Supreme Court Case No. 101625-5

Court of Appeals (Div.-I) No. 82828-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEAN KUHLMEYER,
Appellant (Plaintiff),
vs.
ISABELLE LATOUR, et. al,
Appellee(s) (Defendant(s))

SEAN KUHLMEYER'S PETITION FOR REVIEW

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Appeal of: *Kuhlmeyer v. Latour* (tort) King Cty. No. 20-2-11957-1
Kuhlmeyer v. Latour I: Court of Appeals Div. I Case No. 82828-2
(Issue of first-impression of applicability and constitutionality of RCW-26.51.)

Wednesday, January 11, 2023 (1/11/2023)
Estimated-Reading-Time: 9.86 Decimal-Minutes

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III. INTRODUCTION AND SUMMARY OF GROUNDS FOR REVIEW

This is a case of first impression.

A. Overview – Tort Claims

Sean Kuhlmeyer and Isabelle Latour divorced in 2018. After initially filing for dissolution without making claims there were any issues of domestic-violence, and after negotiating an Agreed Final Parenting Plan with shared custody, when informed that because she made more money, that Latour must pay Kuhlmeyer child-support, Latour – *for the first time in a 20-year relationship* – alleged Kuhlmeyer was abusive, breached the 50/50 plan, fabricated evidence to support her claim Kuhlmeyer's residential time should be reduced, and began aggressively litigating, to 'win' custody, and exercise power and control over Kuhlmeyer and the father/son relationship. She hired an extremely aggressive attorney (defendant Zaike) who engaged in unethical tactics, and the dissolution was marred by endemic bad faith and false allegations, culminating in the 2018 Arbitration of the

divorce issues and issuance of final orders.

However, in the issuance of those orders, defendant Zaike committed additional torts, by modifying the draft orders approved by the Arbitrator, inserting false facts and false findings, and concealed those forgeries from the Arbitrator and Hon. Richardson whom was proceeding over the dissolution court. When those forgeries were discovered and pointed out, the court, in clear violation of precedent requiring the court's investigation of frauds against it, ignored that defendant Zaike had committed a *Fraud-on-the-Court*.[1] To the tort court judge's credit (Hon. Bender), recognized those facts were a legitimate tort claim against defendant Zaike, but relying upon a false statement by co-defendant Bugni who claimed Division-I reached a factual determination of that issue, proceeded to dismiss all Kuhlmeyer's claims, including his fraud claim against defendant Zaike for forging the final orders.

[1] To this day, this issue – the forgery of the final orders presented to the dissolution court, has never been factually examined by <u>any</u> court.

Notably, throughout the dissolution process, and in the period immediately following, Latour, and her counsel, were repeatedly warned they were committing torts for which Kuhlmeyer could seek damages.

After issuance of final orders, Latour escalated her harassment, committing more torts, and expanding on torts committed during the dissolution, including engaging in a pattern of filing false police reports against Kuhlmeyer seeking false restraining-order convictions (that resulted in two sets of false criminal charges against Kuhlmeyer), publicly defaming Kuhlmeyer's character including in the media, refusing to return any of Kuhlmeyer's property, and engaging in a pattern of behavior calculated to interfere with Kuhlmeyer's relationship with their son and destroy the father/son relationship that has resulted in Kuhlmeyer enduring more than three years without seeing his minor son.

People associated with Latour, also committed torts against Kuhlmeyer in their own right, including Latour's

attorney, who in addition to forging the final dissolution orders, used a fraudulent Writ of Garnishment containing orders already paid, judgements issued against other people, and vacated judgments, to illegally garnish over $64,000, while also defaming Kuhlmeyer's character beyond her limited immunity. Meanwhile a friend of Latour's, took Kuhlmeyer's titled property (boat & trailer), damaged it, then sold it to a third-party after drafting a fraudulent Bill of Sale.

Notably throughout this process, the family court, after first imposing litigation restraints against Kuhlmeyer *sua sponte*, then engaged in a pattern of refusing to allow Kuhlmeyer to enforce any of the court's orders, while also tolerating Latour's refusal to obey the orders, thereby exacerbating both Latour's tortious behavior, and Kuhlmeyer's damages.

Finally, after suffering hundreds of thousands of dollars in damages and extreme emotional suffering, and having repeatedly warned all parties their behavior was tortious, Kuhlmeyer brought suit against the parties in one combined claim, submitted

with extensive evidence of their tortious conduct.

Immediately upon being able to do so based on the trial calendar, and without conducting any discovery whatsoever, Kuhlmeyer filed a Motion for Summary Judgement of Liability, with the express permission of the tort trial court judge. CP-1077-1394.

