NO. 90507-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 69830-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ESTATE OF GARY FILION, by and through
Lester Filion as personal representative,

Respondent,

v.

JULIE JOHNSON,

Petitioner.

FILED
JUL 21 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

AMENDED PETITION FOR REVIEW

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FILED
JUL 17 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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ORIGINAL

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A. IDENTITY OF PETITIONER

Julie Johnson asks this court to accept review of the Court of Appeals decisions terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Johnson asks this court to review the following parts of the decision filed May 12, 2014:

(1) The conclusion that the trial court properly denied Johnson's motion for summary judgment and properly ordered that Johnson is precluded from raising the anti-SLAPP [RCW 4.24.510, *not RCW 4.24.525*] defense at the trial-de novo.

(2) The conclusion that Johnson waived her defense of absolute immunity under RCW 4.24.510 by failing to assert the defense in a document labelled "answer";

(3) The conclusion that Johnson's assertion of the RCW 4.24.510 immunity defense was dilatory;

(4) The unstated conclusion that Filion was surprised or prejudiced by the manner in which Johnson asserted the RCW 4.24.510 immunity defense;

(5) The denial of Johnson's timely motion for reconsideration.

A copy of the May 12, 2014, decision is in the Appendix at pages A-3 through A-10.

A copy of the June 6, 2014, order denying Johnson's motion for reconsideration is in the Appendix at page A-2.

C. ISSUES PRESENTED FOR REVIEW

(1) Where a complaint seeks to impose civil liability for money damages based upon a protected party's communications with law enforcement, i.e. Johnson's call to 911 and her report to the responding deputy sheriff in which she reported that plaintiff committed a restraining order violation, does the complaint fail to state a claim upon which relief can be granted?

(2) Where a pro se defendant's answer pleads the defense that *"Plaintiff has failed to state a claim against defendant on which relief may be granted"*, has the answer sufficiently informed plaintiff of the nature of the defense of immunity under RCW 4.24.510?

(3) Where defendant raised the RCW 4.24.510 immunity defense as a CR 12(b)(6) motion to dismiss which is heard and fully addressed by both parties as a motion for summary judgment, and is denied by the trial court, must defendant amend her pleadings to state the defense in a document labelled "answer" in order to preserve the defense in the case?

(4) Where the RCW 4.24.510 immunity defense is actually tried in mandatory arbitration, and defendant prevails on the basis of that

defense in arbitration, is the defense preserved as having been "tried with the parties' express or implied consent". *Henderson v. Tyrrell,* 80 Wn. App. 592, 624, 910 P.2d 522 (1996)

(5) Where both parties have briefed and argued the defendant's RCW 4.24.510 immunity defense multiple times on the record before trial, and on defendant's prior appeal in Court of Appeals Division One case no. 63978-1-I, and in the subsequent mandatory arbitration hearing, and in the proceedings on the second motion for summary judgment, and the plaintiff is undeniably and admittedly fully informed of the factual and legal basis of the defense, may the trial court none-the-less bar defendant from asserting and relying upon the defense at trial de-novo?

D. STATEMENT OF THE CASE:

The marriage between Gary Filion and Julie Johnson was dissolved by decree entered June 1, 2006, in Snohomish County Superior Court. The decree contains an order that restrains each party from:

> "going onto the grounds of or entering the home, work place or school of the other party"
>
> "knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the other party, or the day care or school of these children listed above."
> (CP 217 l. 18 to CP 218 l. 16; Appendix pp. 65 – 66)

In addition to the restraining order, the decree provided that Filion was to retrieve certain personal property items from Johnson's residence within 30 days of entry of the Decree. (CP 28 & 29; CP 212 & 213)

Johnson's residence had been sold. The buyers were to have possession by 9:00 p.m. on August 1, 2006. (CP 200 – 201) Johnson's packing to move took longer than anticipated. The parties' realtor spoke with Johnson that morning and was informed that Johnson would not be moved out before 9:00 p.m. that evening. (CP 198, l. 6 – 8)

The realtor visited Johnson's residence at 1:00 p.m. on August 1 to see how things were going and found that *"It was obvious that Johnson would need all the time prior to her 9:00 p.m. deadline to finish packing and moving."* (CP 198, l. 8 – 10)

The realtor phoned Filion and told him that Johnson would not be out of the house until 9:00 p.m. that evening. Filion told the realtor that he was going to the house at 4:00 pm with a truck to pick up furniture & personal belongings. (CP 198, l. 14 – 17)

The realtor phoned Johnson and told her that Filion said he was coming over to pick some things up. Johnson told the realtor, *"He better not or I'll call the cops."* (CP 198, l. 18 – 19)

Filion called the realtor again and asked if she had told Johnson he was coming over. The realtor told him, *"Yes, I did"*. Filion asked, *"What*

did she say?" The realtor told him that Johnson had said, *"He better not!"* and that *"the house is a mess and it will be a small miracle if Julie completes her move by the 9:00 p.m. deadline."* (CP 198, l. 20, to CP 199, l. 1)

Despite the restraining order, and despite having been informed that Johnson and her children would still be at the residence until 9:00 p.m., Filion came to the door of Johnson's home at 4:00 p.m. August 1, 2006. Through the kitchen window, Johnson saw him approach. She saw a moving truck come up her driveway. It stopped near the garage door. She saw Filion get out of the truck. Johnson had a panic attack and took a Xanax. Filion came to the front door, knocked, and rang the doorbell. Johnson called 911. Filion was told by one of Johnson's helpers that he should not be there and the police are on their way. (CP 102 – 107, at ¶¶ 5 – 6) (CP 185) Filion left the premises and was gone before the deputy sheriff arrived. (CP 190 -191, at ¶ 4).

A King County Deputy Sheriff arrived shortly, took a statement from Johnson, and completed an Incident Report dated August 1, 2006, (CP 226 – 230)

On August 16, 2006, the prosecuting attorney for the City of Shoreline, King County, Washington, filed a complaint in King County District Court charging Filion with willfully violating the terms of a

restraining order in violation of RCW 26.50.110. (CP 206)

On August 16, 2006, the district court clerk issued a Summons/Subpoena/Notice for Filion to appear for arraignment on August 28, 2006 at 8:45 AM. (CP 204) Filion appeared and entered a plea of "Not Guilty". (CP 234) The criminal case was dismissed on October 12, 2006. (CP 236)

On February 21, 2007, Filion filed this action in King County Superior Court, case no. 07-2-06353-6 SEA against Johnson and her dissolution lawyer Mark Olson. The complaint seeks civil money damages from Johnson based on her August 1, 2006 call to 911 and her report to the responding deputy sheriff. (CP 3 – 4; Appendix pp. 42 – 43)

Johnson's pro se answer filed May 16, 2007 (CP 8 to 10; Appendix pp. 47 - 49) denies Filion's claims and asserts affirmative defenses, including:

> 2. Failure to State a Claim on Which Relief Can Be Granted. Plaintiff has failed to state a claim against defendant Julie Johnson on which relief may be granted." (CP 9, l. 21 – 23) (App. p. 48)

and the prayer of her answer requests that plaintiff's claims be dismissed with prejudice, that the court enter judgment in Johnson's favor, that plaintiff be awarded nothing, for her costs and disbursements, for her reasonable and actual attorney's fees, and for such other and further relief as the court deems just and equitable. (CP 10, l. 11 – 22; Appendix p. 49)

The Court of Appeals opinion states that *"Johnson engaged in trial preparation without demonstrating any intent to pursue the defense."* (2nd full paragraph at p. 6 of May 12, 2014, unpublished opinion) This statement misconstrues the trial court record.

Filion filed his original complaint on February 21, 2007. (CP 4; Appendix p. 42). It names the following persons as defendants:

> JULIE JOHNSON and MARK OLSON and JANE DOE OLSON, husband and wife, and their marital community.

Filion filed an Amended Complaint on April 9, 2007. (CP 5; Appendix p. 44)

Johnson filed her *pro se* answer on May 16, 2007. (CP 8; Appendix p. 47)

Filion filed a Second Amended Complaint, without leave of court, on August 15, 2007 (CP 11; Appendix p. 50). His Second Amended Complaint no longer lists MARK OLSON and JANE DOE OLSON, husband and wife, and their marital community, as defendants. Rather, their names are replaced in the caption by OLSON and OLSON PLLC, a legal services corporation as defendant in their place. (CP 11; Appendix 50)

Attorney Mark Olson d/b/a OLSON and OLSON PLLC was Johnson's lawyer in the Filion/Johnson dissolution of marriage case.

Filion's claims against Olson were dismissed by order entered February 8, 2008. (See p. 8 of Appendix to Appellant's Opening Brief filed in the Court of Appeals). All activity in the case through February 2008 was between Filion and Olson. During that time, the only activity involving Johnson was the filing of her *pro se* answer on May 16, 2007. (CP 8)

There was minimal "trial preparation" activity involving Filion and Johnson prior to the filing of Johnson's October 24, 2008 CR 12(b)(6) Motion to Dismiss. (CP 42 – 44; Appendix 58 – 66). The Court of Appeals opinion cites the parties had "demonstrated the ability and intent to litigate":

> Joint Confirmation Regarding Trial Readiness filed July 14, 2008. (CP 632; Appendix p. 53); and
>
> Plaintiff's Jury Demand filed July 17, 2008. (CP 716; Appendix p. 55)

Rather than proceed to trial in superior court, the parties stipulated to transfer the case to mandatory arbitration. The case was transferred to mandatory arbitration on July 24, 2008. (CP 634; Appendix p. 56)

On October 24, 2008, Johnson filed her MOTION TO DISMISS UNDER CR 12(b)(6), FOR CR 11 SANCTIONS, AND FOR COSTS, ATTORNEY FEES, AND STATUTORY DAMAGES, raising her defense of absolute unqualified statutory immunity and requesting an award of her expenses, reasonable attorney fees, and statutory damages of

$10,000.00 under RCW 4.24.510. (CP 36 to 63); at Appendix pp. 58 – 66 without all the attachments)

On October 29, 2008, the trial court ordered that Johnson's CR 12(b)(6) motion be heard as a motion for summary judgment under CR 56. (CP 73; Appendix p. 67) The summary judgment hearing was held on November 21, 2008, before the Honorable Douglas McBroom, who retired shortly after. The court entered an order that states in whole as follows:

> "This Court, having heard a motion to dismiss pursuant to (12)(b)(6)
> "IT IS HEREBY ORDERED that the motion is denied."
> "DATED this 21st day of November, 2008.
> "Honorable Douglas D. McBroom"
>
> (CP 108 - 109; Appendix p. 79)

The case was referred to arbitration under the Superior Court Mandatory Arbitration Rules. Johnson's arbitration brief is devoted to her defense of immunity and claim for an award of expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510. (CP 704 – 708; Appendix pp. 80 – 84) The parties attended a one-day arbitration hearing.

The arbitrator's award was filed on March 4, 2009. Though not a model of clarity, the award finds for Johnson on the basis of immunity under RCW 4.24.510, the sole basis which Johnson asserted for dismissal of Filion's claims and for an award of expenses, attorney fees, and statutory damages. There is no other legal basis upon which a claim for

statutory damages could have been asserted by Johnson in this case. Thus, it is patently obvious on the face of the arbitrator's award that the finding for Johnson is based on her RCW 4.24.510 claim of statutory immunity. (CP 110 – 111; Appendix pp. 85 – 86)

Johnson filed and served a REQUEST FOR TRIAL DE NOVO AND FOR CLERK TO SEAL ARBITRATION AWARD on April 2, 2009, together with payment of the $250.00 trial de novo filing fee. (CP 122 – 123; Appendix p. 88)

Filion then changed lawyers and filed a MOTION TO DISMISS ALL CLAIMS on May 11, 2009 (CP 675 – 679) supported by two declarations of counsel. (CP 680 – 697) Johnson responded on May 15, 2009, again asserting her claim of immunity and for an award of expenses, attorney fees, and statutory damages under RCW 4.24.510. (CP 698 – 703) Filion filed a declaration of counsel (CP 713 – 730) and a memorandum in reply (CP 731 – 742). Johnson replied, again discussing the RCW 4.24.510 defense in detail. (CP 743 – 750) The motion to dismiss was denied. (CP 119 – 121) On May 19, 2009, Filion filed a second CR 41(a) MOTION FOR DISMISSAL OF ALL CLAIMS BEFORE RESTING. (CP 124 - 129) An order dismissing the case was entered. (CP 130 - 131)

On Johnson's appeal from the order of dismissal, the Court of

Appeals reversed. Unpublished opinion filed November 22, 2010, in Court of Appeals, Division One, case no. 62978-1-I. (CP 136 – 139; Appendix pp. 99 – 102) Filion's petition for review. Review was denied. The Mandate was filed in King County Superior Court on January 3, 2012. (CP 135; Appendix p. 98)

The case was set for trial.

The parties' motions for summary judgment filed in October 2012 were heard on November 2, 2012, by Honorable Sharon S. Armstrong, Judge, King County Superior Court. (VRP 11/02/2012)

Filion's motion was denied by order dated November 5, 2012. (CP 338 – 340)

Johnson's motion was denied by order filed on November 7, 2012. (CP 341 – 348; Appendix 18 -15)

The parties appeared for trial before the Honorable Michael J. Hayden, Judge, King County Superior Court, on December 19, 2012. Counsel and the court engaged in colloquy and, rather than proceed to trial, the parties agreed to entry of a STIPULATED JUDGMENT which preserves for appeal Johnson's argument that her defense of immunity and claims under RCW 4.24.510 were erroneously denied and barred by the trial court. (CP 449 -454; Appendix pp. 12 - 17)

The judgment provides, among other things, that:

"For purposes of preserving her argument on appeal and making a record, the Parties agree that the Defendant did in fact again assert her anti-slapp defense to the trial Court before the jury trial was to begin on December 19, 2012, but the Court, in reliance on Judge Armstrong's prior ruling (which precluded the Defendant's attempt to raise the anti-slapp statute (RCW 4.24.510)), also precluded and barred the Defendant from raising the 4.24.510 immunity defense at trial." (CP 452, l. 8 – 14)

5) Also added below. (CP 453, l. 20)

"# 5) This stipulation and judgment is not intended to be construed to prejudice or preclude Defendant's rights to appeal the denial of her claim for the defense of RCW 4.24.510 (immunity/anti-slapp)" (CP 454, l. 10 – 17)

Johnson appealed on January 18, 2013. (CP 609 – 624) See Court of Appeals unpublished decision filed May 12, 2014. (Appendix 3 – 10)

Johnson timely filed a motion for reconsideration. The order denying reconsideration was filed June 6, 2014. (Appendix p. 2)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because:

1. The Court of Appeals' decision is in conflict with other decisions of the Court of Appeals; and

2. The petition involves issues of substantial public interest that should be determined by the Supreme Court, i.e. whether a person protected by a restraining order who communicates a restraining order violation to 911 and the responding officer, is immune under RCW 4.24.510 from civil claims for money damages and has the right to recover expenses, attorney fees, and statutory damages under the circumstances of this case where the protected person is sued based solely upon the

content of her report to law enforcement of the restraining order violation.

The standard of review in this matter is de novo. The trial court's decision turns on a substantive issue of law. *Washburn v. City of Federal Way*, 283 P.3d 567, 169 Wn.App. 588 (2012)

The purpose of the immunity granted by RCW 4.24.510 is to prevent the filing of a lawsuit in the first place. Regarding claims of qualified immunity, our courts have held that:

> "It is particularly important that good faith (or its absence) in a qualified immunity situation be determined promptly ... a prompt determination is vital because qualified immunity is not simply a defense to liability but a protection from suit." *Dutton v. Washington Physicians Health Program, 87 Wash.App.* 614, 622-23, 943 P.2d 298 (1997).

The principle stated in *Dutton*, supra, certainly applies in a case such as this where the RCW 4.24.510 statutory grant of immunity is absolute and unqualified.

RCW 4.24.500 explicitly recognizes that *"The costs of defending against such suits can be severely burdensome."* Johnson's repeated requests for dismissal based on RCW 4.24.510 were denied by the trial court. As a result, both sides continued to incur substantial attorneys' fees, costs, and expenses in this matter.

Filion should not have filed this lawsuit in the first place. When

Johnson first asserted her RCW 4.24.510 immunity defense, Filion should have recognized that his claims are barred and taken this case no further.

The superior court's order denying Johnson's motion for summary judgment states

> "However, because trial is imminent, the court takes this opportunity to discuss whether RCW 4.24.510, Washington's Anti-SLAPP statute, applies to these facts at all."
>
> (CP 342 l. 9 – 12)
>
> " * * * the content of defendant's call to police concerned a private matter: her attempt to keep the husband off her property so she could complete her packing. The expression was made privately, in a call to police, not in a public statement. And the purpose of the speech served her private concern to keep the husband off her property, not a public discussion."
> (CP 347 l. 17 – 22)
>
> "This court concludes that the conduct of the defendant here is not within the scope of RCW 4.24.510."
>
> (CP 348 l. 5 – 6)

The Court of Appeals stated basis for affirming the trial court is that Johnson had not timely or properly asserted her RCW 4.24.510 immunity defense. However, the established case law on this issue is in conflict with the Court of Appeals' decisions in this case.

Johnson is entitled to protection of immunity established by RCW 4.24.510 in this case.

RCW 4.24.500 provides that:

> "Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies."

RCW 4.24.510 provides that:

> "A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to 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, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith."

The 2002 statutory amendments to RCW 4.24.510 removed the "good faith" element and made the grant of immunity under RCW 4.24.510 absolute and unqualified. There is no issue of "good faith" on the question whether Johnson is protected by immunity under RCW 4.24.510. Immunity under RCW 4.24.510 is not qualified or conditioned

upon considerations of whether the communication to the government agency by the target of the lawsuit was made in good faith. *Bailey v. State*, 147 Wn.App. 251, 260-63, 191 P.3d 1285 (2008).

Although RCW 4.24.500 references protection for "good faith" reports, as explained in *Bailey*, intent statements do not control over the express language of an otherwise unambiguous statute. 147 Wn. App. at 262-63. The legislative decision to remove a good faith reporting requirement from RCW 4.24.510 cannot be undone by its failure to similarly amend the intent section. Id. See also *Lowe v. Rowe*, 294 P.3d 6 (Decided 12/06/2012; Ct of App Div 3 case no. 30282-2; Publication Ordered Jan. 31, 2013)

For RCW 4.24.510 immunity to apply, Johnson only needed to establish that she communicated to law enforcement concerning a matter within its responsibility. She so established. Filion admits that Johnson so established. The trial court erred in concluding that the RCW 4.24.510 statutory immunity does not apply to Johnson's August 1, 2006 call to 911 and report to the responding law enforcement officer.

This court has held that RCW 4.24.510 immunity applies to communications with the police and law enforcement. *Dang v. Ehredt*, 95. Wn. App. 670, 977 P.2d 29, review denied. 139 Wn.2d 1012 (1999) (bank employees called 911 to report what they mistakenly believed was a

counterfeit check); to communications with officials of a land development division and county executive. *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697, review denied, 125 Wn.2d 1010 (1994); and to communications with judicial offices such as Superior Court Administration. *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 20 P.3d 946 (2001).

The facts of this case are similar to *Dang v. Ehredt,* supra. In *Dang* a bank, through its employees, called 911 to report that *Dang* was attempting to pass a counterfeit check. The police came to the bank and arrested *Dang,* who later sued the bank and its employees among others for damages. When it was later determined that the check was valid and not counterfeit, *Dang* was released and the charges were dismissed. The *Dang* court held that the bank and its employees, who did nothing to restrain or otherwise imprison Ms. Dang other than call and make a report to 911, are entitled to immunity from liability for their actions under RCW 4.24.510.

An affirmative defense raised in a CR 12(b) motion is not waived by failing to plead it in a document labeled "answer". Civil Rule (CR) 8(c) requires responsive pleadings to set forth "any ... matter constituting an avoidance or affirmative defense," including statutes of limitation. Affirmative defenses are waived unless they are (1) affirmatively pleaded,

(2) asserted in a motion under CR 12(b), or (3) tried by the parties' express or implied consent. *In re Estate of Palmer*, 187 P.3d 758, 145 Wn.App. 249, 258 (Wash.App. Div. 2 2008); *Harting v. Barton,* 101 Wash.App. 954, 962, 6 P.3d 91 (2000).

In *Henderson v. Tyrrell*, 910 P.2d 522, 80 Wn.App. 592 (Wash.App. Div. 3 1996) this court explained that

> "Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties." Bernsen v. Big Bend Elec. Coop., 68 Wash.App. 427, 433-34, 842 P.2d 1047 (1993). However, in light of the rule's policy to avoid surprise, affirmative pleading sometimes is not required:
>
> "It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. Tillman v. National City Bank, 118 F.2d 631, 635 (2d Cir.1941) [cert. Denied, 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521 (1941)]. Also, objection to a failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense. Joyce v. L.P. Steuart, Inc., 227 F.2d 407 (D.C.Cir.1955). There is a need for such flexibility in procedural rules. In the present case, the record shows that a substantial portion of [910 P.2d 541] plaintiff's trial memorandum and the entire substance of the hearing on summary judgment concerned the effect of the liquidated damages clause. **To conclude that defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings**

> **which is both unnecessary and contrary to the policy underlying CR 8(c), and we refuse to reach such a result.**
> (Emphasis in **bold** added)

Even where an affirmative defense is not "(1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties", the defense is not waived. "[I]f the substantial rights of a party have not been affected, noncompliance is considered harmless and the defense is not waived." See *Bernsen v. Big Bend Elec. Co-op., Inc.*, 842 P.2d 1047, 68 Wn.App. 427 (Wash.App. Div. 3 1993) where the appellate court ruled that the affirmative defense of failure to mitigate was not waived though not affirmatively pleaded nor asserted in a motion under CR 12(b) because the parties had argued mitigation and the trial court ruled on it. Thus, the defense of mitigation was treated as if raised in the pleadings.

Johnson's failure to plead the RCW 4.24.510 defense in a document labelled "answer' clearly did not affect any substantial right of the plaintiff Filion. As shown by the record, Filion was neither surprised nor prejudiced. He briefed and argued the merits of the defense on Johnson's CR 12(b)(6) motion in 2008. It was the deciding element in the 2009 mandatory arbitration hearing. Filion addressed it in detail on his 2009 motions to dismiss all claims, on the prior appeal in this case, and in his papers for the summary judgment proceedings in 2012.

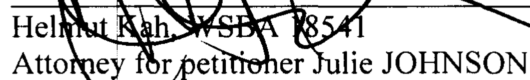
The mandatory arbitration hearing is the trial on the merits and the trial de novo is an appeal from the arbitrator's decision. *Singer v. Etherington,* 57 Wn.App. 542, 789 P.2d 108 (1990); *Valley v. Hand,* 38 Wash.App. 170, 684 P.2d 1341, review denied, 103 Wash.2d 1006 (1984) The RCW 4.24.510 immunity defense was tried on the merits at the mandatory arbitration hearing. How then could the superior court properly bar Johnson from relying upon that defense at the trial de novo?

