

1 Judge Nicole Gaines Phelps
2 Filed: Friday, January 3, 2020 at 11:00 a.m.
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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF KING

9 LARGO WALES, a married woman,

10 Plaintiff,

11 v.

12 CITY OF AUBURN, WA, a Washington,
13 State municipality; NANCY BACKUS, as
14 Mayor of the City of Auburn, and
15 Individually and her marital community;
16 and The Committee to Elect Nancy
Backus and
its J. Doe committee members thereto; and
ROB ROSCOE and his marital
community,

17 Defendants.

No. 19-2-20274-2 KNT

DEFENDANTS CITY OF AUBURN,
ROB ROSCOE AND MAYOR
NANCY BACKUS' REPLY RE:
CR 12(b)(6) MOTION TO DISMISS
PLAINTIFF'S COMPLAINT

18
19 **I. REPLY**

20 Rather than address unassailable legal authority cited by Defendants, Plaintiff
21 appears to express disbelief regarding the state of the law in Washington, despite a plethora
22 of legal authority specifically establishing that she cannot pursue civil claims based on
23 alleged violations of the Washington State Constitution. However, ignorance of the law does
24 is not cause to ignore it. The court should enter an order dismissing Plaintiff's Complaint.

25 **A. Plaintiff Still Fails to State a Claim on Which Any Relief Can be Granted and
26 Thus Her Complaint Should Be Dismissed as a Matter of Law Pursuant to
27 CR 12(b)(6).**

Plaintiff fails to even acknowledge, must less respond to, well-established

1 Washington barring private civil claims based on the State constitution. *See, Blinka v. Wash.*
2 *State Bar Ass'n*, 109 Wn.App. 575, 591, 36 P.3d 1094 (2001), *rev. den.* 146 Wn.2d 1021
3 (2002). *Sys. Amuse., Inc. v. State*, 7 Wn.App. 516, 517, 500 P.2d 1253 (1972); *Spurrell v.*
4 *Bloch*, 40 Wn.App. 854, 860–61, 701 P.2d 529 (1985); *Reid v. Pierce County*, 136 Wash.2d
5 195, 961 P.2d 333 (1998). This is the “common law” of the State as established by
6 Washington appellate jurisprudence. Plaintiff’s statement in her response brief that “the
7 remedy flows from the common law underneath, and incorporated into, the Washington
8 State Constitution” (p. 3, ll. 28-29) is simply wrong.

9 Contrary to Plaintiff’s argument suggestion that precluding civil claims eviscerates
10 the individual rights protected by the Washington Constitution, the teeth are sharpened by
11 authorizing courts to void government conduct that violates such rights. *See, Systems*
12 *Amuse., Inc. v. State*, 7 Wn.App. 516, 517, 500 P.2d 1253 (1972) (while acts that violate
13 constitutional protection may be declared void by the courts, the state constitution does not
14 provide a private cause of action). In *Systems Amusement*, the court specifically declined to
15 create a new cause of action based on an alleged violation of the State Constitution. Sixteen
16 years later, the Washington Supreme Court similarly refused to create a private right of
17 action based on violation of privacy rights established under Art. 1 §7. *Reid v. Pierce Cty.*,
18 136 Wn.2d 195, 961 P.3d 333 (1998)(dismissing constitutional claims pursuant to
19 CR 12(b)(6).

20 This is why most Washington caselaw citing the State Constitution—including most
21 cases cited by Plaintiff-- arises in the criminal context. *See, e.g. State v. Afana*, 169 Wn.2d
22 169, 233 P.3d 879 (2010) (excluding evidence obtained during warrantless search of car that
23 did not meet the more restrictive privacy standards under the Washington Constitution
24 during criminal trial); *State v. Arreola*, 176 Wn.2d 284, 290 P.3d 983 (2012)(and cases cited
25 in excerpt)(describing higher level of restriction on warrantless searches and seizures by law
26 enforcement under Art. I, §7 of the Washington Constitution than under the Federal Fourth
27

1 Amendment for purposes of determining exclusion of evidence in criminal cases). None of
2 these cases in any way suggest that a private right of action for damages follows upon
3 establishing a violation of the State Constitution.¹

4 Like the United States Constitution, the Washington Constitution simply does not
5 establish a cognizable cause of action for enforcement of rights protected “without the aid of
6 augmentive legislation.” *Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d
7 1094, 1102 (2001). While 42 U.S.C §1983 provides a vehicle for a certain scope of civil
8 claims against certain parties to remedy Constitutional rights under the Federal Constitution,
9 the Washington legislature has never adopted such parallel legislation at the State level.

10 **B. Plaintiff’s Failure to State An Actionable Claim is Not Simply a Matter of**
11 **Inartful “Notice” Pleading.**

12 Here, Plaintiff has filed three different Complaints in this action thus far. Under the
13 standards applied in a CR 12(b)(6) motion, the court should assume—for purposes of this
14 motion only—that all factual allegations in Plaintiff’s Complaint are true. The question here
15 is whether she has stated an actionable, substantive *legal* claim.² Despite filing three
16 Complaints and a substantive response to Defendants’ Motions to Dismiss, plaintiff still fails
17 to identify one.