Meanwhile, after having 'forum-shopped' a Motion to Restrict 'Abusive' Litigation before three judges in two different cases (dissolution and tort), and after a new judge was assigned to the tort case with relationships with defendants and a witness identified by Latour as within 3° of separation of her honor (prohibited by CJC 2.11), defendant Zaike again filed her motion under RCW 26.51, and said hearing was scheduled for the same day as the MSJ hearing.[2] The MSJ was not answered by any

[2] It was discovered shortly after issuing her dismissal order, that Hon. Bender has relationships with named defendants and a witness identified by defendant Latour within 3° of separation (Bender's mom is close friends and business partners with defendant Bugni, and Bender volunteered for over a decade with an organization identified as a witness by Latour), these relationships were never disclosed.

defendant. At the hearing, Hon. Bender, after admitting she did not review Kuhlmeyer's material for the RCW 26.51 issues, and admitting she had specifically allowed the MSJ, surprised the parties and refused to hear the MSJ, struck it, and proceeded to move forward with the RCW 26.51 issues. RP-7, *also see*, RP-8 ln.12 – RP-10 ln.5. The tort court never read the MSJ, even when submitted as an exhibit for the ALA briefing on the legitimacy and basis in fact of the claims. If the court had read the MSJ, this case would not exist.

In examining those issues, despite admitting that the Arbitrator (the trial court per RCW 26.51.020(1)(a)(ii)(C)), had never found any domestic-violence had occurred, the tort court found the opposite, by finding that merely because a 'box was checked' on a general restraining-order[3] that Kuhlmeyer was a 'credible threat' to Latour – *even though no such finding had ever been made (and defendant Zaike checked such box without*

[3] Which was the continuation of an agreed restraining-order to keep the family peace, but did not state he was a threat.

authorization of the arbitrator) – and while acknowledging the language specifically obligated by RCW 26.51.020(1)(a)(ii)(C) requiring the Arbitrator "made a specific finding that the restraining-order was necessary due to domestic violence" was absent from both the order and the underlying findings (which should have ended the inquiry), Hon. Bender found such a 'checked box' was enough for the ALA; and without doing the analysis required by RCW 26.51.020(1)(a)(iii)(b)(i)-(iii), dismissed all claims, against all parties, including those who had committed independent torts against Kuhlmeyer having nothing to do with Latour's conduct. CP-2841-2864.

On appeal, Division-I affirmed on a theory, not supported by the facts, that "Each claim is rooted in facts related to Kuhlmeyer and Latour's dissolution proceeding." *See*, *Kuhlmeyer v. Latour*, Div.-I, No. 82828-2-1, 07Nov2022. And a theory that when defendant Zaike, with no authorization from the Arbitrator and without her approval, and without the required underlying findings, 'checked the box' Kuhlmeyer was

a credible threat to Latour, that was effectively a finding of domestic-violence, and that when Kuhlmeyer challenged the issuance of the restraining-order in a previous appeal, that Division-I's affirmation of the order thus confirmed all aspects of the order. *Id.* pg.10.

On reconsideration, Division-I, when pointed out the previous appeal regarding the restraining-order was because only a one-year order had been litigated, but a five-year order was entered *sua sponte* by the arbitrator, and the pertinent language of 'credible threat' was not a legal issue and not linked to any aspect of RCW 26.51 (because it did not exist at the time Division-I initially reviewed the case), Division-I ignored the issue, and denied. Note-4.

More broadly, on reconsideration, it was raised that

[4] Absent from Division-I's analysis when the restraining-order was originally on appeal, was the gross due-process violation that occurred when the Arbitrator, *sua sponte* and without notice and opportunity to be heard, and after arbitration had ended, and in violation of the fact that they had radically different standards, imposed a five-year restraining-order instead of the one-year order that was litigated. , which have radically different legal standards. *Marriage of Kuhlmeyer,* No. 78765-9-I (Jan. 21, 2020) (unpublished).

fundamentally what Division-I and the underlying tort court had failed to recognize was, that Kuhlmeyer had legitimate tort claims against Latour and the other defendants, and allow those claims to proceed. Instead, what the tort court did, and Division-I affirmed, is ignore the facts no domestic-violence had occurred in the Kuhlmeyer/Latour relationship, that the Arbitrator did not find domestic-violence, and that Latour and other persons had committed, and even admitted to committing, extensive torts against Kuhlmeyer, and that he was severely harmed by those torts.

Division-I's mistake, by affirming the tort court's dismissal, creates a 'roadmap' for any vindictive former intimate to abuse their ex-partner through the courts by falsely accusing them, and by committing torts against them, knowing they will never be held accountable. And, perhaps even more dangerously, it allows others loosely associated with the vindictive partner, to also commit torts with impunity, leaving their victim defenseless.

Division-I's decision in *Kuhlmeyer v. Latour,* in finding the ALA is constitutional is error, because amongst other arguments, the ALA applies different legal standards to different types of civil claims, and thereby deprives a litigant of the rights and protections afforded by the state and federal constitutions for those claims, including the right to a jury determination of tort issues. It also fails the strict-scrutiny test for laws that infringe upon a fundamental constitutional right.

