NO. 90507-0

Court Of Appeals No. 69830-3-I

SUPREME COURT
OF THE STATE OF WASHINGTON

JULIE JOHNSON
Petitioner

v.

ESTATE OF GARY FILION
Respondent.

ANSWER TO THE:

PETITION FOR REVIEW

By Estate of Gary Filion

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1. Identity of Responding Party

Estate of Gary Filion[1]

2. Issue Presented by the Petitioner for Discretionary Review

The issue on which the Court of Appeals decided this case was the Petitioner (Julie Johnson's) failure to affirmatively plead the anti-SLAPP defense in her Answer to the Complaint, and therefore, her failure to preserve that defense for trial. Appropriately then, Division One did not need to reach the issue of whether or not the anti-SLAPP statute was even applicable to a post-dissolution, private dispute between vexatious litigants.

3. Statement of the Case

This is the case of the Never-ending Story. Finally and hopefully, with the Supreme Court's denial of the Petition for Review, this story will end.

The Johnson v. Filion saga flows from the Parties' marriage, acrimonious divorce proceedings[2] and ultimately from the divorce decree issued by the Snohomish County Superior Court **on June 1, 2006**. (CP 482-491, Decree of Dissolution, attached to Stipulated Judgment beginning at 449, hereinafter "Decree CP 482-449")

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[1] Gary Filion passed away (in 2010) while the case was pending in the first Court of Appeals case and the Estate of Gary Filion was substituted in as the Party in interest.

[2] For just a small taste of the post-decree angst, see CP 257, Order on Motion to Enforce (Extending Mutual Restraining Order and entering attorney fees award and a sanction against Johnson if she continued to fail to refinance the real estate, awarded to her.)

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After a trial in Snohomish County, in which seven witnesses testified (CP 19-25, Findings of Fact at CP 19), a Decree of Dissolution was entered which ordered mutual restraints against the Parties (precluding them from disturbing the peace of the other or going onto the property of the other) but which also recognized that Filion still didn't have the remainder of his personal belongings and was entitled to them. Therefore, and despite mutual restraints, a provision was included in the divorce decree allowing (and even ordering) Filion to obtain his personal items:

> ¶9: The following items shall be picked up the by Husband:
>
> a. Studio 56 vintage Christmas house
> b. Golf hand cart, golf roller travel bag
> c. Premarital Christmas ornaments
> d. Samurai sword with case
> e. Cremation ashes of "Siabo"
> f. Any yard tools and ladders at the time of closing of the Shoreline house
> g. Wedding gifts consisting of Complete 12 piece silver set with serving utensils, large quilt, small Christmas theme quilt (if located) and large ceramic ornamental plate (if located) and wedding ....registry if located.
> h. Tan sectional leather...sofa, matching tan chair and ottoman, glass topside lamptable, glasstop coffee table, one 3 light floor lamp.
> 10. The table leaves that belonged to the Wife's father that will be returned to the Wife at the time that the Husband picks up his personal property from the Wife.

(Decree, CP 482-449 at 485, 489-490)

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Thus, the divorce decree contained competing language (or an exception to the mutual restraining order), as it required Mr. Filion to pick up his remaining separate property yet stay away from Johnson's home (and she was required to stay away from his). Reading the order to have Filion pick up his items from the former marital home, the Parties' attorneys agreed to have the "exchange" take place on the last day and hours before the home was to be turned over to the new owners/ buyers.[3] Significantly for Filion, that August 1, 2006 date that the Parties' lawyers had agreed upon (or that Johnson had finally allowed) was set for a mere five (5) hours before the former marital home was to be a turned over at 9pm to the third party as part of the closing/sale. (CP 449-494, Stipulated Judgment at CP 450, lns 15-16; CP 492-494, Decl. of P. Dornay at CP 493, ¶6; CP 3-4, Complaint) So this was the only chance that Mr. Filion had to obtain his personal items. And by that time, it was understood that Johnson should have already moved out. (CP 57, Olson Letter; CP 440-494, Stipulated Judgment) Thus, at the time Filion was to arrive, Johnson was no longer supposed to be living at the Shoreline residence – and

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[3] Decree, CP 482-449 at 485, 489-90; CP 57, Letter from M. Olson to P. Jorgenson, dated 7/28/06; and CP 99-101, Decl.of P. Jorgenson making clear that the intent is for Filion to pick up his items from the former marital home: "the Shoreline Residence" at CP 100, ¶4, "Julie's" at CP

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therefore, technically, Filion would not have been violating any mutual restraint.

