prior request for files, coupled with the receiver's and his attorney's assertions that she must obtain the files from him, and waiting for over 5 months for a response, is prima facie evidence of a lack of malicious intent, especially in light of the fact that the bar complaint was the only mechanism which finally compelled Mr. Du Wors to respond.

(2) That there was want of probable cause for the institution or continuation of the prosecution

The court in *Brin* defined "probable cause" in the civil context:

> A civil plaintiff need not have the degree of certainty as to the existence of the facts on which the proceedings is based that is required of a prosecutor in a criminal proceeding. Instead, the civil plaintiff must have a reasonable belief that the relevant facts can be established through the trial process.
> *Brin*, 89 Wash.App. at 817 (*quoting* Restatement (Second) of Torts § 675 cmt. d. (1977)).

In *Estell*, the parties had been involved in litigation involving property boundaries. The plaintiff's claims were dismissed on summary judgment, as well as the defendant's counter-claim for malicious prosecution. The appellate court found that despite the dismissal of plaintiff's claims on summary judgment, this was "not determinative of the legitimacy of their arguments…" and because plaintiff's "suit was 'neither frivolous nor brought maliciously, as there were legitimate issues' requiring resolution by the court," there was thus "probable cause" to defeat the counterclaim for malicious prosecution. *Estell*, 100 Wash.App. at 430.

As the record makes clear, the defendant had "a reasonable belief that the relevant facts can be established" in the filing of the bar complaint. The defendant had made numerous written requests directly to attorney John Du Wors for a copy of the files, which requests were ignored

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by Mr. Du Wors. Defendant's attorney, Brandon Wayman, had received confirmation from the receiver's attorney for HPV that attorney John Du Wors was in possession of the files to which defendant was entitled. Defendant had a right to the files and attorney John Du Wors, up to the point of filing the bar complaint, had effectively ignored defendant's requests. Only after the filing of the bar complaint, and in response to it, did attorney John Du Wors present a declaration from the receiver of HPV that the files had already been produced to the Receiver. By any measure, the defendant had a good faith basis (and thus 'probable cause') to request the bar to investigate her grievance against attorney John Du Wors for violations of RPC 1.16.

(3) That the proceedings were instituted or continued through malice

As a term of law,

> [m]alice ... has a broader significance than that which is applied to it in ordinary parlance. The word "malice" may simply denote ill will, spite, personal hatred, or vindictive motives according to the popular conception, but in its legal significance it includes something more. It takes on a more general meaning, so that the requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff. Impropriety of motive may be established in cases of this sort by proof that the defendant instituted the criminal proceedings against the plaintiff: (1) without believing him to be guilty, or (2) primarily because of hostility or ill will toward him, or (3) for the purpose of obtaining a private advantage as against him.
> *Peasley v. Puget Sound Tug & Barge Co.,* 13 Wash.2d 485, 497, 502, 125 P.2d 681 (1942)), aff'd 22 Wash.App. 278, 588 P.2d 1222 (1978) (*quoting* Newell, Malicious Prosecution (1892), 237, § 3; 34 Am. Jur. 728, Malicious Prosecution, § 45; 38 C.J. 421-425, Malicious Prosecution, §§ 60-67; 3 Restatement, Torts (1938), § 668).

As the defendant's bar complaint makes clear, it was not brought with malice, but was brought in a good faith basis to obtain the litigation files related to the IP she had purchased. Moreover, as discussed *infra*, a bar complaint is not an "action" for which a claim for malicious prosecution can be brought, and thus, it cannot be brought with malice.

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(4) That the proceedings terminated on the merits in favor of the plaintiff, or were abandoned

RCW 4.24.350 requires that a malicious prosecution counterclaim be based on an "action," not merely a factual allegation.