Even presuming the ALA is constitutional, Division-I's decision is still error as it effectively overturns 130-years of law on Abuse of Process claims against attorney's who misuse the Writ of Garnishment procedure. *See,* Wash. Session. Laws of **1893**, ch.56, §1 (Orig. Ch. LVI, House Bill No. 114 (An Act in Relation to Garnishments));[5] *Van Blaricom v. Kronenberg*, 50 P.3d 266 (Wash. Ct. App. Div. I 2002).

It also creates a 'Division Split' with Division-II's

[5] https://leg.wa.gov/CodeReviser/documents/sessionlaw/1893c56.pdf

decision in *Mason v. Mason,* which, under similar facts, including allegations and 'findings' of domestic-violence that were not supported by evidence, and in which the lower court had found Father's attorney presented "an untrue presentation to the court which created unnecessary litigation," and in which mother sued father and his attorney, and the case was dismissed, Division-II reversed, finding the Mother's tort claims against both her ex-husband, and his counsel were properly brought. *Mason v. Mason,* 497 P.3d 431 (Wash. Div-II. 2021) ("…while "clients are entitled to aggressive advocacy ... the advocacy in this case presented an untrue presentation to the court which created unnecessary litigation."). ***See, Appendix-A.***

Sociologically, Division-I's decision is exceedingly dangerous, and lives will be lost as a result, because it will encourage former intimate partners to lie to get false domestic-violence findings (which is already an endemic problem but will now get worse), and encourage them to abuse their former

partner by committing torts against them. That will escalate conflict between partners, which will eventually result in violence and death because their interpersonal situation was needlessly escalated by the vindictive partner who was able to manipulate the process to obtain domestic-violence findings against their ex-partner and then commit torts against them which they have no power to rectify.

A certain number of these cases will result in violence as either the targeted former partner either loses their ability to cope with the legal abuse and torts against them and reacts with violence, or, the vindictive targeting partner, when confronted with the fact their behaviors and torts has exacerbated the conflict, and they realize they are about to lose their ability to continue to harass their ex because their behaviors have finally drawn the attention of the courts and they are being corrected, reacts with violence.[6]

[6] In simple terms, Division-I's message from *Kuhlmeyer v. Latour* is: 'If you want to abuse your former lover, lie to get a DV 'finding,' then do

Several recent cases with similar facts resulted in violence precisely because one former partner was denied access to justice by the courts, including the Bellevue case of Baron Li who survived a murder attempt by assassins hired by his ex-wife, Bellingham psychologist Michelle Deegan who killed herself and her seven-year-old daughters, Idaho father John Mast who was assassinated by his former father-in-law, and many others. The danger created by Division-I's decision is not hyperbole, and shouldn't be devalued.[7] This is an issue of substantial public interest that should be addressed.

IV. IDENTITY OF PETITIONER

Sean Kuhlmeyer, Plaintiff and Appellant below, asks this Court

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things that hurt them, and when they sue you, say because you have a 'DV' finding, you're immune, and not accountable for what you did.'

[7]
- Baron Li: https://www.seattletimes.com/seattle-news/law-justice/after-bellevue-man-survived-july-shooting-king-county-prosecutors-say-his-ex-wife-continued-to-plot-his-killing/
- Michelle Deegan: https://www.kiro7.com/news/local/whatcom-county-sheriff-mother-killed-twin-daughters-then-shot-herself/Y3ZKMRXZDFGG7CTLVGZOBLWUB4/
- John Mast: https://lmtribune.com/northwest/trial-date-set-in-parking-lot-slaying/article_765fe9d3-b793-5f2c-b59c-d96079bfae7a.html

to review of the Court of Appeals' decision terminating review.

V. CITATION TO COURT OF APPEALS DECISION

A copy of the unpublished Court of Appeals decision, filed 07Nov2022, is attached as ***Appendix-B***. The order denying reconsideration dated 13Dec2022 is ***Appendix-C.*** The order awarding attorney's fees dated 19Dec2022 is ***Appendix-D.***

VI. ISSUES PRESENTED FOR REVIEW

1. Whether the ALA is constitutional when, it limits a person's fundamental due-process rights to access the court, and applies different legal standards for claims than is required by the Washington and United States Constitutions? (No)
2. Whether, presuming the ALA is constitutional, when there is a restraining-order lacking the ALA statutorily required language, and lacking the underlying factual findings required by the ALA, whether merely 'checking the box' one is a 'credible threat' is sufficient to

implicate the ALA and dismiss a tort action that all parties agree were committed by the defendants? (No).

3. Whether, presuming the ALA is constitutional, when there are independent tortfeasors that commit completely independent torts from those committed by the former spouse, whether those tortfeasors can be dismissed from tort claims even they admit they committed? (No.)
4. Whether, presuming the ALA is constitutional, a tort trial court is obligated by the ALA to conduct an analysis of the facts and evidence submitted against one to whom the ALA might apply? (Yes).