The state of Washington has a strong policy of protecting parties from domestic violence and from violations of restraining orders issued in dissolution and domestic violence cases. See RCW 26.50.110; RCW Chapter 10.99; *State v. Bunker,* 169 Wn.2d 571, 238 P.3d 487 (2010).

F. CONCLUSION

This court should accept review for the reasons stated above, reverse the Court of Appeals, hold Johnson is entitled to the defense of immunity under RCW 4.24.510 and her expenses and reasonable attorney fees in the trial court, on appeal, and on review, plus statutory damages, and reverse the awards of costs and attorney fees to Filion.

Respectfully submitted this 16th day of July, 2014.



Helmut Kah, WSBA 18541
Attorney for petitioner Julie JOHNSON

King County Superior Court
Case No. 07-02-06353-6 SEA

COURT OF APPEALS
DIVISION ONE
DECISIONS

Appeal No. 69830-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ESTATE OF GARY FILION, by and through Lester Filion as personal representative, Respondent, v. JULIE JOHNSON, Appellant.	)	No. 69830-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Julie Johnson, having filed her motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 6th day of June, 2014.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN -6 PM 3:48

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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ESTATE OF GARY FILION, by and through Lester Filion as personal representative,	)	No. 69830-3-I
Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
JULIE JOHNSON,	)	
Appellant.	)	FILED: May 12, 2014

APPELWICK, J. — Johnson appeals the dismissal of her anti-SLAPP defense against Filion's malicious prosecution suit. The trial court found that Johnson failed to affirmatively plead the defense and thus had waived it. Because Johnson was unable to assert the defense, she could not improve her position on trial de novo following arbitration. Accordingly, the trial court awarded Filion fees under MAR 7.3. We affirm.

FACTS

Julie Johnson and Gary Filion dissolved their marriage in 2006. Their divorce was contentious. Their dissolution decree contained a mutual restraining order preventing them from going onto the grounds of or entering the home, school, or workplace of the other.

The dissolution decree awarded Filion several items of personal property, which he was to pick up from Johnson's residence. The decree provided that "[s]aid items shall be picked up by the Husband at an agreed time at the Shoreline house within 30 days of entry of the Decree."

Johnson sold the Shoreline home. The closing date, including transfer of possession to the buyer, was August 1, 2006, at 9:00 p.m. Johnson and Filion agreed through their attorneys that Filion would pick up his belongings on the afternoon of August 1, any time after 2:00 p.m. Johnson's attorney indicated that Johnson would move her belongings out on July 31.

However, on the morning of August 1, Johnson's real estate agent discovered that Johnson was not finished packing and would not be done until the 9:00 p.m. deadline. The agent informed Filion, who responded that he would still be at the house at 4:00 p.m. to pick up his belongings. When Johnson learned that Filion intended to do so, she told the agent that "'[h]e better not or I'll call the cops!'" The agent called Filion back and either told him that Johnson said, "'[h]e better not'" or "'I hope he doesn't.'"

Filion arrived at the Shoreline house around 4:00 p.m. and knocked on the door. Johnson's son saw that it was Filion and did not open the door. Johnson also saw Filion arrive and began to have a panic attack. She was afraid of Filion, because they had an abusive relationship. She called 911. Johnson's friend, who was helping her pack, told Filion that the police were coming. Filion left, but was later arrested for violating the restraining order. His lawyer also later discovered that Filion's property was not at Johnson's home at the time, but was held at an undisclosed third-party location.

The charges against Filion were ultimately dismissed. Filion then sued Johnson for malicious prosecution, arguing that she made misrepresentations and false statements to the police. Johnson filed a pro se answer on May 16, 2007, asserting the following affirmative defenses: failure to mitigate damages; failure to state a claim upon

which relief can be granted[1]; comparative fault; apportionment; and severability. On October 26, 2008, now represented by counsel, she brought a CR 12(b)(6) motion to dismiss Filion's suit under RCW 4.24.510, Washington's Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. The court heard the motion as one for summary judgment. It denied the motion.

The parties went to mandatory arbitration on February 9, 2009. The arbitrator found in Johnson's favor, but did not indicate the legal or factual basis for the award. He declined to award her fees or damages under RCW 4.24.510. Johnson then sought trial de novo, which was set for July 2009.

At this point, Filion moved to voluntarily dismiss his claims. Johnson objected, arguing that Filion no longer had the ability to voluntarily dismiss the case. The trial court granted Filion's motion on July 9, 2009. Johnson appealed to this court, which reversed the trial court's order on November 11, 2010. Filion v. Johnson, noted at 158 Wn. App. 1045, 2010 WL 4812914. We found that, because the arbitrator had filed an award and Johnson had requested trial de novo, Filion could no longer voluntarily nonsuit. Id. at *2.

On October 8, 2012, Johnson moved for summary judgment on the basis of the anti-SLAPP law.[2] The court denied her motion. It concluded that Johnson's conduct was not within the scope of the statute and that she had waived it as an affirmative defense. It therefore disallowed her from asserting the defense at trial.

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[1] Johnson did not specify the basis for Filion's failure to state a claim.

[2] At this point, Filion had passed away. His role in the litigation continued by and through his estate.

The parties proceeded by way of stipulated trial. The court found that, regardless of whether Filion prevailed on his claim, Johnson was unable to improve her position on trial de novo without the aid of her anti-SLAPP defense. As a result, it also found that Filion was entitled to fees and costs under MAR 7.3.

Johnson appeals.

DISCUSSION

Johnson challenges the trial court's denial of her motion for summary judgment seeking to dismiss Filion's suit under RCW 4.24.510. She further contends that she should have been allowed to assert her anti-SLAPP defense at trial de novo. Accordingly, she argues that the trial court improperly awarded fees to Filion under MAR 7.3.

I. Waiver of Defense

Johnson contends that the trial court erred in denying her 2012 motion seeking summary judgment under RCW 4.24.510 and preventing her from raising her anti-SLAPP defense at trial de novo.[3] The trial court concluded that Johnson had not pleaded the defense and had thus waived it.[4]

---

[3] Filion argues that Johnson was not an aggrieved party and thus had no standing to appeal the arbitration award. He raises this argument as an alternative basis for relief, but does not do so in a cross-appeal. Because we affirm on the basis of waiver, we need not address his argument.

[4] The trial court provided two additional reasons for denying Johnson's motion. First, the court found that Johnson's 2012 motion merely renewed her 2008 motion without presenting new facts or circumstances as required by King County Local Rule (KCLR) 7(b)(7). The court further concluded that Johnson's conduct did not fall within the scope of RCW 4.24.525, a 2010 amendment to the anti-SLAPP statute. LAWS OF 2010, ch. 118, § 2. We note that Johnson's conduct occurred in 2006, before the amendment was enacted. But, because we affirm on waiver, we do not address the propriety of the trial court's other bases for denying the motion.

CR 8(c) establishes that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively [any matter] constituting an avoidance or affirmative defense." Generally, affirmative defenses are waived unless (1) affirmatively pleaded; (2) asserted in a CR 12(b) motion; or (3) tried with the parties' express or implied consent. Henderson v. Tyrrell, 80 Wn. App. 592, 624, 910 P.2d 522 (1996). The policy behind this rule is to avoid surprise. Id. Accordingly, a defense may be waived if a defendant's assertion of the defense is inconsistent with the defendant's previous behavior or if the defendant's counsel is dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

In French v. Gabriel, 116 Wn.2d 584, 587, 593-94, 806 P.2d 1234 (1991), the court found that the defendant preserved his affirmative defense by raising it in his answer, even though his answer was several months late. While the court expressed displeasure at his tardiness, it reasoned that the defendant's conduct was neither inconsistent with the intent to bring his defense nor resistant to efforts by the plaintiff to move the case along. Id. at 593. By contrast, in Raymond v. Fleming, 24 Wn. App. 112, 114, 600 P.2d 614 (1979), the defendant repeatedly asked for continuances in response to the plaintiff's requests for an answer and attempts to resolve the case. The defendant ultimately delayed the case for almost a year before bringing a CR 12(b) motion asserting insufficient service as an affirmative defense. Id. at 115. The court found the defense waived due to dilatory conduct. Id. Likewise, in Lybbert, the court found that the defendant waived its insufficient service defense by acting for nine months as if it were

preparing to litigate on the merits and then raising the defense in its answer filed only after the statute of limitations had run. 141 Wn.2d at 32, 44-45.

Johnson's initial answer did not assert the anti-SLAPP statute as an affirmative defense. Johnson was pro se at the time. But, a pro se litigant is held to the same standard as an attorney. Batten v. Abrams, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981). On the record before us, it appears that Johnson did not raise the defense for seventeen months, in her CR 12(b) motion on October 26, 2008. In the meantime, the parties had demonstrated the ability and intent to litigate. Johnson filed a joint confirmation of trial readiness on July 14, 2008. Filion filed a jury demand on July 17. The trial date was set for August 4. Then, the parties stipulated to strike the trial date and transfer the case to mandatory arbitration. The order transferring the case was signed July 24. The parties then waited until August 21, nearly a month later, to file the order. Two months after that, Johnson raised her affirmative defense.

Unlike the defendant in French, Johnson did not preserve her defense by raising it in her answer. See 116 Wn.2d at 593. Instead, like the defendant in Lybbert, she engaged in trial preparation without demonstrating any intent to pursue the defense. See 141 Wn.2d at 32. Her assertion of the defense was thus inconsistent with her conduct over the previous seventeen months. This delay was even longer than in Lybbert and Raymond. See id.; Raymond, 24 Wn. App. at 114. With the trial date set and the case transferred to arbitration, Johnson was at a further point in the trial progression than in either of those cases. See Lybbert, 141 Wn.2d at 33; Raymond, 24 Wn. App. at 114; CP

632, 634. It was dilatory to wait until that point to assert the defense.[5] This constituted waiver of Johnson's anti-SLAPP defense. Nothing that happened in the ensuing years of litigation changed that fact.

The trial court properly denied Johnson's motion for summary judgment and prevented her from raising her anti-SLAPP defense at trial de novo.

II. Attorney Fees

Johnson contends that the trial court improperly awarded fees to Filion under MAR 7.3. MAR 7.3 mandates a fee award against a party who appeals an arbitration award and fails to improve his or her position on trial de novo. Johnson appealed the arbitration award, but could not raise her anti-SLAPP defense. She thus could not improve her position on trial de novo. The trial court properly awarded fees against her under MAR 7.3.

Johnson requests attorney fees and costs both at the trial level and on appeal. Under RCW 4.24.510, a party who prevails on the anti-SLAPP defense is entitled to recover reasonable attorney fees and costs. Johnson does not prevail on her defense. We deny her request.

Filion requests fees on appeal under MAR 7.3. A party who is entitled to fees under MAR 7.3 at the trial court level is also entitled to fees on appeal if the appealing party again fails to improve its position. Arment v. Kmart Corp., 79 Wn. App. 694, 700,

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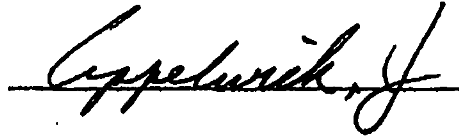
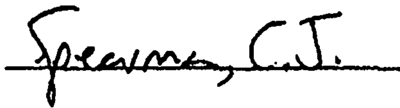
[5] Johnson further assigns error to the trial court's denial of her 2008 motion to dismiss. We know that the basis of Johnson's 2008 motion was also her anti-SLAPP defense under RCW 4.24.510. The record does not show the trial court's reasoning for denying her motion. However, based on the facts before us, we conclude that the trial court's decision would have been properly supported by waiver.

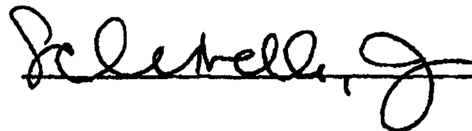
902 P.2d 1254 (1995). The trial court awarded Filion fees under MAR 7.3. Johnson, the appealing party, again failed to improve her position. We award Filion fees on appeal.[6]

We affirm.



WE CONCUR:





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[6] Filion maintains that his ultimate goal is to see this case dismissed and he is willing to forfeit his right to attorney fees in order to do so. While the court lacks the authority to fashion this arrangement, the parties have the ability to do so.

King County Superior Court
Case No. 07-02-06353-6 SEA

DECISIONS

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JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ESTATE OF GARY FILION (by and through LESTER FILION as Personal Representative) Plaintiff, v. JULIE JOHNSON, Defendant.	NO. 07-2-06353-6 SEA **STIPULATED JUDGMENT**

STIPULATED JUDGMENT

This matter was set for trial on December 19, 2012. The Plaintiff Estate (Plaintiff passed away in 2010) appeared through its personal representative Lester Filion and trial counsel, Noah Davis and Jamila Taylor of IN PACTA PLLC. Defendant Julie Johnson appeared through her trial counsel, Helmut Kah.

Although a jury demand had been filed by Plaintiff, in order to expedite the Court's resolution of this matter, counsel for the Parties have agreed to waive the Parties' right to a jury trial and have stipulated to entry of this Judgment by the Court.

While the Parties disagree on many of the facts, they can agree to the following

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1 stipulated facts:

2

3 This case was premised on the Plaintiff's alleged August 1, 2006 violation of a mutual

4 restraining order contained in a divorce decree which prevented Plaintiff from coming within

5 a certain distance of Defendant Johnson's residence (a copy of the June 1, 2006 divorce

6 decree has previously been filed with the Court and which is incorporated herein).

7

8 The Parties also agree that, pursuant to a separate provision in the divorce decree,

9 Gary Filion was to pick up a list of items from the Shoreline Property ("Shoreline Property").

10 Pursuant to that language in the Decree, the lawyers for the Parties communicated with one

11 another and that one or more letters had been exchanged by the lawyers for the purpose of

12 scheduling Gary Filion to pick up certain personal property from the "Shoreline Property" on

13 August 1, 2006 at 4pm.

14

15 The Shoreline Property had been sold and the closing (including the turn-over of

16 possession to the buyer) was to be completed on August 1st by approximately 9pm.

17

18 On August 1st, 2006, before 4pm (and therefore before Mr. Filion's arrival at the

19 Shoreline Property) he had been informed by real estate agent Pat Dornay during a telephone

20 call that Julie Johnson would likely still be present at the Shoreline Property at 4pm (as she

21 had not yet moved out).

22

23 Ultimately, a short time after Mr. Filion arrived at 4pm, August 1, 2006 at the

24 Shoreline residence with a moving truck and movers, he was told by a third party (who had

25 come out of, or from, the Shoreline Residence) that Julie Johnson was present in the home

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and that she had called the police. Mr. Filion then left with his parents (whom he had also asked to be present at 4pm at the Shoreline Residence) without collecting his personal property.

Defendant Johnson did in fact call 911. In response to the call, an officer from the King County Sheriff's office came to the Shoreline Property and took a statement from Defendant Johnson. Thereafter, Mr. Filion was later charged with violation of the restraining order. After Mr. Filion hired a criminal defense attorney, the charges were dismissed. Plaintiff Filion then filed a civil action for malicious prosecution.

Although the Parties dispute the nature of the conversations between Parties and their counsel (or between the Parties and third parties) and although the Parties disagree as to the nature of the agreements that emanated from these conversations, for purposes of trial, the Parties agree that Plaintiff has the burden of proof on the estate's malicious prosecution claim and that the issue that had remained for trial was whether the Defendant acted with malice (or reckless disregard) as this issue is defined and set forth in Judge Armstrong's prior Orders on Summary Judgment.

And while the Parties disagree on whether or not Plaintiff would have ultimately been successful on the claim for malicious prosecution (i.e. in proving the Defendant acted with malice when she called the police and filed a police report), the Parties can agree that the trial has become useless or futile because regardless of whether or not the Plaintiff is successful on its claim, the Defendant is unable to improve her position from mandatory arbitration (in the absence of her proffered immunity defense under RCW 4.24.510). In order to improve her

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position, Defendant would have to prevail on her immunity defense under the anti-slapp statute: RCW 4.24.510. However, for the reasons stated in Judge Armstrong's (two) Orders Denying Summary Judgment, the Defendant's anti-slapp defense was denied (and the Defendant was precluded from raising anti-slapp at trial). Thus, without the immunity defense, the Defendant is unable to improve her position at trial (that is, from the arbitration award which awarded no damages to either Party).

For purposes of preserving her argument on appeal and making a record, the Parties agree that the Defendant did in fact again assert her anti-slapp defense to the trial Court before the jury trial was to begin on December 19, 2012, but the Court, in reliance on Judge Armstrong's prior ruling (which precluded the Defendant's attempt to raise the anti-slapp statute (RCW 4.24.510)), also precluded and barred the Defendant from raising the 4.24.510 immunity defense at trial.

Thereafter, the Parties stipulate that judgment be entered by the Court as follows:

1) That (solely for the purpose of the malicious prosecution claim and not with relation to the anti-slapp defense) because the Plaintiff may not be able to prove that the Defendant acted with malice when she called the police and followed with a reported violation of a mutual restraining order, Plaintiff's claim of Malicious Prosecution fails (solely for purposes of this stipulated judgment without prejudice to a new trial if one ever becomes necessary);

2) That the Defendant had filed for a trial de novo from Mandatory Arbitration but, in

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1 the absence of the immunity defense under RCW 4.24.510) cannot improve her
2 position from the Arbitration Award and that therefore Plaintiff is entitled to
3 reasonable attorney's fees and costs in accordance with the MARs. And thus
4 Plaintiff shall bring its Motion for attorney's and costs to be heard without oral
5 argument and within the time prescribed under the MARs.
6
7 3) That the Caption of this Judgment be used as the Caption for all future pleadings
8 and filings with the Court.
9
10 4) That the following exhibits be filed be admitted into evidence and filed with the
11 Court:
12
13 Declaration of Gary Filion
14
15 Declaration of Mark Olsen with attachments
16 Declaration of Pete Jorgenson
17
18 Police Report of King County Sheriff's Office Taken 8/1/06
19
20 Declaration of Pat Dornay
#5) Also Added below
21 SO ORDERED AS THE JUDGMENT OF THE COURT this 19 Day of December
22 2012
23
24 Judge Michael Hayden
25 King County Superior Court
26

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Seattle, WA 98104
P: 206.734-3085
F. 206.860.0178

1 THE ABOVE FACTS AND JUDGMENT ARE STIPULATED TO BY THE PARTIES THROUGH COUNSEL:
2 IN PACTA PLLC
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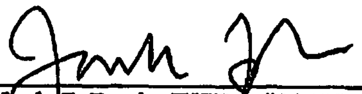
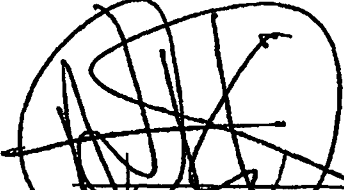
4 
5 Noah C. Davis, WSBA #30939
6 Jamila A. Taylor, WSBA #32177
For the Estate of Gary Filion



Helmut Kah, WSBA#___
For Defendant Julie Johnson

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9
10 #5) This stipulation & judgment is not
11 intended to be construed to prejudice
12 or preclude Defendant's rights to
13 appeal the denial of her claim for the defense of RCW 4.24.510
14 (immunity/antislapp).
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Hon. Sharon S. Armstrong

FILED
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SUPERIOR COURT CLERK
BY Carolina Ceja
DEPUTY

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

LESTER FILION as Personal Representative of the Estate of GARY FILION, Plaintiff, vs. JULIE JOHNSON,, Defendant.	No. 07-2-06353-6SEA ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on defendant Julie Johnson's motion for summary judgment, under RCW 4.24.510, to dismiss plaintiff's malicious prosecution claim against her. The court has heard oral argument and considered the following materials:

1. Defendant Johnson's (Corrected) Motion for Summary Judgment
2. From the court file, sub numbers: 1, 8, 10, 15, 21, 27, 30, 56, 57, 67, 70, 122 submitted by defendant
3. Plaintiff's Response
4. Declaration of Jamila Taylor

ORIGINAL

Hon. Sharon S. Armstrong
King County Superior Court
King County Courthouse, 516 Third Avenue
Seattle, Washington 98104
(206) 296-9363

5. Defendant's (Corrected) Reply.

Defendant previously brought the same motion to dismiss, and the motion was denied by Judge McBroom on November 21, 2008. KCLCR 7(b)(7) bars the remaking of the same motion to a different judge absent " a showing by affidavit any new facts or other circumstances that would justify seeking a different ruling from another judge."

Defendant has not made such a showing. Nor has the defendant pled the statute as a defense or affirmative defense, and the date for amending claims has long passed. The motion should be denied for these reasons. However, because trial is imminent, the court takes this opportunity to discuss whether RCW 4.24.510, Washington's Anti-SLAPP statute, applies to these facts at all.

The statute was adopted in 1989, amended in 2002 (to remove a good faith requirement and to expand protection to the right of petition), and amended again in 2010 (adding a motion to strike procedure).

RCW 4.24.510 provides that:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonable of concern to that agency or organization.

The purpose of the statute is to protect a person's exercise of First Amendment rights and rights under Article I, section 5 of the Washington State Constitution, concerning "a substantive

Hon. Sharon S. Armstrong
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issue of some public interest or social significance." Laws 2002, ch. 232, section 1. The amendments made clear that the communication to a government agency need not be a good faith report. Bailey v. State, 147 Wn.App. 251 (2008). The statute protects a defendant's statements even when they are made in bad faith or are defamatory per se.

Several Washington courts, however, have held that the protected communication must concern issues of public interest or social significance. Valdez-Zontek v. Eastmont School Dist., 154 Wn. App. 147 (2010); Eugster v. City of Spokane, 139 Wn. App. 21 (2007); Skimming v. Boxer, 119 Wn. App. 748 (2004). The Washington Supreme Court in Right-Price Recreation, LLC v. Connells Prairie Community Council, 146 Wn. 2d 370 (2002), cert. denied 124 S. Ct. 1147, rehearing denied 124 S. Ct. 1708, characterized the statute as involving communications made to influence a governmental action or outcome, which result in (1) a civil complaint or counterclaim (2) filed against nongovernmental individuals or organizations on (3) a substantive issue of some public interest or social significance.

On the other hand, calls to police have been held protected under the statute. For example, in Dang v. Ehredt, 95 Wn. App. 670, rev. denied, 139 Wn.2d 1012 (1999), bank employees' 911 calls to report an alleged counterfeit check was protected by the anti-SLAPP statute.

The scope of the anti-SLAPP statute, and what constitutes a matter of public concern, were clarified in the 2010 amendments to the statute. Those amendments added section RCW

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4.24.525, which provides for a "special motion to strike claim." The motion to strike was intended to stay discovery in a SLAPP suit and dismiss it early, if certain showings are made.

The new section applies to any claim 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 written statement or other document submitted, in a place open to the public or 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.

Section 4(a) authorizes a party to bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined above. Section 4(b) provides that the moving party has the initial burden of showing the claim (in the SLAPP suit) is based on an "an action involving public participation and petition." If the moving party meets this burden, the responding party must establish by clear and convincing evidence a probability of prevailing on the claim. If the responding makes this showing, then the motion to strike is denied.