Ultimately, on the day and time that Gary Filion arrived with the movers and his parents (to finally obtain the last of his personal items), Filion was sent away empty handed as a friend of Johnson's shouted at Filion from the home that Julie Johnson was not finished moving, was inside, and was calling the police. (CP 449-494, Stipulated Judgment at 450, lns 23-25) Although he had left the home without speaking to or seeing Johnson (CP 157) and without collecting his things (which could have been placed outside or in the garage if Ms. Johnson really wanted to return them), Julie Johnson did in fact call the police and did instigate a prosecution of Mr. Filion. (CP 449-494, Stipulated Judgment at CP 451, lns 1-3 & CP 477-481, Police Report; CP 5-6, First Amended Complaint) This in turn led not only to understandable anguish, but also the cost of having to hire a defense attorney to defend against the false police report (CP 5-6, First Amended Complaint).

After being charged with violating the restraining order, Mr. Filion's criminal defense attorney was able to provide the omitted

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57; & CP 449-494 Stipulated Judgment at CP 450, lns 8-14, at CP 475, Decl. of P. Jorgenson, ¶4.

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information to the prosecutor and have the charge dismissed. (CP 5-6, First Amended Complaint, CP 236 Criminal Docket Report)

However, as he was upset that he still didn't have his belongings and that he was wrongfully charged with a crime, and that he had to pay an attorney to defend him against the baseless charge made by Johnson, Mr. Filion chose to file a malicious prosecution action against Johnson in the King County Superior Court. (CP 3-4) While Filion's reaction was due in large part to the long and acrimonious private history of the Parties (CP 3-4), it was also based on what Filion believed to be a false and malicious police report because:

- Johnson never informed the police as to the language that was the exception to the restraining order (i.e. Gary was ordered to pick up his things);
- Johnson did not inform the police of the express agreement by the Parties' counsel as to the date and time for the property exchange. (See CP 226-230, Police Report, and absence of such facts/reporting; see also CP 314-315, Decl. of J. Taylor, Dep. Tr. of Johnson, attached thereto, CP 325, Lines 17-25);
- Johnson hadn't informed the police that she wasn't even supposed to be living at the residence at the time she called the police; and

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➢Gary Filion learned that his personal property wasn't even at the house when he arrived – because it had already been moved by Johnson! (CP 99-101 Decl. of P. Jorgenson)

And, of course, since Mr. Filion's malicious prosecution Complaint followed a series of events and acts of retribution between the Parties, it should not have been surprising then that Ms. Johnson would try and upstage Mr. Filion by doing something even harsher – which she did attempt, with the wrongfully asserted anti-SLAPP defense (RCW 4.24.500 *et seq*). With this defense, Ms. Johnson could really stick it to Mr. Filion (and his estate) one last time, for the biggest and grandest act of revenge yet (an attorney fee award to pale all others)!

There are two important underlying considerations in this case: motive and opportunity. Throughout this case, Gary Filion (followed by his Estate) sought voluntary dismissal either of right or through agreement of the Parties. But Julie Johnson has persistently and stubbornly refused to let this case go – she has even gone so far as to have appealed and obtained reversal of a voluntary dismissal filed by Gary Filion under CR 41(a).[4] Even after Gary Filion's untimely passing, Johnson has refused

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[4] The Order Granting Dismissal under CR 41was appealed by Julie Johnson and reversed by Division One in *Filion v. Johnson*, 63978-1-I on the basis that once the arbitrator filed his award, Filion no longer had an

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every attempt to voluntarily dismiss[5] – the reason: because she wants to obtain sanctions and attorney's fees against Filion's Estate under Washington's anti-SLAPP statute, RCW 4.24.500 *et seq.*[6]

But, she didn't plead this defense. Despite the multitude of opportunities to plead this defense by way of an amended answer or a motion to amend the answer, Johnson failed to do so. She did file an amended answer with the assistance of counsel but even then makes no mention of or reference to the anti-SLAPP defense or statute. And to his credit, Filion never consented to have that defense apply or be tried. Without it pleaded, and without consent to have it tried, it was not properly preserved.

Ultimately, Johnson forced this matter to be set for trial. And, after Johnson again refused to voluntarily dismiss all claim(s) (pleaded or not)

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unfettered right to dismiss under CR 41(a) – since the arbitration in essence, constituted a trial on the merits. Shortly after the request for a trial de novo, a trial on the merits had already taken place, and the case was reinstated,

[5] And, on the day of trial, prior to entering a stipulated judgment against Johnson, when specifically asked by Judge Michael Hayden whether the Estate of Filion would offer to abandon its claims if Johnson would agree to voluntary dismiss, the Estate affirmatively and without hesitation answered yes. (Although no transcript is available, Johnson could not deny this exchange an offer in open Court).