VII. STATEMENT OF FACTS AND PROCEDURE

A. Overview Facts

Facts for the tort claims are best stated in Kuhlmeyer's Complaint. CP-1-406. Which included 57 exhibits of uncontested evidence. CP-75-406. Although the defendants, criticized the size of Kuhlmeyer's complaint he stated:

> The advantage of having put in so much evidence is that the Court

> has, literally right in front of it, evidence related to these other defendants that can, you know, clearly show there is some evidentiary basis for these claims and they just don't fall under the statute. RP-pg.22 ln. 1-12.

Even the trial court obliquely acknowledged the claims had evidence (although it ignored the evidence). CP-61 ln.16-18. Rather than restate the facts for the majority of the claims, for efficiency, Kuhlmeyer draws to attention those he thought were his 'strongest' and on which he filed a Motion for Summary Judgement of Liability without conducting any discovery whatsoever. CP-1-78. These claims included Malicious Prosecution against Latour for knowingly filing a false police report against Kuhlmeyer causing him to be falsely charged with a crime he didn't commit, and suppressing exculpatory evidence of his innocence costing him approximately $200,000 in damages. CP-21-24. See note-8. And Defamation, and Defamation Per Se, claims for falsely, and publicly, claiming

[8] CP-92-125 (false police report); CP-127-130 (SMT Report proving Latour knew she was maintaining false criminal charges against Kuhlmeyer); CP-1181-1182 (Case 637289 Summons); CP-1184 (Case 637289 Dismissal); CP-1186-1187 (Declaration); CP-1146-1163.

Kuhlmeyer ‘stalked’ her, and that courts had found he was “mentally ill,” and “physically and emotionally abusive” etc.

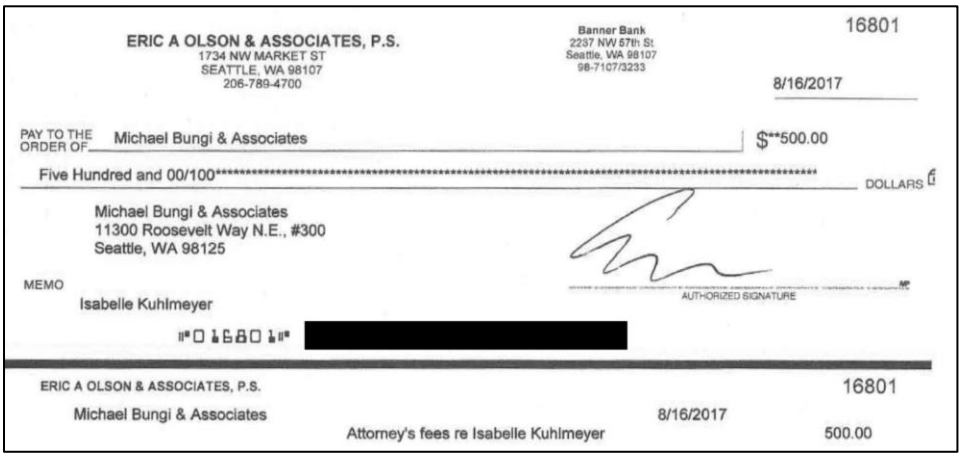
Other claims against Latour included disposing of Kuhlmeyer’s property including his dead mother’s ashes; defaming plaintiff to their son; withholding their child to inflict emotional suffering on Kuhlmeyer; misusing the legal system to abuse and harass Kuhlmeyer; and contribution for federal-taxes for disobeying tax code. CP-1-406.

Against defendant Zaike, Kuhlmeyer’s strongest claims were Abuse of Process for violating the Writ of Garnishment procedure to wrongfully take over $64,000 from Kuhlmeyer which was not owed, by: A) Deliberately drafting falsehoods into the writ, including claiming that debts already paid, debts owed by other people (and paid), and vacated orders, were owing when they were not, and, B) Violating procedure to deny Kuhlmeyer a hearing, and C) Refusing to correct the situation. CP-32-36; CP-338-339; 341-342; 346; 359-361.

Notably, Zaike’s garnishment came over a year after the

divorce, and thus could not be, as Division-I wrongfully asserted, "…rooted in facts related to Kuhlmeyer and Latour's dissolution proceeding" but rather was based in Zaike's tortious conduct of illegally taking money from Kuhlmeyer. *See, Kuhlmeyer v. Latour,* Division-I No. 82828-2-1, 07Nov2022.