18 *Champagne v. Thurston Cty.*, 163 Wn.2d 69, 85, 178 P.3d 936 (2008), cited by
19 Plaintiff, is distinguishable. There, the Defendant has argued that Plaintiffs had not clearly
20 articulated the basis of their claims because they had not specified the nature of remedy
21 sought pursuant to each legal theory. However, the court ruled that the Plaintiffs had
22 provided sufficient notice of its intent to pursue claims pursuant to the terms of three
23 different wage loss statutes by *specifically referencing the statutes* in the Complaint. Here,

24 _____
25 ¹ Indeed, if it did, there would no doubt be a corresponding civil lawsuit following each and every one of the
26 criminal cases in which the courts found a violation of the State Constitution resulting from a warrantless arrest
27 or other law enforcement conduct.

² A complaint may be lacking for one of two reasons: (i) absence of a cognizable legal theory, or (ii)
insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534
(9th Cir. 1984).

1 Plaintiff is not pursuing claims based on statutes or legal theories other than alleged
2 violation of “rights” and “duties” established by the terms of the Washington State
3 Constitution.

4 Plaintiff’s first Complaint was titled “Complaint for damages violation of freedom of
5 speech, right to privacy;” the Complaint failed to cite to any substantive source of law under
6 which she was pursuing claims but included language asserting Defendants acted “under
7 color of law” and violated Plaintiff’s “right to exercise free speech” and “right to privacy”—
8 language indicative of state and federal constitutional standards. *See, Complaint filed August*
9 *1, 2019.*

10 Plaintiff then amended her Complaint on September 12, 2019, adding references to
11 alleged violations of her “United States First Amendment right to free speech,” and
12 “expectation of privacy” “as enunciated by the Washington State Constitution.” *See,*
13 *Amended Complaint*, p. 2 ¶1 and p. 3, ¶1. A week later, Plaintiff further amended her
14 Complaint, deleting references to the Federal Constitution and specifying that her claims
15 were based on Article 1, Sections 5 and 7 of the Washington State Constitution—rights to
16 free speech and privacy. *See, Second Amended Complaint*, p. 2 §1 and p. 3 §1-2.³

17 Plaintiff clearly, intentionally, and expressly limited the causes of action she is
18 pursuing to claims based solely on Art. 1 §7 of the Washington Constitution. No statutory
19 claims. No Federal claims. No tort claims. In fact, if Plaintiff’s Complaint had plead any tort
20 claims against the municipal Defendants here, additional defenses would bar such claims,
21 including failure to file a tort claim and statutes of limitations. No such claims were plead,
22 however, after filing three versions of the Complaint, and thus there has not been a basis for
23 raising such claims. Plaintiff’s failure to file a tort claim or affirmatively plead that she
24 complied with the pre-filing tort claim requirements of RCW 4.96.020 (requiring filing of
25

26 ³ On October 23, 2019, Defendants served Plaintiff with notice of the hearing on Defendants Motion to
27 Dismiss on December 6, 2019, the first date the court had available. Subsequently, the motion was re-noted on
January 3, 2020 at Plaintiff’s request.

1 tort claim as condition precedent to pursuing a tort claim against a local government entity)
2 further evidences her intent to pursue only claims based on the Washington State
3 Constitution as plead in her Complaints.

4 There is nothing unclear about the remedies Plaintiff seeks; each version of her
5 Complaint specifies she is seeking damages and attorney fees. Even in her response, she
6 reiterates that she is pursuing damages claims base on “rights enumerated in the Washington
7 State Constitution.” Defendants promptly moved for dismissal of these claims pursuant to
8 CR 12(b)(6) instead of first filing an Answer as allowed by CR 12(b).⁴

9 **II. CONCLUSION**

10 Based on the foregoing, the court should enter an order dismissing Plaintiff’s Second
11 Amended Complaint and all claims and causes of action therein as a matter of law.

12
13 *I certify that this memorandum contains 1,326 words, in compliance with the Local*
14 *Civil Rules.*

15
16 DATED: December 6, 2019

17 KEATING, BUCKLIN & McCORMACK, INC., P.S.

18
19 By: /s/ Jayne L. Freeman

20 Jayne L. Freeman, WSBA #24318
21 *Attorney for Defendants City of Auburn, Rob Roscoe,*
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27 ⁴ If Federal claims had been included in the Complaint, Defendants would also have the option of removing the matter to Federal court.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on December 6, 2019, a true and correct copy of the foregoing DEFENDANTS CITY OF AUBURN, ROB ROSCOE AND MAYOR NANCY BACKUS' REPLY RE: CR 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT was served upon the parties listed below *via the King County Superior Court Efiling system and courtesy email:*

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DATED this 6th day of December, 2019, at Seattle, Washington.

/s/ LaHoma Walker
LaHoma Walker, Legal Assistant