In this case, a prior decree of dissolution between plaintiff and defendant contains both mutual restraining orders and a provision requiring the husband to come onto the wife's property to retrieve his personal property at a mutually agreeable time. Counsel for the parties arranged such a time, to occur the last day before the property was to be delivered to the new owners. The evidence is expected to show the wife unilaterally chose to exclude the husband from the property because she was not finished packing. She called the police and he was arrested. She did not provide information to the police about the pre-arranged pick-up of his property. The prosecuting attorney, being advised of this additional information, dismissed the charges against the husband. The husband then sued the wife for malicious prosecution. Whether he prevails on that claim turns on whether he establishes the wife's malice.

Does the wife's call to the police meet the definition of an action involving public participation and petition? The wife's call to police does not meet the definition of 2(a), (b), (c), or (d) because it was not made in a "proceeding", was not reasonably likely to "encourage public participation", and was not made in "a place open to the public" or in "a public forum" concerning "an issue of public concern." Section 2(e), which permits lawful conduct in furtherance of the exercise of the constitutional right of petition, refers to Washington Constitution, art. I, section 4, which provides that "The right of petition and of the people peaceable to assemble for the common good shall never be abridged." This section has reference only to the exercise of political rights. Housing Auth. v. Saylors, 87 Wn. 2d 732 (1976). The state right is consistent with the First Amendment. Richmond v. Thompson, 79 Wn. App. 327 (1995), aff'd, 130 Wn. 2d 368 (1996). Making a call to police is not an expression of political activity.

Tom Wyrich analyses the effect of the 2010 amendments in his Washington Law Review article "A Cure for a 'Public Concern': Washington's New Anti-SLAPP Law" (October 2011). The author traces the origins of the 2002 amendment to a similar California statute, and argues under the "borrowed statute" doctrine that the similarities to the California law permit reliance on California precedent, while the differences require evaluation of other authorities. Specifically, the Washington amendment departs from California law in its use of "issues of public concern" rather than "issues of public interest." The author argues that "issues of public concern", which is a narrower standard, has a well-established meaning in Washington jurisprudence, dating to the U.S. Supreme Court decision Connick v. Myers, 461 U.S. 138 (1983).

For the past twenty-five years, Washington courts have decided whether speech is "of public concern" by adopting the U.S. Supreme Court's test from Connick. In Connick, an assistant district attorney circulated a questionnaire around the district office concerning office morale, an office transfer policy, the need for a grievance committee, and the level of confidence in superiors. The district attorney learned of the questionnaire and fired her. The U.S. Supreme Court held that the attorney's expressive conduct did not pertain to a matter of public concern, and did not deserve First Amendment protection.

The Court analyzed three factors: the content, the form, and the context of the speech. When analyzing the content, courts look to see if the expression relates to public, rather than private, matters. When analyzing the form, court consider whether the actor made the expression public, or if the speech was made in a private manner. And when analyzing the context, courts look to the purpose of the speech, particularly whether the speech was part of a public discussion or whether it merely served a private purpose. Wyrich at 685-686.

Applying the Connick three-part test here, the content of defendant's call to police concerned a private matter: her attempt to keep the husband off her property so she could complete her packing. The expression was made privately, in a call to police, not in a public statement. And the purpose of the speech served her private concern to keep the husband off her property, not a public discussion.

This interpretation is consistent with the Washington State's Constitution's guarantee of free speech, which is broader than its federal counterpart. Wash. Const. art. I, section 5 provides

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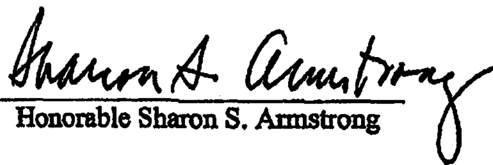
that "Every person may freely speak, write and public on all subjects, being responsible for the abuse of that right." In this case, while defendant had the right to make a complaint to police, she is responsible for abuse of that right.

This court concludes that the conduct of the defendant here is not within the scope of RCW 4.24.510. Therefore, defendant's motion to dismiss is denied, and the issue shall not be asserted at trial. The issue for trial is whether defendant acted with malice, or whether there is some explanation for her call to police and her assertion that plaintiff violated the restraining order.

Based on the foregoing,

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

DATED this 6TH day of November, 2012



Honorable Sharon S. Armstrong

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STATUTES

RCW 4.24.500 Good faith communication to government agency — Legislative findings — Purpose.

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

[1989 c 234 § 1.]

RCW 4.24.510 Communication to government agency or self-regulatory organization — Immunity from civil liability.

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to 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, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

[2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

Notes:

Intent -- 2002 c 232: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." [2002 c 232 § 1.]

RCW 4.24.525 Public participation lawsuits — Special motion to strike claim — Damages, costs, attorneys' fees, other relief — Definitions.

(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 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 written statement or other document submitted, in a place open to the public or 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 the 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 of proof 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 the 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 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.

[2010 c 118 § 2.]

Notes:

Findings -- Purpose -- 2010 c 118: "(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate." [2010 c 118 § 1.]

Application -- Construction -- 2010 c 118: "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." [2010 c 118 § 3.]

Short title -- 2010 c 118: "This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation." [2010 c 118 § 4.]

COURT RULES

CIVIL RULE 8 GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or inseparate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. The adoption of this rule shall not be considered an adoption or approval of the forms of pleading in the Appendix of Forms approved in rule 84, Federal Rules of Civil Procedure.

CIVIL RULE 12 DEFENSES AND OBJECTIONS

(a) When Presented. A defendant shall serve his answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46. 64.040.

(4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the courts action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the courts own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

CIVIL RULE 54 JUDGMENTS AND COSTS

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. **In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs, Disbursements, Attorney's Fees, and Expenses.

(1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of

the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) Time. Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Amended effective September 1, 1989; September 1, 2007.]

King County Superior Court
Case No. 07-02-06353-6 SEA

SELECT DOCUMENTS
FROM CLERK'S PAPERS

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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

GARY FILION,

Plaintiff,

vs.

JULIE JOHNSON and MARK OLSON and JANE DOE OLSON, husband and wife and their marital community,

Defendant.

NO. 07-2-06353-6SEA

COMPLAINT FOR DAMAGES

JOAN E. DUBUQUE

I. JURISDICTION

The acts giving rise to liability complained of occurred in the cities of Seattle and Shoreline, King County, state of Washington.

II. PARTIES

At all times pertinent to this lawsuit defendant conducted business and/or resided in King County, state of Washington.

III.

Gary Filion, plaintiff, is divorced from defendant, Julie Johnson. Ms. Johnson was represented by attorney Mark Olson in the divorce proceeding. Mutual restraining orders were contained in the divorce decree. Mr. Filion was represented by attorney Peter Jorgenson. Pursuant to an agreement and memorialized in a letter from Mr. Olson to Mr.

TIMOTHY S. McGARRY, ATTORNEY AT LAW
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(206) 322-1555 · FAX 322-6118

1 Jorgenson, Mr. Filion was to go to the residence of Ms. Johnson to pick up personal
2 property on August 1, 2006. Mr. Filion obtained a truck and hired persons to help him
3 move his property. Plaintiff went to the residence located at 19814 8th Avenue NW in
4 Shoreline, Washington, on August 1, 2006, at the appointed time. When he arrived, the
5 police were called and he was placed under arrest for violation of a no contact order.
6 Mr. Filion was prosecuted in King County District Court for violation of the no contact
7 order. The charge was dismissed on motion of the prosecuting attorney when advised of
8 the letter authorizing the visit to the home written by Mr. Olson.
9 Defendant Johnson, by misrepresentation and false statements to police officers,
10 caused the false arrest and malicious prosecution of plaintiff. Defendant Olson was
11 negligent in misrepresenting to plaintiff that he could go to the residence at the time
12 established in the letter to plaintiff, failing to communicate with his client and otherwise
13 made negligent misrepresentations in not preventing Mr. Filion from being arrested and
14 falsely prosecuted.
15 As a direct and proximate result of the defendant's acts and omissions, plaintiff has
16 sustained injury, pain and suffering, emotion distress, property loss, lost wages which
17 damages are continuing.
18 WHEREFORE, the plaintiff asks for judgment against the defendant in such sums
19 as will justly and fairly compensate him for his damages including:
20 1. General Damages;
21 2. Special Damages;
22 3. Plaintiff's Costs and Interest; and
23 4. Attorney's fees.
24 DATED this 21st day of February, 2007.
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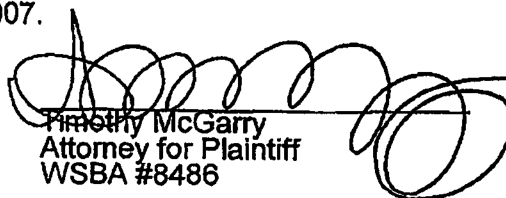

Timothy McGarry
Attorney for Plaintiff
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KING COUNTY
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SEATTLE, WA

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

GARY FILION,

Plaintiff,

vs.

JULIE JOHNSON and MARK OLSON and JANE DOE OLSON, husband and wife and their marital community,

Defendant.

NO. 07-2-06353-6 SEA

AMENDED COMPLAINT FOR DAMAGES

I. JURISDICTION

The acts giving rise to liability complained of occurred in the cities of Seattle and Shoreline, King County, state of Washington.

II. PARTIES

At all times pertinent to this lawsuit defendant conducted business and/or resided in King County, state of Washington.

III.

Gary Filion, plaintiff, is divorced from defendant, Julie Johnson. Ms. Johnson was represented by attorney Mark Olson in the divorce proceeding. Mutual restraining orders were contained in the divorce decree. Mr. Filion was represented by attorney Peter Jorgenson. Pursuant to an agreement and memorialized in a letter from Mr. Olson to Mr.

TIMOTHY S. McGARRY, ATTORNEY AT LAW
1416 E. THOMAS, SEATTLE, WA 98112
(206) 322-1555 · FAX 322-6118

1 Jorgenson, Mr. Filion was to go to the residence of Ms. Johnson to pick up personal
2 property on August 1, 2006. Mr. Filion obtained a truck and hired persons to help him
3 move his property. Plaintiff went to the residence located at 19814 8th Avenue NW in
4 Shoreline, Washington, on August 1, 2006, at the appointed time. When he arrived, the
5 police were called and they responded and attempted to arrest plaintiff for violation of a no
6 contact order.

7 Mr. Filion was prosecuted in King County District Court for violation of the no contact
8 order. The charge was dismissed on motion of the prosecuting attorney when advised of
9 the letter authorizing the visit to the home written by Mr. Olson.

10 Defendant Johnson, by misrepresentation and false statements to police officers,
11 caused the false arrest and malicious prosecution of plaintiff. Defendant Olson was
12 negligent in misrepresenting to plaintiff that he could go to the residence at the time
13 established in the letter to plaintiff, failing to communicate with his client and otherwise
14 made negligent misrepresentations in not preventing Mr. Filion from having police pursue
15 him and being falsely prosecuted.

16 As a direct and proximate result of the defendant's acts and omissions, plaintiff has
17 sustained injury, pain and suffering, emotion distress, property loss, lost wages which
18 damages are continuing.

19 WHEREFORE, the plaintiff asks for judgment against the defendant in such sums
20 as will justly and fairly compensate him for his damages including:

21 1. General Damages;
22 2. Special Damages;
23 3. Plaintiff's Costs and Interest; and
24 4. Attorney's fees.

25 DATED this 5th day of April, 2007.

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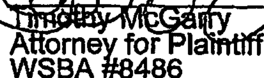

27 Timothy McGarry
Attorney for Plaintiff
WSBA #8486

28

TIMOTHY S. McGARRY, ATTORNEY AT LAW
1416 E. THOMAS, SEATTLE, WA 98112
(206) 322-1555 · FAX 322-6118

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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

GARY FILION, Plaintiff, Vs. JULIE JOHNSON, a single woman, and MARK OLSON and LESLIE OLSON, husband and wife and their marital community, Defendants,	IC JUDGE: Joan DuBuque NO. 07-2-06353-6 SEA NOTICE OF APPEARANCE PRO SE

TO: GARY FILION

AND TO: TIMOTHY S. McGARRY, his attorney

YOU will please take notice that the Defendant, JULIE JOHNSON, personally appear in the above entitled cause by the undersigned pro se litigant and requests that all further papers and pleadings herein be served upon the undersigned pro se litigant at the address below stated. Service Address:

Dated: 5/5/07

JULIE JOHNSON, Pro Se

Faxed to King County Superior Court on MAY 16 2007

Sent on 5-8-07 orgnal located at

NOTICE OF APPEARANCE PRO SE

Page 1 of 1

JULIE JOHNSON
1550 NW 195th St, #103
Shoreline, WA 98177
206-992-0363

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SEATTLE, WA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

GARY FILION, Plaintiff, Vs. JULIE JOHNSON, a single woman, and MARK OLSON and LESLIE OLSON, husband and wife and their marital community, Defendants.	IC JUDGE: Joan DuBuque NO. 07-2-06353-6 SEA ANSWER

COME NOW defendant JULIE JOHNSON, a single woman (hereafter "Defendant JOHNSON"), by and through being pro se on record, and answers and asserts *affirmative* defense to Plaintiff's Amended Complaint as follows:

I. JURISDICTION

1.1 Defendant lacks sufficient information or knowledge to forma a belief as to the truth of the allegations in paragraph 1.1 and therefore denies the same.

II. PARTIES

2.1 Defendant admits Defendant Johnson is a single woman. All other allegations contained in paragraph 2.1 not expressly admitted are denied.

Sent on 5-8-07 original located at

 Faxed to King County Superior Court on MAY 16 2007

JULIE JOHNSON
1550 NW 195th St, #103
Shoreline, WA 98177
206-992-0363

05/18/2007 00:47 FAX 4257451140 004/012

III. FACTS AND DAMAGES

Defendant admits that parties are divorced, that Mr. Filion was represented by Peter Jorgenson in the divorce, and that Ms. Johnson was represented by Mark Olson in that same divorce action.

Defendant admits that there are mutual restraining orders contained in the divorce decree.

Defendant lacks sufficient information or knowledge to forma a belief as to the truth of any other allegations in paragraph 3.1 and therefore denies the same. All other allegations contained in paragraph 3.1 not expressly admitted are denied.

Defendant lacks sufficient information or knowledge to forma a belief as to the truth of any other allegations in paragraph 3.2 and therefore denies the same. All other allegations contained in paragraph 3.2 not expressly admitted are denied.

Paragraph 3.3 defendant denies.

Paragraph 3.4 defendant denies.

All other allegations contained in paragraph 3 not expressly admitted are denied.

Affirmative Defenses

In alleging the following affirmative defenses, defendant does not allege or admit that she has the burden of proof with respect to any such matters.

1. **Failure to Mitigate Damages.** Plaintiff may have failed to mitigate or otherwise limit his damages, if any.
2. **Failure to State a Claim on Which Relief Can Be Granted.** Plaintiff has failed to state a claim against defendant Julie Johnson on which relief may be granted.
3. **Comparative Fault.** Plaintiff's injuries, if any, were cause or contributed to by the negligence of plaintiff.
4. **Apportionment.** Defendant is entitled to an apportionment of fault, if any, between all at-fault entities in accordance with RCW 4.22.
5. **Severability.** Fault and/or damages, if any, are several.

JULIE JOHNSON
1550 NW 195th St, #103
Shoreline, WA 98177
206-992-0363

Reservation of Rights

This answering defendant reserves the right to amend this answer to assert additional affirmative defenses, third party claims or cross claims in the future.

This answering defendant has not had the opportunity to conduct a full inquiry of the facts underlying this lawsuit, so some of the foregoing affirmative defenses may not be supported by the facts to be revealed in discovery and investigation of this case. Upon request and after having completed discovery in this case, this answering defendant will voluntarily withdraw those defenses that are unsupported by the facts revealed in pretrial discovery and investigation.

WHEREFORE, the defendant having fully answered plaintiff's amended complaint, imposed affirmative defenses, and reserved the right to assert additional affirmative defenses, the defendant prays for relief as follows:

1. For dismissal of plaintiff's amended complaint with prejudice;
2. For this court to enter judgment in favor of defendant;
3. For plaintiff to be awarded nothing;
4. For defendant's costs and disbursements incurred herein;
5. For defendant's reasonable and actual attorney's fees; and
6. For an appointment of fault and damages, if any, pursuant to RCW 4.22.
7. For such other and further relief as the court may deem just, equitable, and proper.

Dated: 5/5/07

JULIE JOHNSON, pro se

JULIE JOHNSON
1550 NW 195th St, #103
Shoreline, WA 98177
206-992-0363

05/18/2007 00:47 FAX 4257451140 ☒008/012

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KING COUNTY
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SEATTLE, WA

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8 **IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON**
IN AND FOR KING COUNTY
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10 GARY FILION,
11 Plaintiff,
12 vs.
13 JULIE JOHNSON and OLSON and OLSON, PLLC, a legal services corporation,
14
Defendants.
15

NO. 07-2-06353-6SEA

SECOND AMENDED COMPLAINT FOR DAMAGES

16 I. JURISDICTION

17 The acts giving rise to liability complained of occurred in the cities of Seattle and
18 Shoreline, King County, state of Washington.

19 II. PARTIES

20 At all times pertinent to this lawsuit Defendant conducted business and/or resided
21 in King County, state of Washington.

22 III.

23 Gary Filion, Plaintiff, is divorced from Defendant, Julie Johnson. Ms. Johnson,
24 Defendant, was represented by Mark Olson of Defendant Olson and Olson, PLLC, in the
25 divorce proceeding. Mutual restraining orders were contained in the divorce decree. Mr.
26 Filion was represented by attorney Peter Jorgenson. Pursuant to an agreement and
27 memorialized in a letter from Mr. Olson to Mr. Jorgenson, Mr. Filion was to go to the
28

TIMOTHY S. McGARRY, ATTORNEY AT LAW
1416 E. THOMAS, SEATTLE, WA 98112
(206) 322-1555 • FAX 322-6118

1 residence of Mrs. Johnson to pick up personal property on August 1, 2006. Mr. Filion
2 obtained a truck and hired persons to help him move his property. Plaintiff went to the
3 residence located at 19814 8th Avenue NW in Shoreline, Washington, on August 1, 2006,
4 at the appointed time. When he arrived, the police were called and he was placed under
5 arrest for violation of a no contact order.

6 Mr. Filion was prosecuted in King County District Court for violation of the no contact
7 order. The charge was dismissed on motion of the prosecuting attorney when advised of
8 the letter authorizing the visit to the home written by Mr. Olson.

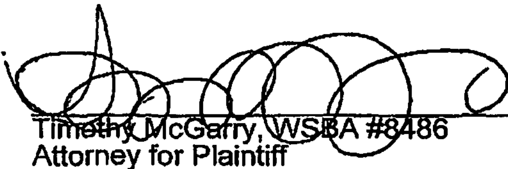
9 Defendant Johnson, by misrepresentation and false statements to police officers,
10 caused the false arrest and malicious prosecution of Plaintiff. Defendant Olson was
11 negligent in misrepresenting to Plaintiff that he could go to the residence at the time
12 established in the letter to Plaintiff, failing to communicate with his client and otherwise
13 made negligent misrepresentations in not preventing Mr. Filion from being arrested and
14 falsely prosecuted.

15 As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
16 sustained injury, pain and suffering, emotion distress, property loss, lost wages which
17 damages are continuing.

18 WHEREFORE, the Plaintiff asks for judgment against the Defendant in such sums
19 as will justly and fairly compensate him for his damages including:

20 1. General damages;
21 2. Special damages;
22 3. Plaintiff's Costs and interests; and
23 4. Attorney's fees.

24 DATED this 15th day of August, 2007.



25
26 Timothy McGarry, WSBA #8486
Attorney for Plaintiff
27
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TIMOTHY S. McGARRY, ATTORNEY AT LAW
1416 E. THOMAS, SEATTLE, WA 98112
(206) 322-1555 • FAX 322-6118

FILED

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KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 07-2-06353-6 SEA

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

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GARY FILION, Plaintiff, vs. JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation, Defendants.	IC JUDGE: Joan Dubuque **NO. 07-2-06353-6 SEA** NOTICE OF APPEARANCE

12
13

PLEASE TAKE NOTICE that Helmut Kah hereby appears as attorney of record for the defendant, Julie Johnson.

14
15

Please serve all further pleadings and papers, except original process, upon the undersigned attorney:

16
17

Name: Helmut Kah, Attorney at Law
Address: 16818 140th Avenue NE
Woodinville, WA 98072-9001
Telephone: (425) 892-6467
Facsimile: (425) 892-6468

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Dated this 3rd day of March, 2008.

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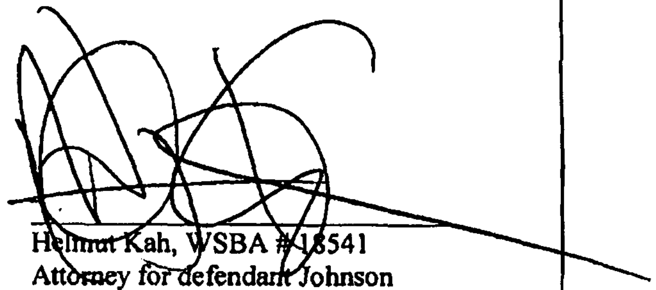

Helmut Kah, WSBA #18541
Attorney for defendant Johnson

HELMUT KAH, Attorney at Law
16818 140th Avenue NE
Woodinville, Washington 98072-9001
Telephone: (425) 402-3033
Facsimile: (425) 939-6049
Email: helmut.kah@att.net

Assigned Judge: Douglas McBroom
Trial Date: 08/04/2008

FILED
KING COUNTY, WASHINGTON
JUL 1 4 2008
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

FILION,	)	
	)	
PLAINTIFFS	)	NO. CASE # 07-2-06353-6 SEA
vs.	)	
	)	JOINT CONFIRMATION REGARDING TRIAL READINESS
JOHNSON ET ANO,	)	
	)	
DEFENDANTS	)	[CLERK'S ACTION REQUIRED]
	)	**DUE DATE: 07/14/2008**

The parties jointly represent that they have conferred regarding the following information, are aware of all deadlines and requirements in the Pretrial Order, and certify the following to the Court regarding trial readiness. If parties are unable to confirm jointly each party is required to file a separate confirmation.

A. All parties [x] are ~~[ ] are not~~ represented by counsel. If any party is not represented by counsel, state that party's name, current mailing address, and telephone number

NAME: ______________________

ADDRESS: ______________________

CITY/STATE/ZIP: ______________________

PHONE: (____) ______________________

EMAIL: ______________________

B. This trial is a ~~jury/~~ **non-jury trial.**

C. It is estimated, based upon a maximum of 5 trial hours per day that this trial will last NO MORE THAN 2 days.

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Sent on JUL 1 4 2008 via fax for filing in King County Superior Court.

D. Settlement/Mediation/ADR with a neutral third party **WAS** accomplished: [ ]· ~~YES~~ [x]· NO

If settlement/mediation/ADR with a neutral third party **WAS NOT** accomplished, you must provide a detailed explanation and identify what arrangements have been made to complete the same before trial. Counsel/party(ies) may be sanctioned for failure to comply with this requirement.

E. OTHER REQUIREMENTS:

1. **CR 16 CONFERENCE:**

Any party may file a motion for a CR 16 Conference with the assigned Judge.