As an example of the clarity of this issue, below is a copy of a check negotiated for payment of attorney's fees ordered by the dissolution court against Kuhlmeyer's former attorney Ashley Olson on 14Jul2017. CP-251-252. Kuhlmeyer was <u>never ordered</u> to pay these funds, they were assessed against Olson, and were immediately paid, yet despite that defendant Zaike had <u>already collected those funds</u>, she deliberately included them


ERIC A OLSON & ASSOCIATES, P.S.
1734 NW MARKET ST
SEATTLE, WA 98107
206-789-4700

Banner Bank
2237 NW 67th St
Seattle, WA 98107
98-7107/3233

16801

8/16/2017

PAY TO THE ORDER OF Michael Bungi & Associates $**500.00

Five Hundred and 00/100********** DOLLARS

Michael Bungi & Associates
11300 Roosevelt Way N.E., #300
Seattle, WA 98125

MEMO Isabelle Kuhlmeyer

AUTHORIZED SIGNATURE

⑈016801⑈ [redacted]

ERIC A OLSON & ASSOCIATES, P.S. 16801

Michael Bungi & Associates 8/16/2017

Attorney's fees re Isabelle Kuhlmeyer 500.00

Screenshot of CP-252

in the Writ of Garnishment, collecting them a second time, plus interest, plus attorney's fees. *Id.* Although this was a clear violation of the garnishment process subjecting her to direct liability – *supported by 130 years of statutory and case-law precedent including holdings of this court* – the trial court, and Division-I, ignored these facts, and allowed dismissal.

For clarity, to this day, defendant Zaike has exercised wrongful control over those funds (and others), and if this court does not reverse, it appears Kuhlmeyer has no recourse to recover the money Zaike stole.

When an attorney misuses the Writ of Garnishment process, they are subject to direct liability. *Olympic Forest Products, Inc. v. Chaussee CoRP-.*, 82 Wn.2d 418, 511 P.2d 1002 (Wash. 1973) (debts must be "just, due and unpaid.") (emphasis added), *citing,* Wash. Session. Laws of **1893**, ch.56, §1 (Orig. Ch. LVI, House Bill No. 114 (An Act in

Relation to Garnishments)).[9] *Van Blaricom v. Kronenberg*, 50 P.3d 266 (Wash.Div.I 2002) (attorney liable for deficient Writ of Garnishment); *Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964 (1974) (attorney liable for writs of garnishment when use constituted an abuse of process); *Rock v. Abrashin*, 154 Wn. 51, 280 P. 740 (1929) (misuse of garnishment process constitutes abuse of process); RCW-6.27.060 (drafter responsible for accuracy of "amount alleged to be due under that judgment"). Division-I's decision nullifies the law for Writs of Garnishment for any attorney who represents anyone who is able to successfully able to use the ALA to their advantage.

[9] https://leg.wa.gov/CodeReviser/documents/sessionlaw/1893c56.pdf

VIII. ARGUMENT

A. Under this court's precedent, Division-I errored when it found the ALA was constitutional because it limits a person's fundamental due-process rights to access the courts, and applies different legal standards for claims protected by the Washington and United States Constitutions.

Tort claims require a jury trial. RCW 26.09.050(1). A plaintiff must prove fault, negligence, or strict liability, by a preponderance of the evidence. *Edgar v. City of Tacoma,* 129 Wash.2d 621, 627 28 (Wash. 1996).

Potential claims for dismissal under the ALA per RCW 26.51.020(1)(b)(i)-(iii), are reviewed on an unknown standard, which appears to be discretionary, or a prima-facie analysis, but regardless, in this case, did not happen whatsoever, and contrary to precedent, Division-I affirmed, stating once there is a presumption the claims are 'abusive' the analysis ends there, which nullifies RCW 26.51.020(1)(b)(i)-(iii), which requires analysis.

Regardless of what 'standard' is being applied (if it's

applied at all), per RCW 26.51.020(1)(b)(i)-(iii), it's less than what's required for torts, and thus, it violates a litigant's right to adjudication of their claims based upon civil tort standards.

B. Under this court's precedent, Division-I errored because fundamental rights require strict scrutiny.

Although Division-I analyzed the issue, nowhere in their analysis did they apply the strict-scrutiny test. A person's right to access the courts is a fundamental due-process right protected by the Washington and United States Constitutions. WASH. CONST. art. I, §21 (Trial by Jury); U.S CONST. AMEND. XIV (14th). *Duranceau v. City of Tacoma,* 27 Wn.App. 777, 620 P.2d. 533 (Wash. App. 1980). "'State interference with a fundamental right is subject to strict scrutiny,' which 'requires that the infringement is narrowly tailored to serve a compelling state interest.'" *Chong Yim v. City of Seattle,* 451 P.3d 694 (Wash. 2019 (Certification from the U.S. Dist. Court for the W. Dist. of Wash.), *citing, Amunrud v. Bd. of Appeals,* 158 Wash.2d 208, 219, 143 P.3d 571 (2006). "A law will pass the

most intensive level of scrutiny, 'strict scrutiny,' if necessary to achieve a compelling government purpose – proof the law is the least restrictive means of achieving the purpose.'" *State v. Sieyes,* 225 P.3d 995, 168 Wn.2d 276 (Wash. 2010), *citing, Johnson v. California,* 543 U.S. 499, 125 S.Ct. 1141 (2005).