[6] The Parties agree that the pre-last-amended version of the statute applies (i.e. the version existing at the time that the Complaint was filed by Gary

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without costs or fees to either side (VR 43, lns 20-25, VR 44, lns 1-3), Filion sought to have his own malicious prosecution claim disposed of on summary judgment (CP 140-147). Not to be outdone, Johnson filed her own motion for summary judgment (in which she argued that the Anti-SLAPP statute precluded Filion's claim and entitled her to attorney's fees and sanctions). (CP 162-172, CP 173-185)

After hearing argument from the Parties, the Court issued two Orders – denying the Motions for Summary Judgment in part, and granting Filion's Motion in Part by precluding Johnson from asserting the anti-SLAPP statute since she had not preserved that claim or defense in an Answer and since even if she had, it did not apply in this case. (CP 338-340 & CP 341-348)

On the day set for the jury trial, Judge Hayden asked what the Parties were doing there and whether they would agree to dismiss the case from both sides. (See FN 5) The Estate did offer this but Johnson refused. However, Johnson did acknowledge that without the anti-SLAPP claim, she could not improve her position from the arbitration and therefore, if she wasn't to voluntarily dismiss, that Filion was entitled to attorney's fees and costs (regardless of whether he won on his malicious prosecution

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Filion) and therefore the procedure for adjudicating anti-SLAPP defenses

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claim). (CP 449-494 at CP 449-451) Thereafter, the Parties waived the jury and entered into a stipulated judgment. (CP 449-494) A judgment was entered on the award of attorney's fees and costs in the amount of $13,024.25. (CP 625-627)[7]

Johnson appealed that judgment, Judge Armstrong's Order precluding Johnson's Anti-SLAPP defense, and the prior Order of the Court denying Johnson's earlier Motion for Summary Judgment.[8]

After the Court of Appeals upheld the trial court judgment (and preclusion of the non-pleaded anti-SLAPP defense), now, through the Petition for Review, Johnson still seeks to continue the underlying litigation with the ultimate goal of forcing the Estate to appear and defend in yet a new trial so that she can seek an award of attorney fees.

Thus, truth be told, Johnson can blame much of her present dilemma on her own choices (the failure to accept voluntarily dismissal on at least three occasions, see FN 5-6) and the failure to have preserved (by pleading) the very basis and foundation for her appeal. Because she failed to preserve the anti-SLAPP statute by pleading it in her Answer (or her

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did not yet exist.

[7] Although no collection efforts have been made as of 9/5/14.

[8] Johnson has filed three appeals to the Court of Appeals, two of which were decided and a third in the form of a Motion for Discretionary Review

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amended answer), as either an affirmative defense or as a counterclaim, the trial court and the Court of Appeals correctly ruled that Johnson was precluded from asserting that defense at trial. That decision (of the trial court and Court of Appeals was correct) and need not and should not be disturbed.

4. ARGUMENT

The Court of Appeals got it right. Johnson was precluded from asserting her purported anti-SLAPP defense because she had twice plead but failed to preserve that defense (in either her original or her amended Answer) and never moved to amend her Answer to include it. She had also failed to move in a CR 12 motion prior to filing her answer.

And now, there is simply no basis for accepting review of this decision since:

a. The Court of Appeals decision does not conflict with any Supreme Court precedent (RAP 13.4(b)(1));

b. The Court of Appeals decision does not conflict with any other decision of the Court of Appeals (RAP 13.4(b)(2));

c. There is no significant question of law under the US or Washington constitutions (RAP 13.4(b)(3));

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on November 14, 2012 (CP 355-365) which required an Answer from the

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d. And while the Petition does attempt to assert that an issue of substantial public interest is involved that should be resolved by the Supreme Court, there is no public interest through amicus briefs and even if there was, the Court of Appeals didn't reach (because it didn't need to reach) the applicability of the anti-SLAPP defense. Thus, this is simply not the right case to address the wrongful and overbroad assertions of anti-SLAPP.

Johnson is incorrect in asserting that the law has been changed (or not followed) by the Court of Appeals. That is not the case. What was involved in this case was a defense that was not pleaded but which called for affirmative relief (statutory penalty and attorney's fees). Under the laws at the time (and statute at the time), the anti-SLAPP defense had to be pleaded or tried by agreement.[9] Neither occurred here. That is the

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Estate of Filion before it was abandoned.