2. **TRIAL WEEK AVAILABILITY : If counsel has another trial scheduled at the same time, identify name, cause number, venue of case, and dates of trial. Unusual problems scheduling witnesses should be noted.**

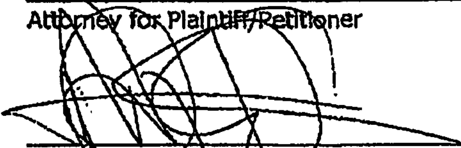
NOTICE: Cases otherwise ready may be held on standby status during the week trial is scheduled to start. Counsel must be within two hours of the designated courthouse while on standby.

Defendant's counsel, Helmut Kah, has a readiness hearing scheduled at Bothell Municipal Court at 10:00 a.m. on Tuesday, August 5, 2008, but will have other counsel cover that hearing if necessary.

3. **OTHER REQUIREMENTS SPECIAL TO THIS CASE:**

It is the responsibility of litigants to arrange for interpreters or necessary trial equipment.

Attorney for Plaintiff/Petitioner WSBA# DATE



7/11/08

Helmut Kah, WSBA#18541
Attorney for Defendant/Respondent DATE

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KING COUNTY SUPERIOR COURT
BARBARA MINER
DIRECTOR & SUPERIOR CT CLERK
SEATTLE WA

07-2-06353-6

Rcpt. Date	Acct. Date	Time
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Cashier: R2F

Paid By: MCGARRY, TIM LAW
Transaction Amount: $125.00

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

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GARY FILION, Plaintiff, vs. JULIE JOHNSON, Defendant.	NO. 07-2-06353-6SEA JURY DEMAND Clerk's Action Required

16 Plaintiff hereby demands a jury of six (6) persons pursuant to KCLR 38.

17 DATED THIS 16th day of July, 2008.

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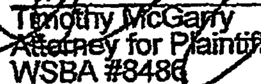

Timothy McGarry
Attorney for Plaintiff
WSBA #8486

TIM McGARRY, ATTORNEY AT LAW
1416 E. THOMAS, SEATTLE, WA 98112
(206) 322-1555 · FAX 322-6118

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JUDICIAL ADMINISTRATION

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7 **SUPERIOR COURT OF WASHINGTON**
COUNTY OF KING

8 GARY FILION,
Plaintiff,
9 vs.
10 JULIE JOHNSON, and OLSON and OLSON,
11 PLLC, a legal services corporation,
Defendants.

NO. 07-2-06353-6 SEA

STIPULATED MOTION AND ORDER TRANSFERRING CASE TO MANDATORY ARBITRATION

12 This matter came before the Court upon the parties' stipulated motion and order to
13 transfer this case to arbitration pursuant to the King County Superior Court Local Mandatory
14 Arbitration Rules, during telephone conference with the parties' respective counsel. The court
hereby grants leave to transfer this case to mandatory arbitration.

15 It is hereby ORDERED, ADJUDGED, and DECREED:

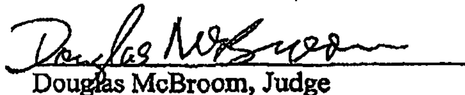
16 1. This matter is subject to mandatory arbitration pursuant to the Superior Court
17 Mandatory Arbitration Rules (MAR) and the King County Superior Court Local Rules for
Mandatory Arbitration (LMAR).

18 2. This matter is hereby transferred to mandatory arbitration pursuant to LMAR 2.1.

19 3. The trial date and case schedule are hereby stricken.

20 DATED this 24 day of July, 2008.

21

22 ORIGINAL 

23 Douglas McBroom, Judge

HELMUT KAH, Attorney at Law
16818 140th Avenue NE
Woodinville, Washington 98072-9001
Telephone: (425) 402-3033
Facsimile: (425) 939-6049
Email: helmut.kah@att.net
Washington Bar # 18541

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2 IT IS SO MOVED AND STIPULATED BY:

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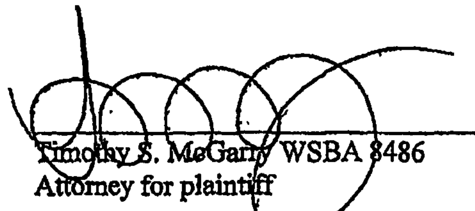
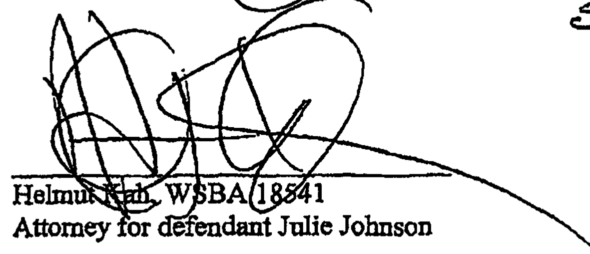
5 

Timothy S. McGarry WSBA 8486
6 Attorney for plaintiff

206-322-1555

1416 E. Thomas
Seattle WA 98112

7 

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Helmut Kah, WSBA 18541
10 Attorney for defendant Julie Johnson

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HELMUT KAH, Attorney at Law
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Facsimile: (425) 939-6049
Email: helmut.kah@att.net
Washington Bar # 18541

FILED

08 OCT 24 AM 8:30

Honorable Judge Douglas McBroom

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 07-2-06353-6 SEA

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

GARY FILION, Plaintiff, vs. JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation, Defendants.	**NO. 07-2-06353-6 SEA** DEFENDANT JOHNSON'S MOTION TO DISMISS UNDER CR 12(B)(6), FOR CR 11 SANCTIONS, AND FOR COSTS, ATTORNEY FEES, AND STATUTORY DAMAGES

Comes now, Defendant, Julie Johnson, by and through her attorney, Helmut Kah, and respectfully requests the following relief:

I. RELIEF REQUESTED

For the entry of an Order dismissing Plaintiffs Complaint for Damages as to defendant Julie Johnson with prejudice, pursuant to Civil Rule 12(b)(6), and for an award of attorney fees, costs, and expenses under CR 11, and for an award of attorney fees and statutory damages under and RCW 4.24.510.

II. STATEMENT OF FACTS

The plaintiff Gary Filion ("Filion") is defendant Julie Johnson's ("Johnson") ex-husband.

Filion's complaint (2nd amended complaint) seeks an award of money damages against Johnson and also against her dissolution lawyer, Mark D. Olson ("Olson"). Filion's claims

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Washington Bar # 18541

1 against Olson were dismissed by order entered February 8, 2008. (see ORDER DISMISSING
2 OLSON & OLSON at SCOMIS sub no. 35)

3 Olson represented Johnson, f/k/a Julie Filion in her dissolution of marriage action
4 involving plaintiff, Gary Filion, in Snohomish County Superior Court cause no. 05-3-00679-1.
5 After trial before the Honorable Ellen J. Fair, a Decree of Dissolution was entered on June 1,
6 2006. Pursuant to the terms of the decree, the Filion and Johnson were to exchange certain
7 items of personal property. The decree of dissolution contained mutual restraining orders
8 which remain in effect until June 30, 2009. (See the 12/10/2007 DECLARATION OF
9 MARK OLSON filed herein under SCOMIS sub no. 27).

10 The dissolution decree's restraining order provides, among other things, that both
11 Filion and Johnson are restrained and enjoined from

12 "disturbing the peace of the other party."

13 "going onto the grounds of or entering the home, work place or school of the other party"

14 and that Filion is restrained and enjoined from

15

16 "going onto the grounds of or entering the home, workplace, school or day care of the following named children: Emelie Nye, Mitchell Nye, Jordan Nye, Spencer Nye."

17 and that both parties are restrained and enjoined from

18

19 "knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the other party, or the day care or school of these children listed above."

20

(see the attached pages 8 – 9 of the dissolution decree)

21

Filion's complaint herein was filed on February 21, 2007. (SCOMIS sub no. 1)

22

Filion filed an amended complaint on April 9, 2007. (SCOMIS sub no. 8)

23

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Washington Bar # 18541

1 Johnson filed an answer on May 16, 2007. (SCOMIS sub no. 10)

2 Filion filed a second amended complaint on August 15, 2007 without requesting or

3 being granted leave of court. (SCOMIS sub no. 15

4 Olson filed an answer to the second amended complaint on November 30, 2007.

5 (SCOMIS sub no. 21)

6 Filion's complaint, amended complaint, and second amended complaint fail to state a

7 claim upon which relief can be granted against Johnson. CR 12(b)(6).

8 Filion was charged with criminal violation of the mutual restraining orders set forth in

9 the parties' June 1, 2006 decree of dissolution of marriage. Filion came to Johnson's home on

10 August 1, 2006 in violation of the dissolution decree's restraining orders. Filion knew that the

11 exchange of personal property was to occur without contact between the parties. Johnson's

12 dissolution lawyer, Olson, coordinated the personal property exchange with Peter Jorgensen,

13 Filion's dissolution lawyer. Olson's only communication with Mr. Filion was through

14 Filion's lawyer, Peter Jorgensen. (See the attached pp. 1-2 of the 12/10/2007

15 DECLARATION OF MARK OLSON filed herein under SCOMIS sub no. 27).

16 Filion's counsel herein, Timothy McGarry, confirms the foregoing facts in Filion's

17 01/17/2008 response to defendant Olson's Motion to Dismiss, where he says under the section

18 titled STATEMENT OF FACTS that:

19 "Plaintiff Gary Filion has initiated a lawsuit against JUlie Johnson, and Olson and Olson, PLLC for damages. Mr. Filion was the respondent in a
20 divorce action initiated by Julie Johnson (Filion). Ms. Johnson was represented by Mark Olson of Olson and Olson PLLC. The decree of
21 dissolution was entered on June 1, 2006. The decree contained mutual no contact orders. Pursuant to the decree, Plaintiff was to pick up
22 certain personal property from the home in which Ms. Johnson was residing. In letters from Mr. Olson to Mr. Filion's lawyer of July 26,
23 2006 and July 28, 2006, Mr. Filion was instructed to go to the home on

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Washington Bar # 18541

1 August 1, 2006 and pick up his belongings. Mr. Filion did that and when he arrived the police were called. Ms. Johnson told the police that
2 Mr. Filion was violating a no contact order. Subsequently, Mr. Filion was prosecuted. However, the case was dismissed when the City
3 Attorney learned that Mr. Filion had been instructed to go to the Johnson home to pick up his personal property. (See attachments)."
4
(see the document titled DEFENDANT'S RESPONSE
5 TO PLAINTIFF OLSON'S MOTION TO DISMISS UNDER CR12(b)(6) [sic] filed herein on 01/17/2007
6 under SCOMIS sub no. 30 at page 1, line 24, to page 2, line 11) [a copy of said document without the
7 attachments is attached hereto]

8 Olson's letter dated July 28, 2006, to Filion's lawyer Peter Jorgensen (attached to
9 attorney McGarry's 01/17/2007 declaration as EXHIBIT # 3 under SCOMIS sub no. 30) states
10 that Johnson does not want Filion coming to the residence while she is still there (copy
11 attached hereto):

12 "Julie is not agreeable to having Mr. Filion come on Monday, July 31st, because she will be in the middle of
13 moving, the children will be home, etc. Please ask him to schedule his pick-up for Tuesday afternoon, anytime after
14 2:00 p.m."

15 Filion's attorney Timothy McGarry's declaration dated 01/17/2008 (SCOMIS sub no.
16 20) has attached to it and incorporates certain police reports as EXHIBIT # 4 which include,
17 on the last page, Johnson's declaration stating that:

18 "Today, at about 4:15 p.m. Gary came over and knocked on the door. Gary knows he has a restraining
19 order that prevents him from contacting me at the house or anywhere else. My realtor had told me that Gary was
20 coming despite their advice for him not to come.
"I am willing to assist in prosecution.
21 "This was written for me by Deputy Rudolph.
Signed by Julie Johnson 8/1/06
22
Filion admits that he was aware of the existence of the mutual restraining orders. His
23

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1 original, 1st amended, and 2nd amended complaints all allege in paragraph III that "Mutual
2 restraining orders were contained in the divorce decree."

3 III. STATEMENT OF ISSUES

4 Should plaintiff's claims against defendant Julie Johnson be dismissed, pursuant to
5 Civil Rule 12(b)(6), and should Johnson be awarded her attorney fees, costs, and expenses
6 under CR 11, and be awarded her attorney fees and statutory damages under and RCW
7 4.24.510?

8 IV. ARGUMENT AND AUTHORITY

9 The record herein shows that Filion violated the plain and clear terms of a mutual
10 restraining order by personally coming upon the grounds of Johnson's residence, an act which
11 is expressly prohibited by the restraint provisions. Nothing in Olson's letter to attorney
12 Jorgenson grants Filion permission to violate the restraining order by coming within 500 feet
13 of or by entering upon the grounds of Johnson's home. Filion and his counsel could have had
14 others perform the personal property exchange at any time. Filion knew that he was
15 prohibited from doing that at Johnson's residence in person. Filion knew that Johnson was
16 still home and packing when he went to Johnson's residence on August 1, 2006.

17 Filion has no claim for damages against Johnson under any theory of recovery on the
18 basis of his pleadings in this case. His complaint alleges that (1) there existed mutual
19 restraining orders, (2) he went to Johnson's residence on August 1, 2006, (3) when he arrived
20 the police were called, (4) he was placed under arrest for violation of a no contact order, (5)
21 Johnson by misrepresentation and false statements to police officers caused the false arrest
22 and malicious prosecution of Filion.

23 But Filion has admitted in pleadings subsequently filed that the mutual restraining

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1 orders prohibited him from going to Johnson's residence, that he knew Johnson was present
2 before he went to the residence, and that he was charged with violation of the restraining order
3 because Johnson reported the violation to the police.

4 On the basis of the indisputable record in this case, Filion has no claim against
5 Johnson. His claim is barred by RCW 4.24.500 and 4:24.510 which provide as follows:

6 RCW 4.24.500:

7 "Information provided by citizens concerning potential
wrongdoing is vital to effective law enforcement and the efficient
8 operation of government. The legislature finds that the threat of a
civil action for damages can act as a deterrent to citizens who
9 wish to report information to federal, state, or local agencies. The
costs of defending against such suits can be severely
10 burdensome. The purpose of RCW 4.24.500 through 4.24.520 is
to protect individuals who make good-faith reports to appropriate
11 governmental bodies."

12 RCW 4.24.510:

13 "A person who communicates a complaint or information to any
branch or agency of federal, state, or local government, or to any
14 self-regulatory organization that regulates persons involved in
the securities or futures business and that has been delegated
15 authority by a federal, state, or local government agency and is
subject to oversight by the delegating agency, is immune from
16 civil liability for claims based upon the communication to the
agency or organization regarding any matter reasonably of
17 concern to that agency or organization. A person prevailing upon
the defense provided for in this section is entitled to recover
18 expenses and reasonable attorneys' fees incurred in establishing
the defense and in addition shall receive statutory damages of ten
19 thousand dollars. Statutory damages may be denied if the court
finds that the complaint or information was communicated in bad
20 faith."

V. EVIDENCE RELIED UPON

21 The court's files and records herein.

22

23

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APPENDIX -- Page 63

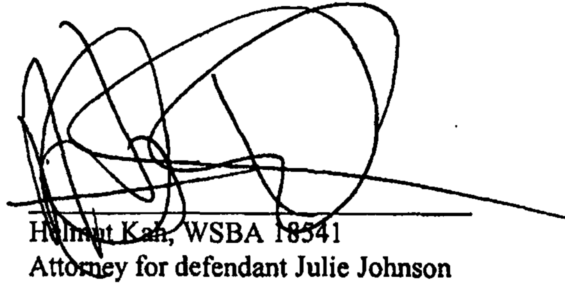
1 VI. CONCLUSION

2 Filion's claims against Johnson should be dismissed with prejudice and Johnson
3 should be awarded her attorney fees, costs, and expenses under CR 11 and should be awarded
4 her reasonable attorney fees plus the statutory damages of $10,000.00 under RCW 4.24.510.
5 Upon the court's granting of this motion to dismiss, a hearing should be scheduled for
6 determination of sanctions, costs, and reasonable attorney fees.

7 A proposed order will be provided with the reply.

8 RESPECTFULLY SUBMITTED this 23rd day of October 2008.

9

10 

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12 Helmut Kah, WSBA 18541
Attorney for defendant Julie Johnson

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secured by Shoreline residence, then any payment thereon will be deducted from the Husband's 40% share as provided herein.

The net sale proceeds shall be divided as follows:

i. The net sale proceeds shall first be applied to payment of the community obligations as set forth in paragraphs 3.5 above.

ii. The Wife shall receive Sixty percent (60%) of the remaining net sale proceeds less $3,380 to be paid to the Husband for her share of the furnace repairs on the Edmonds home.

iii. The Husband shall receive Forty percent (40%) of the remaining sale proceeds less any post separation encumbrance secured/liened against the residence including BECU Equity Advantage Line #6091 secured by Shoreline residence.

i. The Husband/Wife shall each report the one half of the entire gain from the sale of the residence on his/her separate federal income tax return and assume and pay all tax due by reason of said sale and hold the other party harmless from any payment thereon.

3.7 HOLD HARMLESS PROVISION.

Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party.

3.8 SPOUSAL MAINTENANCE.

Neither party shall pay maintenance to the other party.

3.9 MUTUAL CONTINUING RESTRAINING ORDER.

A mutual continuing restraining order is entered as follows:

1. Both parties are restrained and enjoined from disturbing the peace of the other party.

2. Both parties are restrained and enjoined from going onto the grounds of or entering the home, work place or school of the other party, and the Husband is restrained and enjoined from going onto the grounds of or entering the home, work place, school, or day care of the following named children: Emilie Nye, Mitchell Nye, Jordan Nye, Spencer Nye.

3. Both parties are restrained and enjoined from knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the

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other party, or the day care or school of these children listed above.

4. Both parties are restrained and enjoined from molesting, assaulting, harassing, or stalking the other party or the children.

VIOLATION OF A RESTRAINING ORDER IN PARAGRAPH 3.8 WITH ACTUAL KNOWLEDGE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT THE VIOLATOR TO ARREST. RCW 26.09.060.

CLERK'S ACTION. The clerk of the court shall forward a copy of this order, on or before the next judicial day, to: King County Sheriff and Snohomish County Sheriff law enforcement agency which shall enter this order into any computer-based criminal intelligence system available in this state used by law enforcement agencies to list outstanding warrants. **(A law enforcement information sheet must be completed by the party or the party's attorney and provided with this order before this order will be entered into the law enforcement computer system.)**

SERVICE.

The restrained party or attorney appeared in court or signed this order; service of this order is not required.

EXPIRATION.

This restraining order expires on June 30, 2009 and may be renewed upon application by either party.

This restraining order supersedes all previous temporary restraining orders in this cause number.

FULL FAITH AND CREDIT.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

3.10 PROTECTION ORDER.

Does not apply.

3.11 JURISDICTION OVER THE CHILDREN.

Does not apply because there are no dependent children of this marriage.

3.12 PARENTING PLAN.

Does not apply.

3.13 CHILD SUPPORT.

Does not apply.

3.14 ATTORNEY'S FEES, OTHER PROFESSIONAL FEES AND COSTS.

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KING COUNTY, WASHINGTON

ORIGINAL

OCT 2 9 2008

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

SUPERIOR COURT OF WASHINGTON, County of King

Gary Filich Plaintiff, Vs. Julie Johnson Defendant,	No. ORDER 07-2-06353-6 SEA

THIS MATTER having come on regularly before the above-entitled court upon the plaintiff's/~~defendant's~~ motion, the plaintiff appearing through its attorney of record, the defendant appearing through its attorney of record, the court having considered the files and records herein and the arguments of the parties and being fully advised in the premise,

IT IS HEREBY ORDERED as follows: that the motion to strike the hearing is granted and the hearing is continued to November 21, 2008 for hearing on defendant's CR 12(b)(6) motion to dismiss which will be heard by the court as a motion for summary judgment under CR 56.

DATED: Oct 29, 2008

Douglas D. McBroom
JUDGE

PRESENTED BY:

[signature]
Attorney for Plaintiff/ Defendant 8456
Tim McGarry
Printed Name of Attorney

[signature]
Helmut Kah WSBA# 18541
Order Attorney for defendant Johnson

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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

GARY FILION,
Plaintiff,
vs.
JULIE JOHNSON,
Defendant.

NO. 07-2-06353-6SEA

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW, Plaintiff Gary Filion, by and through his attorney, Timothy McGarry, and respectfully submits the following response to Defendant's motion to dismiss:

I. Relief Requested

For the entry of an order denying defendant's motion to dismiss pursuant to CR 12(b)(6), for CR 11 sanctions, attorney fees and damages.

II. Statement of Facts

Defendant has noted a motion to dismiss pursuant to CR 12(b)(6).

Plaintiff was divorced from Defendant by a dissolution decree entered on June 1, 2006. The decree provided that Plaintiff Filion was to pick up certain items of personal property from the wife's residence. See Section 3.2(10) attached. Pursuant to letters from Defendant's counsel dated July 26, 2006, and July 28, 2006, it was agreed by the parties

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1 that this pickup would occur on August 1, 2006, after 2:00 p.m. Defendant submits in the
2 motion to dismiss that Plaintiff came to the Johnson's house in violation of the dissolution
3 decree's restraining order. This is not true in that the decree of dissolution specifically
4 authorized him to pick up property at the Shoreline house at an agreed time. The agreed
5 time was spelled out in the letter of July 28, 2006, written by Ms. Johnson's lawyer. Mr.
6 Filion went to the residence at the agreed time to pick up the property. See Declaration
7 of Gary Filion.

8 Peter Jorgenson, Mr. Filion's lawyer, told his client that Mr. Filion could go o the
9 Shoreline home on August 1, 2006, to pick up his property. See attached Declaration.

10 III. Statement of Issues

11 1. Should Defendant's motion be denied because there are material questions
12 of fact concerning the availability of the affirmative defense pursuant to RCW 4.24.500 et
13 seq.

14 IV. Argument

15 A. Equitable Estoppel

16 The Defendant is precluded from asserting the defense of RCW 4.24.510 by the
17 principle of equitable estoppel. The principle of equitable estoppel is based upon the
18 reasoning that a party should be held to a representation made where inequitable
19 consequences would otherwise result to another party who has justifiably and in good faith
20 relied thereon. *Wilson v. Westinghouse Elec. Corp.*, 85 Wash.2d 78, 81, 530 P.22d 298
21 (1975). The suffered damages by the Plaintiff are a direct result of his justified reliance,
22 in good faith, on the representations made by Defendant Johnson. As such, Defendant
23 Johnson is estopped from asserting the affirmative defense of RCW 4.24.510.

24 In Washington, the claim of equitable estoppel requires that three elements be
25 satisfied: (1) an admission, statement, or act inconsistent with th claim afterwards asserted;
26 (2) an action by the other party on the faith of such admission, statement or act; and (3)
27

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1 an injury to such other party resulting from permitting the first party to contradict or
2 repudiate such an admission, statement, or act. *Wilson*, 85 Wash.2d at 81. In addition to
3 satisfying the elements of equitable estoppel, the party asserting the doctrine must show
4 that the reliance was reasonable. *Concerned Land Owners of Union Hill v. King County*,
5 64 Wash.App. 768, 778, 827 P.2d 1017 (1992).