Here, the legislature's intent was to "provide the courts with an additional tool to curb abusive litigation and to mitigate the harms abusive litigation perpetuates." RCW-26.51.010. But while the legislature recognized the courts already have the ability to curb abusive litigation, evidenced by their statement that courts have "considerable authority to respond to abusive litigation tactics" the legislature did not engage in the required analysis to ensure, since they were regulating a fundamental due-process right, that the statute was the least-restrictive means to accomplish a compelling government interest. *Id.*

Their statement in RCW-26.51.010 of wanting to give courts "an additional tool" reveals they knew courts already had powers to address the issue, thus their action was not the least-

restrictive way to address the problem, even if they had found it was a compelling government interest to limit people's rights to access the courts, which they did not. RCW-26.51.010.

Division-I's analysis that restricting a litigant's fundamental rights to access the courts, via the rubric created by the ALA, does not comply with the strict-scrutiny test, and conflicts with a long-line of Washington and Federal precedent.

C. Under this court's precedent, Division-I errored, when it found that even though there was a restraining-order, which lacked the statutorily required language of the ALA, and lacked the underlying factual findings required by the ALA, and simply had the 'checked box' that one is a 'credible threat' to a former partner, that such 'checked box' is sufficient to implicate the ALA and dismiss a tort action that all parties agree are based in actual torts committed by the defendants.

1. A 'Finding' must be supported by an Explicit Factual Finding based on Evidence.

This court has repeatedly reaffirmed the rules of statutory interpretation require imperatives like *'shall,'* and "presumptively imperative" words like *'specific,'* command

action and "create a duty, rather than to confer discretion." *Parental Rights to K.J.B.*, *187 Wn.2d 592*, *387 P.3d 1072 (Wash. 2017) citing*, *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). The legislature in passing RCW-26.51 obligated courts, per RCW-26.51.020(1)(a)(ii)(C), that to meet use the ALA to dismiss an action based on a generalized restraining-order, there must be a "specific finding" it was "necessary due to domestic violence." *Id.* The trial court did not do that, and Division-I's affirmation was error.

"Specific" means: "Of, relating to, or designating a particular or defined thing; explicit." Black's Law Dictionary 1406 (7th ed. 1999). *"Finding"* means: "Finding of fact. Determination by a judge, jury, or administrative agency, of a fact supported by the evidence in the record…" Black's Law Dictionary 646 (7th ed. 1999). The legislature, by requiring a "specific finding" was requiring an "explicit determination," here, that the restraining-order "was necessary due to domestic-violence," and the Arbitrator's *'finding,'* was required to be

supported by objective evidence in the record. It is uncontested none existed, meaning, there was no specific finding of domestic-violence in the Arbitration decision, nor was there any evidence of domestic-violence in the Arbitration decision, and the restraining-order lacks the required language to implicate the ALA.[10] And in fact Latour made repeated statements per ER-801(d)(2)(i) denying domestic-violence. CP-1073, CP-1075.

Instead, the arbitrator was clear her purpose in allowing a restraining-order, was to end the parental conflict, not to address domestic-violence, stating: "the continued conflict has been detrimental to {their child}, as well as Isabelle." CP-2621 ln.2. And that "Isabelle <u>believes</u> a continuing restraining-order is necessary to protect her from Sean's ongoing harassment and abusive communication." (emphasis added) CP-2616 ln.16-17. While 'harassment and abusive communication' are legitimate issues, the Arbitrator did not find they were domestic-violence,

[10] Again, if the tort court had read the Arbitration Decision it would have determined those facts. But not only did the tort court not read the Arbitration Decision, when it was pointed out it was required to review it, it refused.

and the fact is the Arbitrator never made a domestic-violence finding, let alone one supported by evidence.

Thus, both the tort trial court and Division-I errored, by finding a 'check-box is enough' on a general restraining-order to implicate the ALA and dismiss a litigant's claims by: A) Not reviewing the Arbitration Decision which shows there was no specific finding supporting checking the 'credible threat' box, and, B) Not conducting the analysis that a 'finding' requires an 'explicit determination' of a factual issue, when the plain language of the ALA requires exactly that. RCW-26.51.020(1)(a)(ii)(C).

D. Division-I errored, when it found independent tortfeasors that commit torts can be dismissed from tort claims, merely because of their association with the former spouse, or because the former spouse might be a witness.

Division-I's decision is at clear odds with this court's decisions, and the Washington and Federal Constitutional protections for fundamental due-process rights.

In this case, it is indisputable, and none of the defendants deny, they committed torts harming Kuhlmeyer. Nor do they deny the torts had little to do with Latour's actions.