[9] Johnson's argument is that she raised it in her briefing. But that is exactly what the long standing rules of notice pleading seek to prevent! Getting improperly or un-pleaded claims in through surprise without the express agreement of the Parties (or without objection, here there is objection). If Johnson wanted to assert her claim, she needed to pleaded it, and she failed to. In addition, Johnson states that her claim was tried in arbitration (Johnson Br. Pg. 5-6), but there is no such ruling by the Arbitrator and there is no record to support that finding. That claim was NOT tried by consent if tried at all! And Johnson's counsel acknowledged during argument before the Court of Appeals that the Arbitration Award makes no mention of such a claim. Finally, Johnson tries to raise for the first time that her defense of "failure to state a claim" somehow included

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conclusion that the Court of Appeals came to, it is the correct application of the facts to the law and it is the correct application of the law.

As far as Johnson having the right to have brought a CR 12(b) motion without waiving her right to assert an affirmative defense in a later answer (See Johnson Br. P. 18), Filion doesn't dispute this and neither did the Court of Appeals. That simply did not occur in this case. Johnson didn't bring a CR 12(b) motion to dismiss prior to filing an answer. She filed an answer without the affirmative defense – then, and later with the assistance of counsel. Johnson is simply interpreting the Civil Rules and law wrong here. Her actions were not similar to any of the cases she cites.

And, even had Johnson pleaded the anti-SLAPP statute in her Answer (or Amended Answer since she had filed that Answer with her attorney but without the anti-SLAPP affirmative defense), the anti-SLAPP statute was still correctly precluded by the trial court as a defense because the anti-SLAPP legislation was never intended to apply to a purely private dispute between recently divorced parties fighting over the language of their divorce decree and attempting to use the anti-SLAPP statute as a

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the anti-SLAPP affirmative defense. This novel argument should not be considered as not raised in the trial court below and otherwise, not encompassing the anti-SLAPP defense which Johnson has already acknowledged that she did not plead.

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malicious sword against one other.[10,11,12] In addition, the anti-SLAPP defense was never intended to apply, and does not apply, to completely bar malicious prosecution cases.[13] Were this not so, then not only would

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[10] RCW 4.24.500 does not apply to matters that do not involve substantive issues of public concern.

[11] 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)).

[12] In *Hoffman v. Davenport-Metcalf,* the Rhode Island Supreme Court stated that it was not convinced that the provisions of its anti-SLAPP statute should apply to a private matter between tenants against their property manager and property management company. 851 A.2d 1083, 1088 (2004). (Court was not "persuaded that these are the types of activities that the Legislature intended to protect in enacting the law, and we decline to extend the purview of the anti-SLAPP statute to encompass these private causes of action and criminal complaints.").

[13] 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 Johnson seeks), the very case upon which Johnson relies, *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.3d 29, *review denied.* 139 Wn.2d 1012 (1999), runs contrary to Johnson'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

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malicious prosecution cases stand the prospect of being forever barred, but divorcing parties would be free to make up (and file various) allegations against their estranged spouse (from restraining and protection orders to CPS and assault claims) because the defending spouse would have no recourse (in any proceeding) due to fear of the anti-SLAPP defense. The Parties would rush to file criminal or administrative charges against their estranged or former spouse or even Child Protective Services claims – all in an attempt to be the first to file and gain the protection of anti-SLAPP.

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238 (1998) and *Hunsucker v. Sunnyvale Hilton Inn* 23 Cal.App.4th 1498, 28 Cal.Rptr.2d 722 (1994)[13]. 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

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In addition to addressing the failure to plead and the substance of Johnsons' wrongful assertion of the anti-SLAPP defense, were the Supreme Court to grant review over the objection of the Estate of Filion, then the estate would also respectfully request review of whether Johnson was an "aggrieved party" (as required by MAR 7.1 and RCW 7.06.050) since she didn't have any counterclaims or affirmative defenses and therefore had lacked standing to file for a trial De Novo.[14]

V. CONCLUSION

In closing, what this case is NOT about is domestic violence. Johnson's brief tries to make this an issue as a last ditch method of trying to gain the Court's attention to a serious issue that was not at the center of the facts of this Appeal or Johnson's maliciousness or Johnson's failure to plead the anti-SLAPP statute. The Estate of Filion respectfully requests that the Court grant DENY the Petition for REVIEW and to put an end to a case that has been going on for more than 8 years.

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are sufficient statement of lack of probable cause" in malicious prosecution actions. *Id.*

[14] An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Cooper v. City of Tacoma*, 47 Wash.App. 315, 316, 734 P.2d 541 (1987). Here there was no claim and no evidence presented of such rights being affected.

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DATED this 5th day of September 2014.

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