6 In *Wilson*, the Washington Supreme Court held that the Plaintiff successfully met
7 all the elements of estoppel to prevent the Defendant, Westinghouse, from recovering
8 overages in retirement benefits. The case arose when the Plaintiff, faced with termination,
9 was informed by Westinghouse as to the amount that he would receive in retirement
10 benefits if he chose to retire early. Relying on the representations by Westinghouse,
11 Wilson opted to retire early and forego assistance in finding a new position. Two years
12 later, Westinghouse discovered that they had made a clerical error and reduced his
13 monthly retirement payments. The Plaintiff filed suit to estop Westinghouse from seeking
14 restitution as to the overages already paid to him. The Washington Supreme Court held
15 that all three elements of equitable estoppel were satisfied. First, Westinghouse had
16 represented one position and later changed their position; second, the Plaintiff had relied
17 on their representation in choosing to retire; and third, injustice would result if
18 Westinghouse were allowed to recover overages already paid. *Wilson*, 85 Wash.2d at 81-
19 82.

20 Similar to *Wilson*, in the case at bar all of the elements are satisfied. First, the
21 Defendant represented to Filion through her attorney, Mark Olson, that Filion "could pick
22 up his items anytime after 2:00 p.m. on Tuesday, August 1st." Exhibit 3, Defendant
23 Johnson's Motion to Dismiss Under CR 12(B)(6), for CR 11 Sanctions, and for Costs,
24 Attorney Fees, and Statutory Damages. Second, in reasonable reliance upon the
25 representations of the Defendant, Plaintiff Filion scheduled and rented a truck for the
26 purposes of moving his items out of the house and arrived at the house at the agreed upon
27

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1 time. Finally, Defendant Johnson repudiated her representation that it would be
2 acceptable for Filion to pick up his belongings at that time and Defendant Johnson caused
3 Filion to be falsely arrested and charged with violating the restraining order. Filion's false
4 arrest, the malicious prosecution, and the corresponding attorney fees are a direct result
5 of Defendant Johnson's repudiation of her previous representation. All three elements of
6 the claim of equitable estoppel are satisfied. Accordingly, the Defendant is estopped from
7 asserting the affirmative defense of RCW 4.24.510.

8 B. Good Faith Exception

9 Defendant's assertion of RCW 4.24.510 as an affirmative defense fails because
10 Defendant's communication of information was not in good faith. The purpose of
11 Washington's anti-SLAPP statute is defined in RCW 4.24.500 as "to protect individuals
12 who make *good-faith* reports to appropriate governmental bodies." Wash. Rev. Code
13 Ann.§ 4.24.500 (West 2008) (emphasis added.). This statement of purpose implies a
14 requirement of good faith by the proponent of the statue before communications fall within
15 its protections. The burden to show that the Defendant did not act in good faith lies with
16 the Plaintiff. *Segaline v. State, Dept. Of Labor and Industries,* 144 Wash.App. 312, 325,
17 182 P.3d 480 (2008). The Plaintiff must show that the Defendant knew of the falsity of the
18 communications or acted with reckless disregard as to their falsity. *Id.* at 325.

19 The information that Defendant Johnson communicated to public officers was not
20 communicated in good faith when she neglected to state that the sole reason for Filion's
21 appearance at the house at that time was due to a representation that she herself had
22 made to Filion. Johnson knew of the falsity of her communication and acted with reckless
23 disregard in notifying the police. When Defendant Johnson made the complaint to the
24 police, it was with the knowledge that Filion had arrived at the scheduled time for the
25 purpose of moving his belongings out of the house per Defendant Johnson's prior
26 representation. The question of whether Defendant Johnson made the communication in
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1 good faith is a disputed question of fact.

2 C. "Concerning Potential Wrongdoing"

3 The intent of the anti-SLAPP statute, as stated in RCW 4.24.500, is to protect
4 information provided by citizens "concerning potential wrongdoing." Wash. Rev. Code Ann.
5 § 4.24.510 (West 2008). "The legislature enacted RCW 4.24.510 to encourage the
6 reporting of *potential wrongdoing* to governmental entities." *Gontmakher v. City of*
7 *Bellevue*, 120 Wash.App. 365, 366, 85 P.3d 926 (2004) (emphasis added). AS our
8 appellate courts have held this can apply to communications, the subject of which entail
9 potential illegal acts such as suspected counterfeit checks; *Dang v. Ehredt,* 95 Wash.App.
10 670, 977 P.2d 29, review denied. 139 Wn.2d 1012 (1999), and illegal clearing of land.
11 *Gilman v. MacDonald*, 74 Wash.App. 733, 875 P.2d 697 (1994).

12 Here, the communication that Defendant argues is protected is not the subject of
13 an illegal act. Rather, the act that formed the basis for the communication was precipitated
14 by a mutual agreement between the Defendant and Filion. Filion was following the
15 instructions that had been communicated to him when he arrived at the house. He was
16 not engaged in wrongdoing. When Defendant Johnson made the complaint to the police,
17 it was with the knowledge that Filion had arrived at the scheduled time for the purpose of
18 moving his belongings out of the house per Defendant Johnson's prior representation and
19 the provisions of the divorce decree. Johnson's communication was not reporting potential
20 wrongdoing. RCW 4.24.510 is not intended to protect the type of information that was
21 communication to the police by Defendant Johnson. Johnson's reliance on RCW 4.24.510
22 as an affirmative defense is contrary to the stated purpose of the statute and therefore the
23 Defendant's motion under 12(b)(6) should be dismissed.

24 D. "Reasonably of Concern to that Agency"

25 RCW 4.24.510 requires that the subject of the protected communication be
26 "regarding any matter reasonably of concern to that agency." Wash. Rev. Code Ann. §

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1 4.24.510 (West 2008). "Immunity applies under RCW 4.24.510 when a person (1) 'communicates a complaint or information to any branch of federal, state, or local government, or to any self-regulatory organization, ' that is (2) based on any matter 'reasonably of concern to that agency.' *Bailey v. State*, ___Wash. App. ___, 191 P.3d 1285, 1290 (2008) (quoting RCW 4.24.510). The second prong of this test elaborated in *Bailey* is a question here. The presence of Filion at the house for the purpose of collecting his belongings, per the agreement, is not "reasonably of concern" to the police. Filion was following the instructions that had been communicated to him when he arrived at the house. He was not engaged in wrongdoing. Whether Defendant Johnson's communications are of concern to the police is a question of fact.

V. Evidence Relied Upon

1. Decree of Dissolution Paragraph 3.2 (10)
2. Letters from Mark Olson
3. Declaration of Gary Filion
4. Declaration of Peter Jorgenson

VI. Conclusion

There are material questions of fact that remain concerning the applicability of the affirmative defense under RCW 4.24.500 et seq. as outlined above and whether Plaintiff can assert the defense pursuant to doctrine of equitable estoppel. For these reasons, Defendant's motion should be denied.

DATED this 7th day of November, 2008.

Timothy S. McGarry, WSBA #8486
Attorney for Plaintiff

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

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GARY FILION,
Plaintiff,
vs.
JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation,
Defendants.

NO. 07-2-06353-6 SEA

REPLY DECLARATION OF DEFENDANT JULIE JOHNSON

13 Julie Johnson declares:

14 1. I am the defendant in the above captioned case.

15 2. I make this declaration in reply to the declarations of Gary Filion and his

16 dissolution lawyer, Peter Jorgensen.

17 2. I am over eighteen years of age, of sound mind, competent to testify, and make

18 this declaration on the basis of personal knowledge.

19 3. Contrary to Mr. Filion's statements, neither I nor my dissolution lawyer Mark

20 Olsen authorized Mr. Filion to do anything in violation of the restraining orders set forth in

21 our decree of dissolution of marriage.

22 4. I spoke with our realtor, Pat Dornay, on August 1, 2006 and, as Ms. Dornay

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states in her declaration:

(a) Ms. Dornay represented us in the sale of my residence located at 19814 8th Ave. NW, City of Shoreline, King County, Washington (the property).

(b) My children and I were occupying the property as our home.

(c) I was scheduled to turn over possession to the buyers at 9:00 p.m. on August 1, 2006.

(d) Ms. Dornay phoned me in the morning of August 1, 2006 to check on my progress toward vacating the property by the deadline.

(e) Ms. Dornay came over to the property at about 1:00 p.m. on August 1, 2006 and saw for herself that I would need all the time until 9:00 p.m. to finish packing and moving.

(f) Ms. Dornay told me she had phoned Mr. Filion and informed him I would be at the property until 9:00 p.m. on August 1, 2006 to complete packing and moving.

(g) Ms. Dornay told me that Mr. Filion said he was coming over to the house anyway at 4:00 p.m. with a truck to pick up furniture and personal belongings.

(f) I told Ms. Dornay that Mr. Filion had better not come to the house or I will call the cops.

5. Mr. Filion knocked on the door of my home at about 4:00 p.m. while I and the children were present and still packing and working toward moving by the 9:00 p.m. deadline.

6. Through my kitchen window I saw a moving truck come up my driveway at about 4:00 p.m. The truck stopped near the garage door. I saw Mr. Filion get out of the truck. I began having a panic attack and took a Xanax. Mr. Filion walked up to the front door,

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1 knocked, and rang the doorbell. I called 911. My son, Spencer, answered the door not
2 knowing it was Mr. Filion who was there. Then my friend Larry, who was helping me pack
3 and move, told Mr. Filion that he should not be there and that the police are on their way.
4 7. When Mr. Filion arrived, everyone ran to the far end of the house. Everyone
5 present was aware of the history of Mr. Filion's abusive behavior toward me and my children.
6 I am deathly afraid of Mr. Filion. He has been abusive toward me and my children during all
7 the years of our marriage. That's why the restraining orders were entered as part of our decree
8 of dissolution of marriage.
9 8. I was shocked to see Mr. Filion come to my home that afternoon. Pat Dornay
10 had informed him that we would still be at the property until 9:00 p.m. The dissolution decree
11 prohibits Mr. Filion from coming onto or within 500 feet of my home. Mr. Filion was present
12 in court when the dissolution decree was entered in Snohomish County Superior Court and
13 was fully aware of the restraining provisions contained in the decree.
14 9. Mr. Jorgensen is correct in saying that "Never did the parties interact on their
15 own."
16 10. The decree of dissolution and Mr. Olsen's letters speak for themselves.
17 Nowhere does the decree say that Mr. Filion has permission to come onto the grounds of or
18 enter my home to exchange personal property and furniture. I don't read anything in Mr.
19 Olsen's communications to Peter Jorgensen that says Mr. Filion has permission to violate the
20 restraining orders by personally coming onto the grounds of my home on August 1, 2006.
21 11. Mr. Filion could have had his parents or the movers come up to the house and
22 pick up his furniture and other items. But the decree prohibits Mr. Filion from doing that in
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1 person. He was warned by Pat Dornay that I was not finished moving and that he should not
2 come to the house. He chose to ignore the warnings and the clear and unequivocal provisions
3 of the restraining orders.

4 11. Contrary to Mr. Jorgensen's statements, Mr. Olsen's letters make it clear that I
5 did not want Mr. Filion coming to my home while the children and I were there. Mr. Olsen
6 states in his letter dated July 28, 2006 that "Julie is not agreeable to having Mr. Filion come
7 on Monday, July 31st, because she and the children will be home, etc." Mr. Filion admits that
8 he was told in the early afternoon of August 1, 2006 that we would be home until 9:00 p.m.
9 that evening.

10 12. Mr. Filion's property was in fact at the house on August 1, 2006. But when
11 Mr. Filion did not have it picked up before 9:00 p.m. on August 1, 2006, as he could have
12 done through third persons such as his movers or his parents, I had to move his property to a
13 different location so that the buyers could take possession of the residence at 9:00 p.m.

14 13. The restraining orders were entered to protect me and my children from Mr.
15 Filion. I never gave him permission to do anything in violation of the restraining orders. If
16 Mr. Filion's lawyer led him to believe he could take actions in violation of the court's
17 restraining orders without consequence, that's between him and his lawyer.

18 14. I called 911 in fear of Mr. Filion and in good faith. Mr. Filion came onto the
19 grounds of my and my children's home in violation of the restraining orders that were in
20 effect. My statements to the 911 operator are true. My statements to the police officer are
21 true. I did nothing in bad faith. The restraining orders are there for protection which only
22 works if violations are reported.

23

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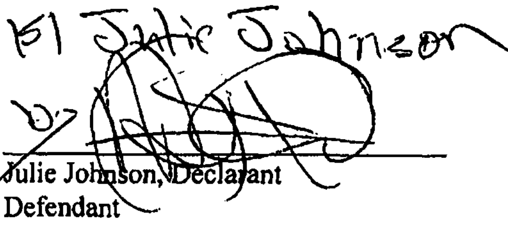
Cell: (206) 234-7798
Email: helmut.kah@att.net
WSBA 18541

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true.
3 Signed at King County, Washington, on November 14, 2008.
4
5
6 Signed by Helmut Kah for Julie Johnson
7 pursuant to telephone permission given on November 14, 2008



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10 Julie Johnson, Declarant
11 Defendant
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WSBA #18541

FILED
KING COUNTY, WASHINGTON

NOV 21 2008

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY,

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF KING

Gary Filion
Pet/Pltf,

v.

Julie Johnson
Resp/Def.

CAUSE No. 07-2-06353-6SEA
ORDER ON CIVIL MOTION (ORM)

This Court, having heard a motion to dismiss pursuant to 12(b) 6

IT IS HEREBY ORDERED that the motion is denied

DATED this 21st day of November, 2008

Douglas D. McBroom
Honorable

Presented by:
Tim McGarry 8486

Copy received
Hemat Kah WSBA 18541
Attorney for Defendant

ORDER ON CIVIL MOTION

King County Superior Court
516 Third Avenue
Seattle, WA 98104

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6
7

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

8 GARY FILION,
Plaintiff,
9 vs.
10 JULIE JOHNSON, and OLSON and OLSON,
11 PLLC, a legal services corporation,
Defendants.

NO. 07-2-06353-6 SEA

DEFENDANT JOHNSON'S BRIEF FOR MANDATORY ARBITRATION HEARING

12 COMES NOW the defendant Julie Johnson ("Johnson"), by and through her attorney,
13 Helmut Kah, and submits the following as her brief for the mandatory arbitration hearing
14 herein which is currently scheduled for 9:00 a.m. on Monday, February 9, 2009. Johnson
15 previously submitted her pre-hearing statement of proof.

16 Plaintiff Gary Filion ("Filion") is defendant Johnson's ex-husband. Filion has filed
17 three complaints. The third complaint, i.e. (2nd amended complaint), seeks an award of money
18 damages against Johnson and against her dissolution lawyer, Mark D. Olson ("Olson").
19 Filion's claims against Olson were dismissed by order entered February 8, 2008.

20 Olson represented Johnson, f/k/a Julie Filion in the parties dissolution of marriage
21 case, *In re the Marriage of: Julie K. Filion and Gary A. Filion,* Snohomish County Superior
22 Court cause no. 05-3-00679-1. After trial before the Honorable Ellen J. Fair, a Decree of
23

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Dissolution was entered on June 1, 2006. Pursuant to the terms of the decree, the Filion and Johnson were to exchange certain items of personal property. The decree of dissolution contained mutual restraining orders which remain in effect until June 30, 2009.

The dissolution decree's restraining order provides, among other things, that both Filion and Johnson are restrained and enjoined from

> "disturbing the peace of the other party."
>
> "going onto the grounds of or entering the home, work place or school of the other party"

and that Filion is restrained and enjoined from

> "going onto the grounds of or entering the home, workplace, school or day care of the following named children: Emelie Nye, Mitchell Nye, Jordan Nye, Spencer Nye."

and that both parties are restrained and enjoined from

> "knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the other party, or the day care or school of these children listed above."
>
> (see the attached pages 8 – 9 of the dissolution decree)

Filion's complaint fails to state a claim upon which relief can be granted against Johnson. The basis of Filion's claims is Johnson's 911 call on August 2, 2006 when Filion came upon the premises of her home in violation of the dissolution decree restraining orders.

Filion violated the plain and clear terms of the mutual restraining orders by personally coming upon the grounds of Johnson's residence, an act which is expressly prohibited by the restraint provisions. Filion was aware of the restraining orders and knew that he was prohibited from coming the premises of Johnson's residence in person. He knew that Johnson was at home and packing for her move when he went to her residence on August 1, 2006.

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Filion's claims against Johnson are barred by the absolute immunity given Johnson by RCW 4.24.500 and 4:24.510 which provide as follows:

RCW 4.24.500:

> "Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies."

RCW 4.24.510:

> "A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to 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, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith."

Johnson has immunity under RCW 4.24.510 because Filion's claim against her are based on her communication to the police "regarding any matter reasonably of concern to that agency or organization." Filion's pleadings alone establish that his claim is based on Johnson's 911 call. He alleges that *"when he [plaintiff] arrived at Johnson's residence, the police were called and he was placed under arrest for violation of a no contact order."* Thus, Filion's complaint alleges that he was arrested and prosecuted because Johnson reported to the

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1 police that Filion had violated a no contact order. Johnson's report of a no contact / 2 restraining order violation is a matter reasonably of concern to the police. Thus, her 3 communication falls squarely under the immunity provided by RCW 4.24.510

4 RCW 4.24.510 requires that the communication, i.e. the 911 call and subsequent 5 report of what happened, be made "to any agency of federal, state or local government." The 6 statute does not define "agency". Our appellate courts have held that the statute applies to 7 communications with the police and law enforcement. *Dang v. Ehredt*, 95. Wn. App. 670, 8 977 P.2d 29, review denied. 139 Wn.2d 1012 (1999) (bank employees called 911 to report 9 what they mistakenly believed was a counterfeit check); to communications with officials of a 10 land development division and county executive. *Gilman v. MacDonald*, 74 Wn. App. 733, 11 875 P.2d 697, review denied, 125 Wn.2d 1010 (1994); and to communications with judicial 12 offices such as the Superior Court Administration. *Kauzlarich v. Yarbrough*, 105 Wn. App. 13 632, 20 P.3d 946 (2001).

14 The facts of this case are similar to facts in *Dang v. Ehredt*, supra. In *Dang* a bank, 15 through its employees, called 911 to report that *Dang* was attempting to pass a counterfeit 16 check. The police came to the bank and arrested *Dang*, who later sued the bank and its 17 employees among others for damages. When it was later determined that the check was valid 18 and not counterfeit, *Dang* was released and the charges were dismissed. The *Dang* court held 19 that the bank and its employees, who did nothing to restrain or otherwise imprison Ms. Dang 20 other than call and make a report to 911, are entitled to immunity from liability for their 21 actions under RCW 4.24.510. The facts in *Dang* mirror the facts in this case. Ms. Johnson is 22 entitled to immunity under RCW 4.24.510.

23

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1 The issue whether "good faith" is an element on the question whether immunity under
2 RCW 4.24.510 applies was squarely addressed in the case of *Bailey v. State*, No. 26031-3-III,
3 decided September 22, 2008. The court held that "good faith" is not an element on the issue
4 of statutory immunity.
5 Filion's claims against Johnson should be dismissed with prejudice and Johnson
6 should be awarded her attorney fees, costs, and expenses under CR 11 and is entitled to an
7 award of her reasonable attorney fees plus statutory damages of $10,000.00 under RCW
8 4.24.510.
9 RESPECTFULLY SUBMITTED this 6th day of February, 2009.
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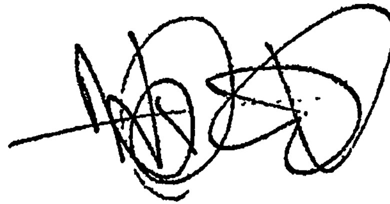

14 Helmut Kah, WSBA 18541
15 Attorney for defendant Julie Johnson
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ARBITRATION AWARD SEALED TO TRIAL JUDGE

FILED
09 MAR -4 AM 9:53
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

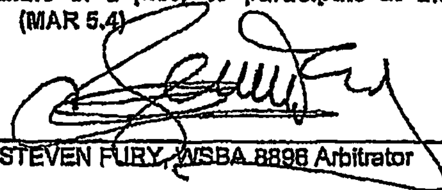
FILION PLAINTIFF(S), vs. JOHNSON DEFENDANT(S).	NO. 07-2-06353-6 SEA ARBITRATION AWARD (Clerk's Action Required - ARBA)

The issues in arbitration have been heard on February 9, 2009, I make the following decision:

Finding for Defendant Johnson. No statutory damages or attorney's fees awarded to defendant Johnson.

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo under MAR 7.1, any party on notice to all parties may present a judgment on the Arbitration Award for entry as final judgment in this case to the Ex Parte Department.

Was any part of this award based on the failure of a party to participate at the hearing?
Yes______ (PLEASE EXPLAIN) No: XX (MAR 5.4)



DATED: February 13, 2009

C. STEVEN FURY, WSBA 8898 Arbitrator

FILE THE ORIGINAL WITH THE CLERK'S OFFICE, KING COUNTY COURTHOUSE, TOGETHER WITH PROOF OF SERVICE ON THE PARTIES. SEND A COPY TO:

KING COUNTY SUPERIOR COURT
ARBITRATION DEPARTMENT
516 THIRD AVENUE - E219
SEATTLE WA 98104

NOTICE: *If no Request for Trial De Novo has been filed and Judgment has not been entered within 45* days after this award is filed, the Clerk will notify the parties by mail that the case will be dismissed for want of prosecution.

ORIGINAL

PHOTOCOPY

FILED
09 MAR 13 PM 2:47
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

FILION PLAINTIFF(S), vs. JOHNSON DEFENDANT(S).	NO. 07-2-06353-6 SEA CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that I mailed on this date a copy of the **ARBITRATION AWARD,** properly addressed and postage prepaid, to the parties listed below:

Timothy McGarry
1416 E. Thomas
Seattle, WA 98112

Helmut Kah
16818 140th Ave. N.E.
Woodinville, WA 98072

Signed at Seattle, Washington on February 13, 2009

TONYA R. ARICO
Paralegal

PLEASE DO NOT ATTACH YOUR CERTIFICATE OF MAILING
TO THE FRONT OF THE AWARD

 ORIGINAL

FILED

KING CO SUPERIOR CT
BARBARA MINER
Director & Superior CT Clerk
Seattle WA

07-2-06353-6

Rcpt. Date	Acct. Date	Time
04/02/2009	04/02/2009	12:06 PM

Receipt/Item #	Tran-Code	Docket-Code
2009-07-05625/01	1111	$FFR

Cashier: JTT
Paid By: KAH, HELMUT
Transaction Amount: $250.00

FILED
09 APR -2 PM 12:04
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

GARY FILION,
Plaintiff,
vs.
JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation,
Defendants.

NO. 07-2-06353-6 SEA

REQUEST FOR TRIAL DE NOVO AND FOR CLERK TO SEAL ARBITRATION AWARD (RTDNSA)
(Clerk's Action Required)

PLEASE TAKE NOTICE that the aggrieved party, defendant Julie Johnson, requests a Trial De Novo from the arbitrator's award dated February 13, 2009, which was filed the clerk of superior court on March 4, 2009, without proof of service of the award. The filing of the award was complete on March 13, 2009, when proof of service of the award was filed with the Clerk of King County Superior Court. See MAR 6.2; *Roberts v. Johnson*, 137 Wn.2d 84; 969 P.2d 446 (1999).