For instance (but not limited to the torts listed herein), defendant Zaike participated in a fraud with her business partner Bugni to steal over $64,000 from Kuhlmeyer by misusing a Writ of Garnishment; Latour was not involved. CP-2999-3014. Kuhlmeyer's claim against Zaike on this issue, is supported by 130-years of precedent. *Van Blaricom, Ibid*. Zaike also repeatedly defamed Kuhlmeyer, including in the media; supported by Division-I's opinion. *Demopolis v. Peoples Nat'l Bank,* 59 Wn. App. 105, 118 (Wash. Ct. App. Div. I 1990) (Defamatory statements made by attorneys outside their limited immunity are actionable). Division-I's decision here effectively overturns *Demopolis*. Kuhlmeyer's Fraud claim is supported by state and federal law. *Murphy v. Farmer*, 176 F. Supp. 3d 1325, (N.D. Ga. 2016).

Defendant Bugni, defendant Zaike's business partner,

was sued on *Respondent Superior* theories for failing to supervise, for engaging in unfair business practices violating the Consumer Protection Act, and for fraud; Latour was not involved. Kuhlmeyer's claims against Bugni are supported by the entire body of *Respondent Superior* law, Fraud law, the Consumer Protection Act, and the State and Federal Constitutions. *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 755, 125 P.3d 164 (Div. 1 2005) (quoting RCW 19.86.020) (Washington's Consumer Protection Act (CPA) protects consumers from "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."); *also see,* Young v. Toyota *Motor Sales, U.S.A.*, 9 Wn.App.2d 26, 35, 442 P.3d 5 (Div. 3 2019) (A consumer may bring a claim under the CPA for "any act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.").

The Kisker's were sued for Doug Kisker's defrauding

Kuhlmeyer of titled property (boat & trailer), damaging that property, and advertising and illegally selling said property, while knowing he was trafficking in stolen property; Latour, while she gave the property to Kisker, was largely not involved. CP-53-57. Kuhlmeyer had a statutory right to his claim. RCW-46.12.680(4).

As stated herein, the Washington and Federal Constitutions protect people's rights to pursue claims against those that harm them. Even if the ALA is constitutional and there are no procedural problems, the statute itself states it is intended to protect "abused partners" and "domestic violence survivors." RCW 26.51.010. As a condition precedent, to access the ALA, the parties must have a "current or former intimate partner relationship." RCW 26.51.020(1)(a)(i).

Except Latour, none of the people were part of the group of people the legislature intended to protect, and thus, the trial court did not have the authority, per the ALA, to dismiss them. Yet, nonetheless, the trial court dismissed, and Division-I

affirmed, thereby denying Kuhlmeyer the ability to redress any of the harms those people caused him.

Division-I claimed, wrongly, the trial court didn't dismiss the non-former-intimate-partner-defendants under the ALA, but instead, under it's "inherent authority to control litigation." *See, Kuhlmeyer v. Latour,* Division-I No. 82828-2-1, 07Nov2022, pg.12. But the trial court said the direct opposite: "the Court finds that the entirety of this litigation is properly subject to dismissal pursuant to RCW 26.51." CP-2856 ln.17-18.

Bottom line is, regardless of whether the ALA might apply to Latour or not, that persons who committed torts against Kuhlmeyer, causing extreme damages, have escaped liability, leaving Kuhlmeyer to absorb the harms they caused him. This is contrary to this Court's precedent favoring tort claims, and at odds with the Washington Constitution's guarantee of the right to trial by jury of civil tort claims, and the United States Constitution's fundamental due-process clauses of the Fifth and Fourteenth Amendments that no person be denied property

without due-process of law, and requiring fundamentally fair procedures. WASH. CONST. art. I, §21 (Trial by Jury); U.S CONST. AMEND. V (5th);U.S CONST. AMEND. XIV (14th).

E. Division-I errored, when it found a trial court is not obligated by the ALA to conduct an analysis of the facts and evidence submitted against one to whom the ALA might apply.

RCW-26.51.060's plain language requires trial courts analyze the factual and evidentiary basis of the claims asserted against the former intimate partner. This is obligated by the ALA and the Constitution's protection of fundamental due process right to access the courts. WASH. CONST. Art.-I, §21. Division-I's decision to the contrary is plain error.

If the legislature intended all persons who had an order issued against them were prohibited from filing any actions against former partners, they would have said so. They didn't. Instead they acknowledged former partners, even ones in which domestic-violence had actually occurred, might have legitimate

claims, so they required a court analyze if the asserted "claims, allegations, and other legal contentions made in the litigation are not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law, or the establishment of new law." RCW-26.51.020(1)(b)(i).

The trial court did not do that, and Division-I affirmed, wrongly restating the language of the statute, that actually requires a court to analyze the factual and evidentiary allegations, and claiming the statute does not require what it plainly says it does. *See, Kuhlmeyer v. Latour,* Division-I No. 82828-2-1, 07Nov2022, pg.11. That was error which should be corrected by this court.

IX. CONCLUSION

For the preceding reasons Sean Kuhlmeyer respectfully requests this court grant review of Division-I decisions.

Respectfully submitted.

I certify that this document contains 4932 total words of a 5000 word limit in compliance with RAP 18.17(b). See below certification.