> In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.
> RCW 4.24.350(1)

"Action 'in its legal sense means a lawsuit brought in a court, a formal complaint with the jurisdiction of a court of law.'" *Brin,* 89 Wash.App. at 816 (*quoting Black's Law Dictionary* 28 (6th ed.1990)); *see also Biggs v. Vail*, 119 Wash.2d 129, 136, 830 P.2d 350 (1992). A counterclaim for malicious prosecution under RCW 4.24.350 may be maintained in the same cause of action, but can only be based on an improperly filed cause of action and not on an invalid factual allegation made in support of a cause of action that is otherwise supported by probable cause. *Id*. at 817.

Plaintiff cannot meet his burden of proving this element as a matter of law. First, a bar complaint is not an "action." As discussed, *supra*, a bar complaint is *quasi-judicial* in nature and is filed with an administrative body, and not with a court. Should attorney John Du Wors attempt to argue that his Complaint was not filed as a counterclaim, and that RCW 4.24.350(1) does not mandate the filing of such an action as a counterclaim, defendant would note: a) plaintiff filed his Complaint shortly after the bar complaint was filed, *and both remain pending*, and b) the statute is nonetheless clear that a claim for malicious prosecution be filed in response

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to an "action," whether independently or as a counterclaim. Third, the Defendant has given notice of her intent to "abandon" that portion of her bar complaint that pertained only to the production of files. However, that does not mean the "proceeding terminated in favor of plaintiff." The WSBA always has the final say on whether to pursue ethical violations and determine what, if any, ethical violations occurred. *See* ELC 5.3(e) (stating, "None of the following alone requires dismissal of a grievance: the unwillingness of a grievant to continue the grievance, the withdrawal of the grievance, a compromise between the grievant and the respondent, or restitution by the respondent). Finally, while the defendant's bar complaint may have been based on an invalid factual allegation, attorney John Du Wors only produced the affidavit from the receiver *after* defendant had filed her complaint, the withholding of that information did not make the filing of the bar complaint improper. Mr. Du Wors had at least two prior opportunities to respond to defendant's requests, and months in which to make that response.

(5) That the plaintiff suffered injury or damage as a result of the prosecution

The plaintiff cannot demonstrate any injury or damage as a result of a bar complaint. As noted above, a bar complaint is not an "action" at law; it cannot cause injury or damage. Moreover, the filing of a bar complaint is not an action that the party can "prosecute." It is a *quasi-judicial* action in which the WSBA makes an independent determination whether to prosecute or dismiss. *See* ELC 5.3 "Investigation of Grievance." In other words, a finding of misconduct is not made by the party bringing the grievance; the misconduct is a determination by the WSBA that an attorney violated an ethical rule. There can be no "injury" regardless of what the WSBA determines, as the inquiry concerns only whether a lawyer acted in compliance with his/her ethical duties as an attorney.

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(6) Arrest or seizure of property

There has been no arrest or seizure of property.

(7) Special injury (meaning injury which would not necessarily result from similar causes of action)

There cannot be any special injury, as no injury can result merely from a proceeding into whether an attorney complied with his/her duties under the RPCs.

V. CONCLUSION

Based upon the facts and pleadings herein, plaintiff's complaint must be dismissed for failure to state a viable cause of action. More importantly, CR 11 sanctions are appropriate against the plaintiff. Attorney John Du Wors is a sophisticated IP attorney with a downtown Seattle office. He has been in practice for over 10 years. On its face, he knowingly filed a complaint that had absolutely no merit for the purpose of retaliation against defendant for filing her bar complaint: he filed the complaint in Kitsap County, despite the fact that defendant lives in King County; his office is in Seattle; the relevant facts and events all occurred in King County; he vigorously pursued discovery knowing the matter was frivolous, even demanding a deposition on December 23, 2015, just two days before Christmas, and served interrogatories requesting production of all personal emails between defendant and her friends, family, and significant other. Mr. Du Wors clearly sought to harass and embarrass defendant.

Defendant requests dismissal of attorney John Du Wors' Complaint and leave to brief the court on the issue of attorney fees and sanctions under CR 11.

Dated this 28th day of December, 2015

/s/ Reed Yurchak

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