1. A Trial De Novo is requested in this case pursuant to MAR 7.1 and LMAR 7.1.
2. The Arbitration Award shall be sealed pursuant to LMAR 7.1 and 7.2.
3. Filing fee of **$250.00** is attached
4. Pursuant to LMAR 7.1(b), a Jury Demand **IS NOT** being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from date of service of request for Trial De Novo to file a jury demand.

THE REQUEST FOR TRIAL DE NOVO SHALL NOT REFER TO THE AMOUNT OF THE AWARD. DO NOT ATTACH A COPY OF THE AWARD

Dated and Signed on April 2, 2009

Helmut Kah, WSBA 18541
Attorney for defendant Julie Johnson

REQUEST FOR TRIAL DE NOVO (12/17/01)
Page 1 of 2

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Washington Bar # 18541

ORIGINAL

1 2 3 FILE, TOGETHER WITH PROOF OF SERVICE, WITH THE CASHIER'S SECTION IN THE CLERK'S OFFICE, KING COUNTY COURTHOUSE OR KENT REGIONAL JUSTICE CENTER. SERVE COPIES ON ALL PARTIES AND ARBITRATION DEPARTMENT, ROOM E-219, KING COUNTY COURTHOUSE, 516 THIRD AVENUE, SEATTLE, WA 98104.

4 **IMPORTANT: NOTICE TO PARTIES**

5 6 The Court will assign an accelerated trial date. A request for trial may include a request for assignment of a particular trial date or dates, PROVIDED that the date or dates requested have been agreed upon by all parties and are between 60 and 120 days from the date the Request for Trial De Novo is filed.
(Agreed date: ______________________________)

7 8 For cases originally governed by KCLCR 4, the Court will mail to all parties a Notice of Trial Date together with an Amended Case Schedule, which will govern the case until the Trial De Novo.

9 **TYPE NAMES AND ADDRESSES OF ALL ATTORNEYS**

10 **Attorney for Defendant Julie Johnson:**

11 12 **Helmut Kah, Attorney at Law**
16818 140th Ave NE
Woodinville, WA 98072-9001

13 14 Telephone: 425-892-6467
Facsimile: 425-892-6468
Cellular: 206-234-7798
WSBA # 18541

15 **Attorney for Plaintiff:**

16 17 18 **Timothy S. McGarry**
Attorney at Law
1416 E. Thomas
Seattle, WA 98112-5148

19 20 Phone: 206-322-1555
Fax: 206-322-6118
Email: mcgarrylaw@msn.com
WSBA # 8486

21

22 23 **COMMENT: Defendant OLSON and OLSON, PLLC, a legal services corporation, was dismissed from this case by order entered on February 2, 2008 (see SCOMIS Sub # 35]**

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Washington Bar # 18541

FILED
09 APR -2 PM 12:04
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

GARY FILION, Plaintiff, vs. JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation, Defendants.	NO. 07-2-06353-6 SEA **PROOF OF SERVICE OF REQUEST FOR TRIAL DE NOVO**

Helmut Kah declares:

I personally served a true and complete copy of defendant Julie Johnson's REQUEST FOR TRIAL DE NOVO dated April 2, 2009, by delivering a true, legible, and complete copy thereof to the office of plaintiff's attorney, Timothy McGarry, and to the Arbitration Department of King County Superior Court, during normal business hours, at the following addresses:

Timothy S. McGarry
Attorney at Law
1416 E. Thomas
Seattle, WA 98112-5148

COPY RECEIVED
LAW OFFICES
APR 02 2009
1416 East Thomas
Seattle, WA 98112

HELMUT KAH, Attorney at Law
16818 140th Avenue NE
Woodinville, Washington 98072-9001
Telephone: (425) 402-3033
Facsimile: (425) 939-6049
Email: helmut.kah@att.net
Washington Bar # 18541

1
2 **Arbitration Department**
Room E-219, King County Courthouse
3 **516 Third Avenue**
Seattle, WA 98104
4
5 **RECEIVED**
6 APR 02 2009
7 SUPERIOR COURT
ARBITRATION
8
9 I declare under penalty of perjury under the laws of the State of
10 Washington, that the facts stated above are true to the best of my
11 knowledge, information, and belief.
12 SIGNED at Seattle, Washington this 2nd day of April, 2009.
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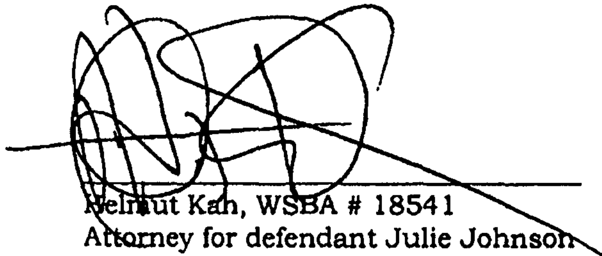
16 
17 Helmut Kah, WSBA # 18541
18 Attorney for defendant Julie Johnson
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Washington Bar # 18541

FILED
09 APR 14 PM 4:38
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT, STATE OF WASHINGTON
KING COUNTY

GARY FILION Plaintiff, v. JULIE JOHNSON Defendant.	**No. 07-2-06353-6 SEA** NOTICE OF SUBSTITUTION OF COUNSEL **(Clerk's action required)**

NOTICE OF SUBSTITUTION OF COUNSEL

TO: Clerk of the Superior Court

AND TO: Helmut Kah
16818 140th Ave NE
Woodinville WA 98072-9001
425.402.3033
425.939.6049

PLEASE TAKE NOTICE THAT NOAH DAVIS, of IN PACTA PLLC, is substituting his appearance in the above-entitled action on behalf of GARY FILION, Plaintiff in the same. NOAH DAVIS is substituting as counsel of record replacing TIMOTHY MCGARRY.

With this substitution and appearance, NOAH DAVIS does hereby demand notice of all further proceedings, and that all future notices, motions and communications (except original service, show cause orders and other documents/pleading requiring personal service on the client) be directed to NOAH DAVIS at the address provided below right.

ORIGINAL

IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

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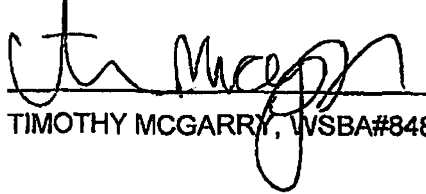
SUBSTITUTING OUT

DATED: 4/9/09



TIMOTHY MCGARRY, WSBA#8486

SUBSTITUTING IN

IN PACTA PLLC

DATED: 4/14/09

By:

NOAH DAVIS, WSBA #30939
801 2ND AVE STE 307
SEATTLE WA 98104

Certificate of Service

I, Noah Davis, certify that I served a copy of the above "Notice of Appearance" on Helmut Kah by 1st class mail postage prepaid

This day 14th April 2009.

Noah Davis, Esq.

IN PACTA PLLC
Lawyers
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281
Fax 206-860-0178

RECEIVED
18 MAY 2009 10 59
DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

FILED
09 MAY 18 AM 11:23
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

GARY FILION
Plaintiff,

v.

JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation,

Defendants.

No. 07-2-06353-6 SEA

REPLY RE: PLAINTIFF'S MOTION FOR DISMISSAL

COMES NOW, the Plaintiff, GARY FILION, by and through his counsel Noah Davis of IN PACTA PLLC to offer this Reply to Defendant Johnson's Response to Plaintiff's Motion for Dismissal.

I. Reply

Defendant Johnson requests that the Court dismiss Plaintiff Filion's claims but allow Defendant Johnson's "claims" for expenses, attorney's fees, and statutory damages pursuant

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801 2ND AVE, STE 307
SEATTLE WA 98104
PH: 206-709-8281
FAX: 206-860-0178

ORIGINAL

to RCW 4.24.510 to remain pending for trial de novo. The problems with this proposition are many.

First and foremost, the **only** legal authority cited by Defendant Johnson to support any of the positions she asserts in her Response is *Magee v. Allen* – an unpublished opinion. And we would respectfully request that the Court not follow this unreported decision. However, for the sake of argument, even if the Court did consider the opinion in *Magee v. Allen*, it is of extreme importance to note that the case was decided before the Washington Supreme Court rendered its ruling in *Wachovia Small Business Capital, a Washington Corporation v. Deanna D. Kraft*, 165 Wash.2d 481, 200 P.3d 683 (2009) (by which *Magee* would appear to be tacitly overruled). The *Wachovia* Court was clear in its holding that a voluntary dismissal leaves the parties as if the action had never been brought, and that a dismissal without prejudice was not a final judgment giving rise to the existence of a prevailing party. There is no reason why that same line of reasoning should not be applied to the instant case. Also of note is the fact that in *Magee* the Defendant raised the statutory affirmative defense set forth in RCW 4.24.510 in his Answer, whereas in the instant case Defendant Johnson did not make mention of RCW 4.24.510 in her Answer at all.

Defendant Johnson never pled a counterclaim for relief under RCW 4.24.510 in her Answer, nor did she plead an affirmative defense for relief under RCW 4.24.510 in her Answer. Defendant Johnson admits so in her Response. She also admits in her Response that the only times RCW 4.24.510 was ever raised was pursuant to an unsuccessful Motion for

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Summary Judgment and her brief to the Arbitrator. Defendant Johnson's admitted failure to raise a counterclaim or affirmative defense for fees and damages under RCW 4.24.510 in her Answer means that this issue was never properly before the Court (or the arbitrator for that matter), despite the unsupported assertion in her Response to this Motion that her failure to raise the statutory defense in her Answer "is of no moment." And, regardless, it certainly cannot be a basis for a defense to the Motion to Dismiss since there is no law for such a proposition, and since there will exist no affirmative defense or counterclaim remaining for disposition.

Additionally, the plain language of RCW 4.24.510 also precludes Defendant Johnson's ability to proceed to trial de novo on the sole issue of expenses, fees, and statutory damages because the statute awards fees to "a person prevailing upon the defense provided for in this section." If Plaintiff Filion has dismissed his claims pursuant to CR 41(a)(1)(B), which he is entitled to do under the rule at any time before he has rested his case, then there remains no claim against which Defendant Johnson can mount a prevailing defense because there is nothing to defend against.

As a result, Defendant Johnson is not entitled to a trial de novo based solely on a singular issue that was never properly before the arbitrator in the first place. The "trial" in a trial de novo after arbitration refers to the pre-existing cause of action on which the parties were entitled to a trial before the arbitration. *In re Smith-Bartlett*, 95 Wn. App. 633, 976 P.2d 173 (1999). Voluntary dismissal of the action leaves the parties as if the action had never been

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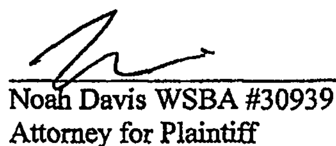
brought. *Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital, a Washington Corporation v. Deanna D. Kraft*, 165 Wash.2d 481, 492, 200 P.3d 683 (2009). And thus, either the Plaintiff's case and all claims are dismissed in total or not at all, thereby allowing Plaintiff Filion the opportunity to pursue his claims in the trial de novo. The trial de novo includes all issues arbitrated and all parties to the dispute; a partial trial de novo is not allowed. *Perkins Coie v. Williams*, 84 Wash. App. 733, 929 P.2d 1215 (Div. 1 1997). Therefore Defendant Johnson's proposal that Plaintiff Filion's claims should be permissively dismissed while allowing her claim for statutory fees and damages, which was never properly pled, to proceed to a trial de novo fails as a matter of law.

II. Conclusion

In conclusion, Plaintiff Filion respectfully requests that the Court grant the voluntary dismissal without prejudice, including a dismissal without an award of costs or terms. Should the Court deny the Plaintiff's Motion to Dismiss in full (including without costs), then there can be no bifurcation (dismissing in part and allowing part of the case to proceed) and the Plaintiff would be compelled to litigate his original claims.

Dated this 18th day of May, 2009.

IN PACTA PLLC



Noah Davis WSBA #30939
Attorney for Plaintiff

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LESTER E. FILION, as Personal Representative of the Estate of GARY FILION,

Respondent,

v.

JULIE JOHNSON,

Appellant.

No. 63978-1-I

MANDATE

King County

Superior Court No. 07-2-06353-6.SEA

FILED
KING COUNTY, WASHINGTON
JAN 3 2012
SUPERIOR COURT CLERK

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on November 22, 2010, became the decision terminating review of this court in the above entitled case on December 30, 2011. An order granting substitution and denying motion for reconsideration was entered on February 2, 2011. An order denying a petition for review was entered in the Supreme Court on July 12, 2011. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Helmut Kah
Noah Davis
Hon. Timothy Bradshaw

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 30th day of December, 2011.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GARY FILION,	)	No. 63978-1-I
Respondent,	)	
v.	)	
JULIE JOHNSON,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: November 22, 2010

ELLINGTON, J. — After a mandatory arbitration proceeding, Julie Johnson made a timely request for a trial de novo. The trial court then granted Gary Filion's motion for a voluntary nonsuit under CR 41(a)(1)(B). On appeal, we agree with Johnson that once the arbitrator filed the award, Filion no longer had the right to dismissal under CR 41(a) without permission. The parties' remaining contentions are without merit. Accordingly, we reverse the order of dismissal and remand for further proceedings.

FACTS

Julie Johnson and Gary Filion dissolved their marriage in June 2006. On February 21, 2007, after a dispute over a property distribution provision, Filion filed this action for damages against Johnson, alleging, among other things, negligent infliction of emotional distress and negligent misrepresentation. The case then proceeded to mandatory arbitration.

The arbitrator issued an award on February 13, 2009, which was filed in the trial court on March 4, 2009. Johnson requested a trial de novo. On July 29, 2009, the trial court granted Filion's motion for dismissal under CR 41(a)(1)(B) and dismissed all of his claims without prejudice.

DECISION

On appeal, Johnson contends the trial court erred in dismissing the case under CR 41(a)(1)(B) because Filion did not move for dismissal before resting in the mandatory arbitration hearing. Filion responds that he had an absolute right to a voluntary dismissal under the plain language of the rule because he had not yet rested his case in the trial de novo. Neither party has cited any relevant authority addressing this issue.

The rule is well established, however, that a plaintiff cannot nonsuit the case without permission once the arbitrator has filed a decision. In Thomas-Kerr v. Brown,[1] the defendant requested a trial de novo after mandatory arbitration, and then sought to withdraw the request. The plaintiff objected to the withdrawal and, in the alternative, moved for a voluntary nonsuit under CR 41(a). We affirmed the trial court's denial of the plaintiff's motion:

> [W]hile a case is assigned to an arbitrator, the plaintiff has the ability to withdraw under CR (41)(a). However, once the arbitrator makes an award, the plaintiff no longer has the right to withdraw without permission. This interpretation is consistent with the rule's purpose and plain language. Thus, we reject Thomas-Kerr's alternative argument that she should have been permitted to take a voluntary nonsuit under CR 41(a) when Brown decided to withdraw his request for trial de novo.
>
> Although the MAR provide limited relief from a judgment following an arbitration award, CR 41(a) cannot be used to circumvent the

[1] 114 Wn. App. 554, 59 P.3d 120 (2002).

> arbitration statute and the finality of judgments. Once the arbitrator presents an award to the court, either party has 20 days to appeal the decision. If neither party appeals in the 20-day period, MAR 6.3 requires the court to enter a judgment. MAR 6.3 does not allow a plaintiff to nonsuit a case following a decision by the arbitrator.[2]

Here, Filion could have withdrawn his claims while the case was pending before the arbitrator.[3] But once the arbitrator filed the award and Johnson filed a timely request for a trial de novo, Filion was not entitled to a voluntary nonsuit under CR 41(a)(1)(B). The trial court therefore erred in granting Filion's motion to dismiss.[4]

Johnson also contends that this court should review the trial court's denial of her motion for summary judgment, which occurred before the arbitration. She maintains that she was entitled to statutory immunity from Filion's claims under RCW 4.24.510, Washington's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute.

But the trial court's interlocutory prearbitration ruling is not properly before us for review. Generally, once a case has proceeded through arbitration, "review of a pretrial order denying summary judgment is neither possible nor appropriate."[5] Any other result would permit Johnson to circumvent both the policy of avoiding useless trials and the

---

[2] Id. at 562–63 (citations omitted).

[3] Under MAR 1.3(b)(4), "[t]he arbitrator shall have the power to dismiss an action, under the same conditions and with the same effect as set forth in CR 41(a), at any time prior to the filing of an award."

[4] Because they rest on the erroneous assumption that the trial court properly dismissed his claims under CR 41(a), we do not address Filion's contentions that Johnson is not an aggrieved party and lacks standing to appeal the trial court's order.

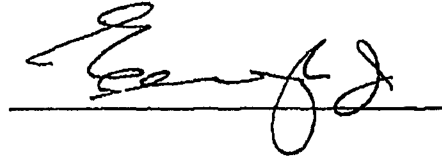
[5] Cook v. Selland Constr., Inc., 81 Wn. App. 98, 101, 912 P.2d 1088 (1996).

trial de novo procedures governing the review of arbitration proceedings.[6] "[T]he sole way to appeal an erroneous ruling from mandatory arbitration is the trial de novo."[7]

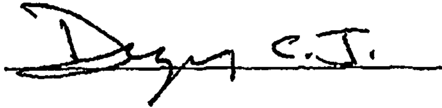
Johnson requests an award of attorney fees based on RCW 4.24.510. Because that provision is not properly before us on appeal, we deny the request. We also deny Filion's request for attorney fees based on a frivolous appeal.

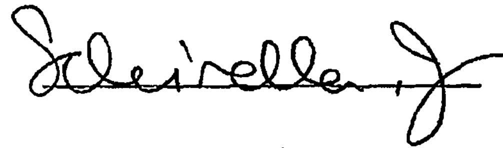
We reverse the trial court's order of dismissal and remand for further proceedings.

Reversed and remanded.



WE CONCUR:





[6] See id. (after arbitration, party could not avoid the requirements of a trial de novo by appealing trial court's interlocutory denial of summary judgment).

[7] Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 529, 79 P.3d 1154 (2003).

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KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 07-2-06353-6 SEA

HONORABLE SHARON ARMSTRONG
Oral Argument Friday, November 2, 2012
11:00 a.m.

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

LESTER FILION, as Personal Representative of the Estate of GARY FILION, Plaintiff, vs. JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation, Defendants.	**NO. 07-2-06353-6 SEA** DEFENDANT JOHNSON'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now Defendant Julie Johnson, by and through her attorney, Helmut Kah, and respectfully submits the following response to plaintiff's motion for summary judgment.

I. RELIEF REQUESTED

The court should deny plaintiff's motion for summary judgment, dismiss plaintiff's claims with prejudice, and enter judgment for defendant Johnson pursuant RCW 4:24.500 - .510 and award Johnson her expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510 as requested by Johnson's motion for summary judgment which is pending and scheduled for hearing in this court at the same date and time as plaintiff's motion.

Johnson hereby relies upon and incorporates her pending motion for summary judgment and supporting documents in reply to plaintiff's summary judgment motion.

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II. STATEMENT OF FACTS

On October 10, 2008, Johnson filed a CR 12(b)(6) motion to dismiss Filion's claims based upon the absolute statutory immunity granted by RCW 4.24.510. The facts and law pertaining to Johnson's claim of statutory immunity under RCW 4.24.510 are stated in detail in Johnson's motion for summary judgment and will not be repeated in the body of this reply.

Johnson is surprised that plaintiff's motion for summary judgment fails to address any facts or issues regarding Johnson's defense of absolute immunity under RCW 4.24.510 but, instead, totally fails to address those facts and issues as though they do not exist in this case..

The evidence submitted with Filion's motion for summary judgment shows that Filion was warned by Johnson through the parties' realtor, Pat Dornay, not to come to the property in the afternoon of August 1, 2006 because, as plaintiff's counsel Ms. Taylor summarizes at page 7, lines 2 to 6 of plaintiff's motion:

> "Ms. Dornay, the real estate agent, went to the home on the afternoon of August 1st and noted that the house was a mess, that the defendant was still packing and that it would be a small miracle if the defendant managed to remove all of her belongings prior to the 9:00 p.m. deadline."

Ms. Dornay's declaration dated October 17, 2008, is attached as Exhibit 3 to the Declaration of Jamila Taylor. In that declaration Ms. Dornay states:

> I was aware that Julie and Gary Filion were ina contentious dissolution and the situation betweenthem was volatile. I used my best judgment in communicating between them totry and keep things as calm as possible. I was aware of the court-issued restraining order.
>
> I phoned Mr. Filion and told him that Julie would notbe out of the house until 9:00 p.m. that evening, at which time the house would be turned over to the buyers. Mr. Filiontold me he was going over to the house at 4:00pm with a truck to pick up some furniture& personal belongings.

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> I phoned Julie back and told her that Gary Filion had said hewas planning to come over to pick somethings up. Julie told me "He better not or I'll call the cops!"
>
> Mr. Filion called me back and asked me ifl had told Julie he was coming over. I told him "Yes, I did'. He said, "What did she say?" I told him she said, "He better not!" andthat the house is a mess and it will be a small miracle if Julie completes her move by the 9:00deadline.

Plaintiff's pleadings and motion for summary judgment admit that plaintiff filed this lawsuit because Johnson reported to law enforcement on August 1, 2006, that Gary Filion had violated the restraining orders set forth at ¶ 3.9 of the parties' decree of dissolution entered June 1, 2006, in Snohomish County Superior Court case no. 05-3-00679-1. This alone requires dismissal under RCW 4.24.510 and entitles Johnson to an award of her expenses and reasonable attorney fees against plaintiff.

As shown, Johnson warned Gary Filion, though Pat Dornay, not to come to house in the afternoon of August 1, 2006. She did not lure him there, nor agree that he could come to the house while she or her children were present. He plainly shoes to ignore the warnings and also the dissolution decree's restraining provisions.

Plainmtiff admits that there was never any direct communication between Gary Filion and Julie Johnson or Julie's then counsel, Mark Olsen. Filion states that all communication with Johnson was through his lawyer Peter Jorgenson. Peter Jorgensen's declaration states at p. 1, ¶ 2, that:

> "It was customary throughout the entire period of time that any and all matters between the two parties was always entirely handled through myself and Olson as council. (sic) Never did the parties interact on their own."
>
> (Exhibit 2 attached to Declaration of Jamila Taylor).

Attorney Olson's letter dated July 28, 2006 to Mr. Jorgensen states very clearly that

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1 Johnson does not want Gary Filion coming to her residence when she and the children are

2 present:

3 "Julie is not agreeable to having Mr. Filion come on Monday, July 31st, because she will still be in the middle of moving, the children will be
4 home, etc."

5 **II. STATEMENT OF ISSUES**

6 Should plaintiff's claims against defendant Julie Johnson be dismissed based on the
7 statutory immunity afforded by RCW 4.24.500 - .510, and be awarded her expenses and
8 reasonable attorney fees and statutory damages under and RCW 4.24.510?

9 **IV. ARGUMENT AND AUTHORITY**

10 The record herein shows that Filion violated the plain and clear terms of a mutual
11 restraining order by personally coming upon the grounds of Johnson's residence, an act which
12 is expressly prohibited by the dissolution decree's restraint provisions. It further shows that
13 plaintiff's complaint in this case was filed because Julie Johnson called 911 and made a report
14 to law enforcement when Gary Filion violated the restraining provisions of the parties' decree
15 of dissolution of marriage.

16 Johnson warned Filion Pat Dornay not to come to the residence in the afternoon of
17 August 1. Having warned Filion that she would still be at the premises until at least 9:00 p.m.,
18 Filion cannot claim he had her permission to come upon the premises that afternoon. This
19 indisputably shows that Julie Johnson acted in good faith. She warned him not to come. She
20 is afraid of him. The restraining orders were for her protection. She had a right to claim their
21 protection when Filion violated the restraining orders. Thus, her call to 911 cannot be said to
22 have been made in bad faith.

23

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All he had to do was obey the restraining order by staying 500 feet away. His parents and the movers could have gone up to the house and loaded his personal property into the moving truck while he observed from the prescribed distance. But Mr. Filion was going to have it his way despite anything anyone, including the court, told him.

Plaintiff's assertion that Flion's personal property was not at the Shoreline residence to be picked up on August 1, 2006 is non-attributed hearsay within hearsay found in Peter Jorgensen's declaration attached as Exhibit 2 to the Declaration of Jamila Taylor where Jorgensen states at ¶ 9 that "I later learned Filion's property was not even at the house, and that it was being held at an undisclosed third-party location." Plaintiff objects to that hearsay statement.

Filion already litigated the issues regarding his personal property in Snohomish County Superior Court and is precluded from relitigating those issues here. Filion filed a motion on 10/09/2009 in Snohomish County Superior Court asserting his claim for recovery of personal property and/or damages related to personal property issues. See attached motion and order at the section titled "2. Personal Property Issues" beginning at page 6 and ending at page 10. Filion submitted declarations in support of that motion. Johnson responded. Filion replied. After a hearing the court denied the motion pertaining to personal property, stating:

> "3.2 Other relief: c) that the request for relief regarding personal property is denied"

The standards for application of collateral estoppels (issue preclusion) in courts of the state of Washington are stated in the case of *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 792 (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987)) as follows:

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1 '"When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is
2 barred by collateral estoppel.'" *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008) (citations
3 omitted) (quoting Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d at 22, 31, 891 P.2d 29 (1995)). Collateral estoppel, or issue preclusion,
4 requires

5 > "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party
6 > to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the
7 > party against whom the doctrine is to be applied."

8 "In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action."

9

V. EVIDENCE RELIED UPON

10

The court's files and records herein and the attached motion and order from
11 Snohomish County Superior Court case no. 05-3-00679-1

12

VI. CONCLUSION

13 Johnson has shown that there is no genuine issue of material fact and that she is
14 entitled to summary judgment as a matter of law. Filion's claims against Johnson should be
15 dismissed with prejudice. Johnson should be awarded her expenses and reasonable attorney
16 fees plus the statutory damages of $10,000.00 under RCW 4.24.510.
17 Upon the court's granting of this motion, a hearing should be scheduled for
18 determination of sanctions, costs, and reasonable attorney fees.
19 RESPECTFULLY SUBMITTED this 22nd day of October ~~2012~~.
20
21
22 Helmut Kah, WSBA 18541
Attorney for defendant Julie Johnson
23

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1
DECLARATION OF HELMUT KAH

2 I declare under penalty of perjury under the laws of the state of Washington that the

3 attached copy of GARY FILION'S MOTION FOR ENFORCEMENT OF DECREE * * *

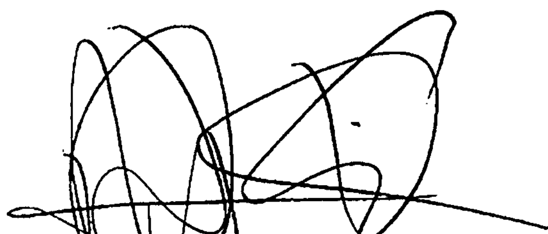
4 and ORDER ON MOTION TO ENFORCE are true copies of the originals as filed in

5 Snohomish County Superior Court case no. 05-3-00679-1.

6 SIGNED this 22nd day of October, 2012.

7

8



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10 Helmut Kah, WSBA 18541
Attorney for defendant Julie Johnson

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KING COUNTY
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CASE NUMBER: 07-2-06353-6 SEA

HONORABLE SHARON ARMSTRONG
Oral Argument Friday, November 2, 2012
11:00 a.m.

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

LESTER FILION, as Personal Representative of the Estate of GARY FILION, Plaintiff, vs. JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation, Defendants.	**NO. 07-2-06353-6 SEA** DEFENDANT JOHNSON'S MOTION FOR SUMMARY JUDGMENT (*CORRECTED*)

Comes now, Defendant, Julie Johnson, by and through her attorney, Helmut Kah, and respectfully submits the following motion for summary judgment.

I. RELIEF REQUESTED

For the entry of an Order dismissing Plaintiffs Amended Complaint for Damages as to defendant Julie Johnson on the basis of the statutory immunity afforded by RCW 4.24.500 - .510, with prejudice, and for an award of her expenses and reasonable attorney fees and statutory damages under and RCW 4.24.510.

II. STATEMENT OF FACTS

On October 10, 2008, Johnson filed a motion for dismissal under 12(b)(6) (SCOMIS Sub # 56) which was heard as a CR 56 motion for summary judgment and ruled upon by the

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Honorable Douglas McBroom (now retired). An order denying the motion was entered November 21, 2008, (SCOMIS Sub # 70). Defendant hereby renews her motion for summary judgment.

Gary Filion ("Filion"), deceased August 29, 2010, was defendant Julie Johnson's ("Johnson") former spouse. The Estate of Gary Filion was substituted as plaintiff by order of the Court of Appeals, Division One, dated February 2, 2011. (copy attached)

Filion's Second Amended Complaint (SCOMIS Sub # 15), filed August 15, 2007, seeks an award of money damages against defendant Julie Johnson and also against her dissolution lawyer, Mark D. Olson ("Olson").

Filion's claims against Olson were dismissed by order entered February 8, 2008. See. ORDER DISMISSING OLSON & OLSON (SCOMIS Sub # 35)

Olson represented Johnson, f/k/a Julie Filion, in the dissolution of her marriage with plaintiff, Gary Filion, in Snohomish County Superior Court cause no. 05-3-00679-1.

After trial before the Honorable Ellen J. Fair, a Decree of Dissolution was entered on June 1, 2006. Pursuant to the terms of the decree, Filion and Johnson were to exchange certain items of personal property. (Declaration of Mark Olsen, SCOMIS Sub # 27)

The decree of dissolution contained mutual restraining orders which remained in effect for 24 months until June 30, 2009. (See the 12/10/2007 Declaration of Mark Olson, SCOMIS Sub # 27).

The dissolution decree's restraining order provides, among other things, that both Filion and Johnson are restrained and enjoined from

> "disturbing the peace of the other party."

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1
"going onto the grounds of or entering the home, work place or school of the other party"

2

and that Filion is restrained and enjoined from

3

"going onto the grounds of or entering the home, workplace, school or day care of the following named children: Emelie Nye, Mitchell Nye, Jordan Nye, Spencer Nye."

4

5

and that both parties are restrained and enjoined from

6

"knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the other party, or the day care or school of these children listed above."

7

8

(See pp. 7 – 8 of the Decree of Dissolution attached to Declaration of Mark Olsen, SCOMIS Sub # 27 herein)

9

10 Filion's original complaint herein was filed on February 21, 2007. (SCOMIS Sub # 1)

11 Filion filed an amended complaint on April 9, 2007. (SCOMIS Sub # 8)

12 Johnson answered the amended complaint on May 16, 2007. (SCOMIS Sub # 10)

13 Filion filed a second amended complaint on August 15, 2007 without requesting or

14 being granted leave of court. (SCOMIS Sub # 15)

15 Olson answered the second amended complaint on November 30, 2007. (SCOMIS Sub

16 # 21)

17 In August 2006 Filion was charged by the City of Shoreline with criminal violation of

18 the mutual restraining orders set forth in the parties' June 1, 2006 decree of dissolution. On

19 August 1, 2006, Filion had come to Johnson's home in violation of the dissolution decree's

20 restraining orders.

21 Filion knew that the exchange of personal property was to occur without contact

22 between the parties. Johnson's dissolution lawyer, Olson, coordinated the personal property

23

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1 exchange with Peter Jorgensen, Filion's dissolution lawyer. Olson's only communication

2 with Filion was through his lawyer, Peter Jorgensen. (See pp. 1-2 of the 12/10/2007

3 Declaration of Mark Olson, SCOMIS Sub No. 27 herein).

4 Filion's original counsel in this case, Timothy McGarry, confirms the foregoing facts

5 in Filion's 01/17/2008 response to defendant Olson's Motion to Dismiss, where he says under

6 the section titled STATEMENT OF FACTS that:

7 "Plaintiff Gary Filion has initiated a lawsuit against JUlie Johnson, and Olson and Olson, PLLC for damages. Mr. Filion was the respondent in a
8 divorce action initiated by Julie Johnson (Filion). Ms. Johnson was represented by Mark Olson of Olson and Olson PLLC. The decree of
9 dissolution was entered on June 1, 2006. The decree contained mutual no contact orders. Pursuant to the decree, Plaintiff was to pick up
10 certain personal property from the home in which Ms. Johnson was residing. In letters from Mr. Olson to Mr. Filion's lawyer of July 26,
11 2006 and July 28, 2006, Mr. Filion was instructed to go to the home on August 1, 2006 and pick up his belongings. Mr. Filion did that and
12 when he arrived the police were called. Ms. Johnson told the police that Mr. Filion was violating a no contact order. Subsequently, Mr. Filion
13 was prosecuted. However, the case was dismissed when the City Attorney learned that Mr. Filion had been instructed to go to the Johnson
14 home to pick up his personal property. (See attachments)."

15 (see the document titled DEFENDANT'S RESPONSE TO PLAINTIFF OLSON'S MOTION TO DISMISS
16 UNDER CR12(b)(6) [sic] filed herein on 01/17/2007 under SCOMIS Sub # 30 at page 1, line 24, to page 2,
17 line 11)

18 Olson's letter dated July 28, 2006, to Filion's lawyer Peter Jorgensen states, as

19 follows, that Johnson does not want Filion coming to her residence while she is still there (see

20 Olsen's letter attached to attorney Timoth McGarry's 01/17/2007 declaration as EXHIBIT # 3,

21 SCOMIS Sub # 30 herein):

22 "Julie is not agreeable to having Mr. Filion come on Monday, July 31st, because she will be in the middle of

23

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1
moving, the children will be home, etc. Please ask him to schedule his pick-up for Tuesday afternoon, anytime after
2
2:00 p.m."

3
Filion's attorney Timothy McGarry's declaration dated 01/17/2008 (SCOMIS Sub #.
4
30) has attached to it and incorporates certain police reports as EXHIBIT # 4 which include,
5
on the last page, Johnson's declaration stating that:

6
"Today, at about 4:15 p.m. Gary came over and knocked on the door. Gary knows he has a restraining
7
order that prevents him from contacting me at the house or anywhere else. My realtor had told me that Gary was
8
coming despite their advice for him not to come.
"I am willing to assist in prosecution.
9
"This was written for me by Deputy Rudolph.
Signed by Julie Johnson 8/1/06
10

Filion admits that he was aware of the existence of the mutual restraining orders. His
11
original, 1st amended, and 2nd amended complaints all allege in paragraph III that "Mutual
12
restraining orders were contained in the divorce decree."
13

III. STATEMENT OF ISSUES

14
Should plaintiff's claims against defendant Julie Johnson be dismissed based on the
15
statutory immunity afforded by RCW 4.24.500 - .510, and be awarded her expenses and
16
reasonable attorney fees and statutory damages under and RCW 4.24.510?
17

IV. ARGUMENT AND AUTHORITY

18
The record herein shows that Filion violated the plain and clear terms of a mutual
19
restraining order by personally coming upon the grounds of Johnson's residence, an act which
20
is expressly prohibited by the dissolution decree's restraint provisions.
21
Filion knew that Johnson was still home and packing when he went to Johnson's
22
residence on August 1, 2006.
23

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1 Filion has no claim for damages against Johnson under any theory of recovery on the
2 basis of his pleadings in this case. His complaint alleges that :
3 (1) there existed mutual restraining orders,
4 (2) he went to Johnson's residence on August 1, 2006,
5 (3) when he arrived the police were called,
6 (4) he was placed under arrest for violation of a no contact order,
7 (5) Johnson by misrepresentation and false statements to police officers caused the
8 false arrest and malicious prosecution of Filion.
9 Filion has admitted in pleadings subsequently filed that the mutual restraining orders
10 prohibited him from going to Johnson's residence, that he knew Johnson was present before
11 he went to the residence, and that he was charged with violation of the restraining order
12 because Johnson reported the violation to the police.
13 Plaintiff's pleadings, motions, responses, and declarations filed herein establish that
14 the sole basis for his filing this lawsuit against his ex-wife Julie Johnson is her call to the
15 police on August 1, 2006, in which she reported that Filion had come upon the grounds of her
16 residence in violation of the existing domestic violence restraining orders contained in their
17 dissolution decree which had just been entered 60 days prior to the violation.
18 On the basis of the undisputed facts of this case, Filion has no claim against Johnson.
19 Filion's claims against Johnson are based upon Johnson's call to 911 on August 1,
20 2006 because Filion had violated the dissolution decree's restraining provisions.
21 The reasons for plaintiff's claims against Johnson in this case are that she
22 communicated information to the police and he asserts that the information she communicated
23

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1 was false. The record shows that Johnson's call to 911 on August 1, 20006 was made in good
2 faith.

3 The good faith of Johnson's call to 911 and her report to law enforcement is irrelevant
4 to the issue whether the immunity afforded by RCW 4.24.510 applies here.

5 Plaintiff's claim is barred by RCW 4.24.500 and 4.24.510, Washington's anti-SLAPP
6 statute. "SLAPP" is an acronym for Strategic Lawsuit Against Public Participation:

7 RCW 4.24.500:

8 "Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient
9 operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who
10 wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely
11 burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate
12 governmental bodies."

13 RCW 4.24.510:

14 "A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any
15 self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated
16 authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from
17 civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of
18 concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover
19 expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten
20 thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad
21 faith."

22 Johnson is entitled to immunity under RCW 4.24.510 because Filion's claims against
23 here are based on her communication to the 911 call center and to the responding officer(s)

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1 "regarding any matter reasonably of concern to that agency or organization."

2 Plaintiff's pleadings state that his claims against Johnson are based on her 911 call.
3 All three permutations of his complaint allege that: *"when he [plaintiff] arrived at Johnson's*
4 *residence, the police were called and he was placed under arrest for violation of a no contact*
5 *order."* Thus, plaintiff's claims are premised on the assertion that Gary Filion was arrested
6 and prosecuted because Johnson reported to an agency of local government, i.e. the 911 call
7 center and the responding police officer(s), that plaintiff Gary Filion had violated a restraining
8 order. In other words, his claims are based on Johnson's report of a matter which is
9 reasonably of concern to the police.

10 Johnson's communication falls squarely under the protection of the immunity
11 provided by RCW 4.24.510. Plaintiff's further allegation that *"Defendant Johnson, by*
12 *misrepresentation and false statements to police officers, caused the false arrest and*
13 *malicious prosecution of Plaintiff"* does not avoid the application of statutory immunity under
14 RCW 4.24.510.

15 RCW 4.24.510 requires that the declarant (Johnson) communicate the complaint or
16 information "to any agency of federal, state or local government," but the statute does not
17 define "agency". Our appellate courts have held that the statute applies to communications
18 with the police and law enforcement. *Dang v. Ehredt*, 95. Wn. App. 670, 977 P.2d 29, review
19 denied. 139 Wn.2d 1012 (1999) (bank employees called 911 to report what they mistakenly
20 believed was a counterfeit check); to communications with officials of a land development
21 division and county executive. *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697,
22 review denied, 125 Wn.2d 1010 (1994); and to communications with judicial offices such as
23

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1 the Superior Court Administration. *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 20 P.3d 946
2 (2001).

3 The facts of this case are similar to the facts in *Dang v. Ehredt*, supra. In *Dang* a bank,
4 through its employees, called 911 to report that *Dang* was attempting to pass a counterfeit
5 check. The police came to the bank and arrested *Dang*, who later sued the bank and its
6 employees among others for damages. When it was later determined that the check was valid
7 and not counterfeit, *Dang* was released and the charges were dismissed. The *Dang* court held
8 that the bank and its employees, who did nothing to restrain or otherwise imprison Ms. Dang
9 other than call and make a report to 911, are entitled to immunity from liability for their
10 actions under RCW 4.24.510. The facts in *Dang* mirror the facts in this case. Ms. Johnson is
11 entitled to immunity under RCW 4.24.510. That conclusion is compelled by an analysis of
12 the pleadings without reference to any other material. However, the factual material
13 submitted with this motion, which is all of record in this case, compels the same conclusion.

14 The issue whether "good faith" is an element on the question whether immunity under
15 RCW 4.24.510 applies was squarely addressed in the case of *Bailey v. State*, No. 26031-3-III,
16 decided September 22, 2008. The court held that "good faith" is not an element on the issue
17 of statutory immunity.

18 The Washington Supreme Court's decision in the case of *Segaline v. State, Dept. of*
19 *Labor and Industries*, 169 Wn.2nd 467, 238 P.3d 1107 (2010) supports this conclusion. On
20 this point, Justice Madsen's concurring opinion explains:

21
> ¶ 27 Chapter 4.24 RCW, when first enacted, " addressed the SLAPP [[1]]
22
> indirectly." Michael E. Johnston, *A Better Slapp Trap: Washington State's Enhanced Statutory Protection for Targets of " Strategic Lawsuits Against Public Participation"*, 38 Gonz. L.Rev. 263, 281 (2002-03) (hereafter
23

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1 Johnston, 38 Gonzaga L.Rev.). The legislature recognized:

2 Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government.
3 The legislature finds that threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or
4 local agencies. The costs of defending such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect
5 individuals who make good-faith reports to appropriate governmental bodies.
6 RCW 4.24.500. Former RCW 4.24.510 (1989), " [t]he operative provision of the legislative package," provided that " ' a

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7 **Page 480**

8 person who communicate[d] in good faith with a government body [was] immune from liability stemming from that communication.' " Johnston, 38
9 Gonzaga L.Rev. at 281 (quoting former RCW 4.24.510). The individual could recover costs and attorney fees expended in defense against a
10 SLAPP filer. Former RCW 4.24.510.

11 ¶ 28 " As originally enacted, sections 4.24.500-.520 did not afford a SLAPP target with a particularly efficient remedy. While the target could
12 ordinarily expect to prevail, it had to endure considerable litigation before it could do so." Johnston, 38 Gonzaga L.Rev. at 288. The legislature
13 accordingly amended RCW 4.24.510, stating:

14 [238 P.3d 1114]

15 Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or
16 organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First
17 Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

18 Although Washington state adopted the first modern anti-SLAPP law in
19 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has
20 made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected
21 and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United
22 States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government
23 decision making. Laws of 2002, ch. 232, § 1.

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¶ 29 Thus, for the first time, the legislature expressly recognized the constitutional threat that SLAPP litigation poses. In amending RCW 4.24.510, the legislature provided that " good faith" was no longer an element of the SLAPP defense and added a provision allowing statutory damages of $10,000 in addition to attorney fees and costs for defending.

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However, " [s]tatutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." RCW 4.24.510.[2]

¶ 30 Under RCW 4.24.510, " the potential SLAPP target enjoys a near absolute statutory immunity." Johnston, 38 Gonzaga L.Rev. at 286. The difference in chapter 4.24 RCW as originally enacted and as amended in 2002 has been described as converting RCW 4.24.510 " from a whistleblower statute to a true anti-SLAPP statute." Johnston, 38 Gonzaga L.Rev. at 286.

V. EVIDENCE RELIED UPON

The court's files and records herein.

VI. CONCLUSION

Johnson has shown that there is no genuine issue of material fact and that she is entitled to summary judgment as a matter of law. Filion's claims against Johnson should be dismissed with prejudice. Johnson should be awarded her expenses and reasonable attorney fees plus the statutory damages of $10,000.00 under RCW 4.24.510.

Upon the court's granting of this motion, a hearing should be scheduled for determination of sanctions, costs, and reasonable attorney fees.

RESPECTFULLY SUBMITTED this 5th day of October 2012.

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CASE NUMBER: 07-2-06353-6 SEA

1 THE HONORABLE SHARON ARMSTRONG
2 Set for Oral Argument Friday, November 2, 2012 at 11:00 a.m.

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

9 GARY FILION (by and through the Estate of Gary Filion) 10 Plaintiff, 11 v. 12 13 JULIE JOHNSON, 14 Defendant.	NO. 07-2-06353-6 SEA **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

15 **I. RELIEF REQUESTED**

16 Plaintiff respectfully requests that the court deny defendant's Motion for Summary
17 Judgment.

18
19

20 **II. STATEMENT OF FACTS**

21 As stated in defendant's statement of facts in her Motion for Summary Judgment the
22 Defendant, back in 2008, has already previously requested, briefed, argued and lost her
23 Motion for Summary Judgment. Please see Declaration of Jamila Taylor Exhibits 1 and 2.
24 Defendant's previous motion was based in part on RCW 4.24.500 and 4.24.510—
25
26

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Washington's anti-SLAPP statute. Defendant's current motion is also based on RCW 4.24.500 and 4.24.510—Washington's anti-SLAPP statute.

Since this case was filed by plaintiff in 2006 defendant has never properly raise any counterclaims. Defendant has not paid the required fee(s) necessary to assert any counterclaims. In addition the defendant failed to include the affirmative defense of RCW 4.24.510 in both her Answer and her Amended Answer.

III. EVIDENCE RELIED UPON

This motion is based on the files and records herein as well as:

1. The Declaration of Jamila A. Taylor in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment with attached exhibits.
2. The statement of facts as set forth in Plaintiff's Motion for Summary Judgment.

IV. ARGUMENT

1. The defendant has improperly noted a motion that has previously been denied by the Court.

Defendant has admitted in her most recent Motion for Summary Judgment that she has previously requested a Motion for Summary Judgment for the exact same issue—the defense of the anti-SLAPP statute. That motion was denied by Judge Douglas McBroom on November 21, 2008. LCR 7(b)(7) Reopening Motions states the following:

> No party shall remake the same motion to a different judge without **showing by affidavit** what motion was previously made, when and to which judge, what the order or decision was, and **any new facts or other circumstances that would justify seeking a different ruling from another judge**. (emphasis added)

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In seeking this latest Motion for Summary Judgment defendant and her counsel have failed to provide the required affidavit. In particular she has failed to show by affidavit any new facts or other circumstances that would justify seeking a different ruling on the same issue. Should defendant have filed an affidavit she still would not have been able to provide any new facts or circumstances—the facts in this case all arise out of an incident in 2006. No new facts or circumstances have been provided by the defendant because no new facts or circumstances exist.

2. The defendant failed to properly raise the defendant of RCW 4.24.500 – 510

The defendant did not raise RCW 4.24.500 et seq as an affirmative defense or as a counterclaim in the action below (and did not pay the required counterclaim filing fee). CR 12(b) states that "every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted and (7) failure to join a party under rule 19. Defendant has failed to meet the requirements of CR 12(b).

3. **The Defense of Absolute Immunity Afforded by RCW 4.24.500 - 510, the anti-SLAPP statute, does not apply.**

Even though the defendant did not raise RCW 4.24.500 et seq as an affirmative defense nor as a counterclaim in the action below (and did not pay the required counterclaim

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filing fee) and even though the defendant's motion for summary judgment has previously been denied, if the Court were somehow to allow the defendant to raise the issue again, then, even in that case, her request for relief should fail as she is not entitled to the relief sought.

Defendant contends that she is entitled to the benefits of the defense of absolute immunity accorded by RCW 4.24.500 -.510. Plaintiff on the other hand, asserts that RCW 4.24.500 does not apply to: a) matters that do not involve substantive issues of public concern;[1] nor, b) cases of malicious prosecution; but c) even if it did, that RCW 4.24.500 et seq cannot be used in bad faith.[2]

a. RCW 4.24.500-510 applies only in situations involving a substantive issue of public concern

In Right-Price Recreation v. Connells Prairie, the Washington State Supreme Court stated that "the anti-SLAPP statute applies when a communication to influence a governmental action results "in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations . . . on (c) a substantive issue of some public interest or social significance." 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (quoting George W. Pring & Penelope Canan, SLAPPS: *Getting Sued For Speaking Out* 8-9 (1996)).

In countenance to this support, and in an effort to support her "absolute immunity" defense, defendant relies on Dang v. Ehredt 95 Wn. App. 670, 977 P.3d 29, *review denied.* 139 Wn.2d 1012 (1999). In Dang bank employees contacted police to report that Ms. Dang

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[1] Especially in cases where the action is between too contentious litigants in a divorce case, and centered over two competing clauses in a divorce decree resulting in a malicious attempt by one litigant to punish the other.

[2] Defendant is not entitled to its protections since she called the police with knowledge that plaintiff was not in violation of a criminal law, and therefore, defendant's reporting was made with in bad faith.

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was attempting to pass a counterfeit check. Dang, alleging that the bank made a mistake, sued the bank under a number of different theories.

Although both Dang and the present situation involve a civil complaint filed against a nongovernmental individual or organization (there, the bank and here an ex wife), Dang is distinguishable because the communication in Dang was in regards to a substantive issue of public interest or social significance (i.e. calling the police to report an attempt to pass a counterfeit check at a bank). It is, however, quite another matter to hold that a substantive issue of public interest exists where an ex-wife calls the police to report what is in actuality an incomplete and even maliciously false statement made by the wife against her ex-husband in an attempt to use the police to get back at the husband (where the divorce decree provided for the exchange and where the Parties' attorneys had agreed in writing as to the exchange time/date, where it was the last day the house would be in the possession of the Parties and where the ex-wife was supposed to have already been moved out).

It is also plaintiff's position that malicious prosecution cases are themselves not matters of public concern. Banks v. Nordstrom, Inc., 57 Wash.App. 251, 264, 787 P.2d 953, *review denied,* 115 Wash.2d 1008, 797 P.2d 511 (1990) (considering the fifth prong of the CPA and matters affecting the public interest, and holding that malicious prosecutions themselves do not satisfy that fifth prong).

And, if defendant can raise the anti-SLAPP statute, then all divorce litigants would be emboldened to use it at every step of the litigation (even if it meant fabricating stories for the benefit of the civil litigation and possible anti-SLAPP defense, since there would be no check) – ranging from alleged restraining order violations, to reporting alleged child endangerment

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1 issues to Child Protective Services, to reporting parenting plan violations to Family Court
2 Services. And, even here, plaintiff should have pre-empted Johnson's call to the police by
3 calling the police when Johnson refused to allow him access. Would the rule then be the first
4 person to call the police is the person afforded immunity? Of course, the stakes would be
5 high with attorney fees and a statutory lever at issue – leaving former couples ammunition to
6 do battle over the application of anti-SLAPP actions to their divorce decrees.
7
8 Holding that anti-SLAPP immunity applies to actions relating to divorce decrees
9 (under these facts and in this situation) could also escalate the application of anti-SLAPP in
10 private vendettas in other areas of law as well, such as disputes between neighbors and
11 landlord/tenants. In Hoffman v. Davenport-Metcalf, the Rhode Island Supreme Court stated
12 that it was not convinced that the provisions of its anti-SLAPP statute should apply to a
13 private matter between tenants against their property manager and property management
14 company. 851 A.2d 1083, 1088 (2004). (Court was not "persuaded that these are the types of
15 activities that the Legislature intended to protect in enacting the law, and we decline to extend
16 the purview of the anti-SLAPP statute to encompass these private causes of action and
17 criminal complaints.").
18
19 There has to be some limit to what is a matter of public concern and that limit is this
20 case, where we have these facts, and a private matter between two contentious divorce
21 litigants seeking retribution against one another.
22
23 **b. The anti-SLAPP statute does not provide absolute immunity against**
24 **malicious prosecution actions.**
25
26

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In this case, of course, the underlying action was based, inter alia, on malicious prosecution relating to the defendant's efforts to have plaintiff charged with violation of a restraining order after he arrived at the marital home at a pre-arranged time and date to pick up his remaining personal property – a date that had been pre-arranged by the Parties' attorneys in accordance with the divorce decree and on the last day before the selling of the house. Actions for malicious prosecution are not precluded by RCW 4.24.500-510 because there is no such specific intent in the legislation and the statute was never intended to do away with this common law action. See Lumberman's of Washington, Inc. v. Barnhardt, 89 Wash.App. 283, 286, 949 P.2d 382 (1997) (Statutes enacted in derogation of the common law are to be strictly construed absent legislative intent to the contrary).

In addition to the absence of a specific intent to do away with malicious prosecution actions (which would be the result defendant seeks), the very case upon which defendant relies, Dang v. Ehredt, 95 Wn. App. 670, 977 P.3d 29, *review denied.* 139 Wn.2d 1012 (1999), runs contrary to defendant's position as it in turn cites and relies on California law – law which in turn specifically excludes malicious prosecution actions from anti-SLAPP immunity.

In reviewing RCW 4.24.510, the court of appeals in Dang v. Ehredt relied on *Devis* v. Bank of America, 65 Cal.App.4th 1002, 77 Cal.Rptr.2d 238 (1998) and Hunsucker v. Sunnyvale Hilton Inn 23 Cal.App.4th 1498, 28 Cal.Rptr.2d 722 (1994). In Devis v. Bank of America, Appellant Devis, due to mistaken identity, was arrested and imprisoned after Bank of America (BofA) informed the police that he had stolen checks from his acquaintance Patrick McKinney. 65 Cal.App.4th at 1004. Devis sued BofA and McKinney for false

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imprisonment, slander and negligence in the investigation which led to the police report. At summary judgment, the trial court ruled that California's anti-SLAPP statute barred retaliatory actions and the case was dismissed. Id. On appeal, the California Court of Appeals explored the causes of action (which did not include one for malicious prosecution) to hold that the California anti-SLAPP statute protected against suits for negligence and false imprisonment. Id. at 1012. In Hunsucker, a maid at the Sunnyvale Hilton Inn informed management that she had seen a woman in Appellate Hunsucker's room brandishing a gun. 23 Cal.App.4th at 1500. A manager at the Hilton reported this information to the police. Id. Prior to arriving at the hotel, the police conducted a routine check for outstanding warrants and background information on the name Don Hunsucker and the search revealed that Don Hunsucker had a felony warrant and weapons record, and the police concluded that the person registered at the Hilton was the same Don Hunsucker. *Id.* The police arrived at the hotel and detained Hunsucker while they searched the room. Hunsucker was detained for approximately 30 minutes before the police discovered that the Hunsucker was not the one with the outstanding warrant. *Id.* at 1501. The Hunsuckers sued the Hilton and the City of Sunnyvale for false imprisonment, assault and battery and deprivation of their civil rights (but not malicious prosecution). On appeal, the California court of appeals disagreed with the Plaintiff's contention that the acts of the Defendant hotel reporting to the police were not privileged. *Id.* at 1502. The Hunsucker court also disagreed with the Plaintiff's contention that false imprisonment and defamation should not be barred by the anti-SLAPP statute. Id at 1505.

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Both Hunsucker and Devis in turn cite the California Supreme Court case, Silberg v. Anderson. 50 Cal.3d 205, 786 P.2d 365 (1990). In Silberg, the California Supreme Court made it clear that while the privilege afforded by the immunity statute is far reaching, barring tort actions based upon a protected communication, **it does not bar** malicious prosecution. Id. at 215-216. Silberg cited the reasoning of the California Supreme Court in Albertson v. Raboff, 46 Cal.2d 375 (1956), as to why malicious prosecution actions are not barred by the anti-SLAPP act. In Albertson, the court distinguished between actions for defamation and those for malicious prosecution.

> [T]he fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.

46 Cal.2d at 382. The Albertson court went on to write that "allegations that the action was prosecuted with knowledge of the falsity of the claim are sufficient statement of lack of probable cause" in malicious prosecution actions. Id.

This is the same reasoning that plaintiff requests the Court apply here.

Although no Washington appellate cases from Division One appear to directly address whether the immunity afforded by RCW 4.24.500 -.510 applies to malicious prosecution, the Court of Appeals, Division Two, has addressed this issue in the converse in dicta in Segaline v. Dep't of Labor & Indus. 182 P.3d 480, 487 (2008). Division Two of the Court of Appeals, did not, however, provide any reasoning for this application (since the trial court had summarily dismissed the claim of malicious prosecution, and the claim was mooted on

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appeal). See Id. at n.5. Because the malicious prosecution claim (and application of RCW 4.24.510) was not properly before Division Two, because that court made reference to RCW 4.24.500-510 in dicta and without any analysis, and because there is no clear intent from the legislature to bar malicious prosecution claims, this Court should decline to follow Division Two's apparently unintentional (and unintentionally sweeping) statement in Segaline.

c. Johnson's Bad Faith Conduct Bars Absolute Immunity

Even if the Court decides that RCW 4.24.510 applies to malicious prosecution, the statute does not grant an absolute immunity unless the police reporting was made in good faith (something that was not present in the instant case).

> [W]here a defendant in a defamation action claims immunity under RCW 4.24.510 on the ground his or her communications to a public officer were made in good faith, the burden is on the defamed party to show by clear and convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.

Segaline, 182 P.3d at 487

And it makes no sense to grant attorney fees to the defendant where bad faith is involved but leave the issue of bad faith and the statutory penalty to the jury to decide. The issue of bad faith, as the Segaline court recognized, must apply across the board to RCW 4.24.500 and the Plaintiff must be provided the opportunity to show by clear and convincing evidence that the report to the police was made in bad faith. Accord to Gilman v. MacDonald, 74 Wash. App. 733, 738-739, 875 P.2d 697 (1994).

Although the legislature may have believed that it had valid reasons for removing the good faith language from the Washington anti-SLAPP statute, the statute would be

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unconstitutional under the First Amendment unless a good faith requirement is read into the statute. The statute chills the plaintiff's First Amendment Right by denying him access to the court by blindly dismissing a valid claim without first addressing whether there is a question of fact regarding good faith.

The right of citizens to contact the government to seek help must be qualified with a good faith requirement and without it, cannot be granted an absolute immunity. If an absolute immunity applies without the requirement of good faith, then the right to free speech is made superior to the right to petition, despite neither constitutional right being pre-eminent over the other. See McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed.2d 384 (1985) (the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment); Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights ... and therefore are united in the First Article's assurance.")

The Washington anti-SLAPP statute was fashioned to protect the free speech of citizens and small groups without fear of retaliation through the legal system from more powerful entities and for this reason, the legislature removed the good faith language. Without the good faith language, however, bad faith reports that do not touch upon public concerns, such as that of defendant, would be afforded absolute immunity and plaintiffs, such as plaintiff, would be unable to petition the court for redress for wrongs made against him in bad faith (i.e., unprotected speech). Thus, if one does not exist across the board, the Court

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1 should read a good faith requirement into the Washington anti-SLAPP statute to avoid this
2 chilling effect.

3 Outside of constitutional and policy reasons why these types of actions should not fall
4 under 4.24.500 (and why the Court could affirm the trial court as a matter of law) there exists
5 numerous factual reasons why defendant's communication to the police was not in good faith.
6 such as being aware that plaintiff was scheduled to arrive at their marital home at that date
7 and time to pick up his remaining personal property, and that the date and time had been
8 extensively pre-arranged and agreed to through both Parties' attorneys. And, the agreed upon
9 date for the property pick up was the last day before the house sold.

10

11 ## V. CONCLUSION

12 For the foregoing reasons, Defendant is in no way entitled to judgment as a matter of
13 law. She has failed to meet her burden under CR 56. Justice requires that the Court reject her
14 attempt to escape liability for causing the plaintiff's injuries and to benefit financially despite
15 her liability.

16

17 The plaintiff respectfully requests the court deny defendant's motion for summary
18 judgment.

19

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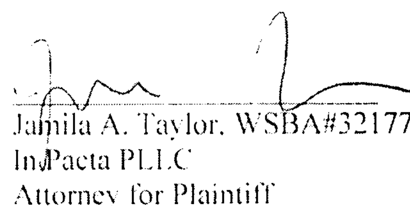
22 Dated this 24th day of October 2012



23 Jamila A. Taylor, WSBA#32177
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CASE NUMBER: 07-2-06353-6 SEA

HONORABLE SHARON ARMSTRONG
Oral Argument Friday, November 2, 2012
11:00 a.m.

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

LESTER FILION, as Personal Representative of the Estate of GARY FILION,
Plaintiff,
vs.
JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation,
Defendants.

NO. 07-2-06353-6 SEA

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The purpose of summary judgment is to avoid a useless trial. Moore v. Pac. NW Bell, 34 Wn.App. 448, 662 P.2d 398 (I 983). [cited in plaintiff's motion for summary judgment, p. 4, l. 14 – 16]

Under CR 54(b), the November 21, 2008 Order on Civil Motion which denies defendant Johnson's 12(b)(6) motion for dismissal of plaintiff's claims on the basis of RCW 4.24.500 - .510 is subject to revision by this court at any time. CR 54(b) provides, inter alia, that:

> "In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and **the order or other form of decision is subject to**

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revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The November 21, 2008, order was entered by the Honorable Douglas McBroom, retired, who left the bench shortly after that order was issued. Thus, it is not possible at this time which is four years after Judge McBroom's retirement to renew defendant's motion for dismissal based upon RCW 4.24.500 - .510 with Judge McBroom.

Plaintiff misunderstands the procedural status of this case. Defendant Johnson's defense of immunity under RCW 4.24.500 - .510 was properly raised via the 12(b)(6) motion in 2008 and is squarely a part of this case. The defense under RCW 4.24.500 - .510 is an affirmative defense not a counterclaim. A filing fee is not required for an affirmative defense. If a filing fee is required for the affirmative defense under RCW 4.24.500 - .510 which provides for an award of expenses and reasonable attorney fees and statutory damages of $10,000, then defendant will pay it. However, the raising of this affirmative defense is not listed in this court's fee schedule as a fee generating event.

Affirmative defenses may be raised either in an answer or in a CR 12(b) motion. Defendant's affirmative defense under RCW 4.24.500 - .510 was raised by way of a CR 12(b)(6) motion. Because matters outside the pleadings were presented to and not excluded by the court, the 12(b)(6) motion was treated as a motion for summary judgment as provided in CR 56. See CR 12(c).

Defendant's 12(b)(6) motion to dismiss was filed early in this case on October 24, 2012. (SCOMIS Sub # 56). To the point in time the activity in this case was focused on the litigation between plaintiff and defendant's dissolution attorney Mark D. Olsen's law firm, Olson and Olson, PLLC.

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1 This court granted Olson's motion to dismiss all claims against Olson by order entered
2 February 8, 2008. (SCOMIS Sub # 35). On February 25, 2008, the court awarded Olson a
3 judgment for $3,600.00 as CR 11 sanctions jointly against Filion and his then counsel
4 Timothy McGarry.

5 Defendant Julie Johnson was pro se in this case until March 4, 2008, when the
6 undersigned appeared as her attorney of record.

7 The procedural status of the case, as between plaintiff and defendant Johnson, at that
8 time was:

9 - 02-21-2007 Plaintiff's original complaint filed (SCOMIS Sub # 1).
10 - 04-09-2007 Plaintiff's 1st Amended Complaint filed. (SCOMIS Sub # 8)
11 - 05-16-2007 Defendant Johnson's answer filed. (SCOMIS Sub # 10)
12 - 08-15-2007 Plaintiff's 2nd Amended Complaint filed. (SCOMIS Sub # 15)
13 - 10-24-2008 Defendant Johnson's CR 12(b)6) motion filed. (SCOMIS Sub # 56)

14 To this date, defendant Johnson has not filed a formal answer to plaintiff's 2nd
15 Amended Complaint. Plaintiff has not filed a motion for default. Under CR 55(a)(2) Johnson
16 may filed an answer to plaintiff's 2nd Amended Complaint at any time before a hearing on a
17 plaintiff's motion for default is held. Plaintiff has not filed a motion for default. If defendant
18 were to include the affirmative defense of immunity under RCW 4.24.500 - .510 it would be
19 in an answer to plaintiff's 2nd complaint, which is identical in every respect to plaintiff's
20 original complaint, and it would be an fresh answer, not an amendment to her existing answer.
21 But the affirmative defense is squarely in this case unless we reverting to the 1800's practice
22 of pidgeon-hole law.

23

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1 In fact, Johnson has properly raised the affirmative defense of immunity under RCW
2 4.24.500 - .510. Plaintiff has responded to and fully briefed the court regarding its position on
3 Johnson's affirmative defense.
4 Nothing precludes this court from considering defendant's motion for summary
5 judgment at this time. That the motion was filed previously and denied does not preclude this
6 court from revisiting and reconsidering this motion. See CR 54(b). The law regarding the
7 immunity defense under RCW 4.24.500 - .510 has developed considerably since that time, as
8 has the law regarding violations of restraining orders.
9 Plaintiff's assertion that RCW 4.24.500 - .510 does not apply to "cases of malicious
10 prosecution" has no support in the law whatsoever. If that assertion was true, then every time
11 a party protected by a restraining order reported the violation to law enforcement, the
12 reporting party would be subject to a claim of malicious prosecution and would not have the
13 RCW 4.24.500 - .510 immunity defense available. The chilling effect of such a position is
14 incalculable.
15 The state of Washington has a very strong policy of protecting party from domestic
16 violence and from violations of restraining orders issued in dissolution and domestic violence
17 cases. See RCW 26.50.110; RCW Chapter 10.99; State v. Bunker, 169 Wn.2d 571, 238 P.3d
18 487 (2010)
19 The case law cited by plaintiff in support of its argument that the anti-slapp statute
20 dfoes not apply to malicious prosecution claims is inapposite and does not stand for the
21 propositions plaintiff asserts that it stands for.
22 It is clear that violations of RCW Chapter 26.09 and 26.50 restraining orders is a
23

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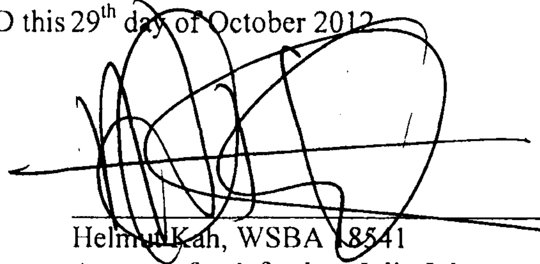
1 matter of vital public concern in the state of Washington and that RCW 4.24.500 - .510
2 applies to the reporting of such violations. Plaintiff's argument is asking this court to overrule
3 the Washington Legislature's policy decision and the decisional law of this state on this
4 subject.

5 RESPECTFULLY SUBMITTED this 29th day of October 2012



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8 Helmut Kah, WSBA 18541
Attorney for defendant Julie Johnson
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HONORABLE SHARON ARMSTRONG
Oral Argument Friday, November 2, 2012
11:00 a.m.

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JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation,
Defendants.

NO. 07-2-06353-6 SEA

CORRECTIONS TO REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW defendant by and through her attorney Helmut Kah and hereby makes the following corrections and clarification to defendant's reply to plaintiff's response to defendant's motion for summary judgment filed October 29, 2012 (corrections and clarification are in **bold** type):

Correction to p. 2, lines 20 – 21:

Defendant's 12(b)(6) motion to dismiss was filed early in this case on October 24, ~~2012~~ **2008**. (SCOMIS Sub # 56). To the point in time the activity in this case was focused on the litigation between plaintiff and defendant's dissolution attorney Mark D. Olsen's law firm, Olson and Olson, PLLC.

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1 Clarification to p. 3, lines 14 – 23:

2 To this date, defendant Johnson has not filed a formal answer to plaintiff's 2nd
3 Amended Complaint. Plaintiff has not filed a motion for default. Under CR 55(a)(2)
4 Johnson may filed an answer to plaintiff's 2nd Amended Complaint at any time before
5 a hearing on a plaintiff's motion for default is held. Plaintiff has not filed a motion for
6 default. If defendant were to include the affirmative defense of immunity under RCW
7 4.24.500 - .510 **in a formal document titled "answer"** it would be in answer to
8 plaintiff's 2nd complaint, which is identical in every respect to plaintiff's original
9 complaint, and it would be a fresh answer, not an amendment to her existing answer.
10 But the affirmative defense is squarely in this case unless we **are** reverting to the
11 1800's practice of pidgeon-hole law.

12

RESPECTFULLY SUBMITTED this 29th day of October 2012

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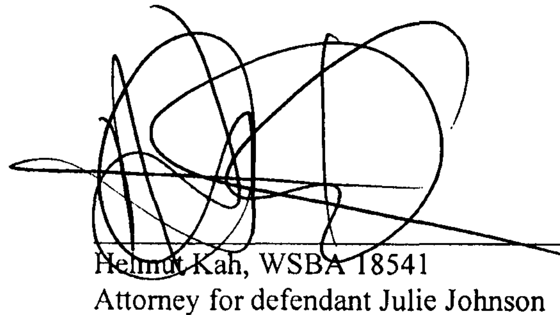

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17 Helmut Kah, WSBA 18541
Attorney for defendant Julie Johnson

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Sent: Thursday, July 17, 2014 4:14 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Noah Davis
Subject: Petition for Review: Replacement pages

Case Name: Estate of Gary Filion, Respondent, v. Julie Johnson, Petitioner
Court of Appeals case no.: 69830-3-I
Supreme Court case no.: none assigned yet
This email and attachments submitted by: Helmut Kah, WSBA # 18541, 425-949-8357, helmut.kah@att.net

Attached are replacement pages for the Amended Petition for Review in this matter.
Please insert the attached replacement pages:

- Cover page;
- Page ii
- Page 1
- Page 17

I discussed with Camilla this afternoon, July 17, 2014.

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