Dated: Wednesday, January 11, 2023 (1/11/2023) at Seattle, Washington.

By: s/Sean Kuhlmeyer .

Sean Kuhlmeyer, JD, WSBA # 38972, *Attorney-at-Law*

Appellant-Plaintiff pro se

Sean Kuhlmeyer's pETITION fOR REVIEW

Filename: 2023.01.11 Kvl Petitionforreview Supremect Case 828282

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X. CERTIFICATE OF SERVICE

I hereby certify that on this Wednesday, January 11, 2023 (1/11/2023), I caused a true and correct copy of this

- SEAN KUHLMEYER'S PETITION FOR REVIEW

Statement of Arrangements for Preparation of Verbatim Report of Proceedings Pursuant to RAP 9.2 to be served on the following in the manner indicated below:

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XI. Appendix List

Appendix-A *Mason v. Mason*, 497 P.3d 431 (Wash. App. Div.-II 2021 (published in part)).

Appendix-B A copy of the published Court of Appeals decisions, filed 07Nov2022. Fn: 2022.11.07- 828282 - Opinion - Unpublished

Appendix-C The order denying reconsideration dated 13Dec2022. Fn: 2022.12.13 82828-2 Deny Reconsideration

Appendix-D The order awarding attorney's fees dated 19Dec2022. Fn: 2022.12.19 828282 Award Atny Fees

Appendix-A. *Mason-v.-Mason*,-497-P.3d-431-(Wash.-App.-Div.-II-2021-(published-in-part)).

Appendix-A. .

497 P.3d 431

Tatyana MASON, Appellant,
v.
John MASON and Laurie Robertson, Respondents.

No. 51642-0-II

Court of Appeals of Washington, Division 2.

Filed October 19, 2021

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PUBLISHED IN PART OPINION

Cruser, J.

¶1 Tatyana Mason appeals from the trial court's orders dismissing personal injury claims she filed against her former husband, John Mason, and his attorney, Laurie Robertson, who represented John[1] during the dissolution proceedings. She argues that the trial court erred in dismissing her abuse of process and intentional infliction of emotional distress claims because (1) the trial court failed to apply the proper standard of review under CR 12(b)(6), (2) she was denied a due process and statutory right when the trial courts in prior family law proceedings and in [497 P.3d 437] the instant case did not provide her with an interpreter, (3) the statute of limitations does not bar her claims, (4) neither res judicata nor collateral estoppel bar her claims, (5) the litigation privilege does not apply to bar her abuse of process claim against Robertson, (6) her abuse of process and intentional infliction of emotional distress claims should have survived both Robertson's and John's motions to dismiss, and (7) sanctions should not have been awarded to John and Robertson under CR 11 or RCW 4.84.185. Tatyana also (8) moved for sanctions on appeal, alleging that John's appellate counsel has a conflict

of interest and that the statement of facts in his response brief is improperly argumentative.

¶2 In the published portion of this opinion, we hold that (1) the summary judgment standard of review applies because the trial court considered material beyond the pleadings; (2) the trial court abused its discretion when it failed to determine whether Tatyana required an interpreter in the instant case; (3) the statute of limitations does not bar Tatyana's claims; (4) the doctrines of res judicata and collateral estoppel do not bar Tatyana's claims; and (5) litigation privilege does not bar Tatyana's abuse of process claim against Robertson or her intentional infliction of emotional distress claims against John or Robertson. In the unpublished portion of this opinion, we hold that (6) the trial court erred in dismissing Tatyana's abuse of process and intentional infliction of emotional distress claims against John on summary judgment; (7) the trial court abused its discretion when it awarded sanctions pursuant to CR 11 to John and Robertson and pursuant to RCW 4.84.185 to Robertson; and we (8) deny Tatyana's motion for appellate sanctions.

¶3 Accordingly, we reverse the trial court's orders granting Robertson's and John's motions to dismiss, and we remand for further proceedings consistent with this opinion.

FACTS

I. MARRIAGE AND DISSOLUTION

¶4 Tatyana Mason came to the United States from the Ukraine under a fiancé visa sponsored by John Mason. The two married several months later, on August 19, 1999. While married, Tatyana and John had two children.

¶5 In 2007, a family law court entered a civil finding of domestic violence against John, and Tatyana obtained a domestic violence protection order. Soon after, John hired Laurie Robertson to represent him as his attorney, and he filed a petition for dissolution.

¶6 The decree of dissolution, final parenting plan, and child support order were entered in 2008. Initially, the parents shared equal residential time with their children. John was ordered to pay child support to Tatyana. In determining the support amounts, the trial court found that Tatyana was "voluntarily unemployed" and imputed income to her. Clerk's Papers (CP) at 565.

II. JOHN'S PETITION FOR A PARENTING PLAN MODIFICATION

¶7 In 2011, John filed a petition to modify the parenting plan, alleging that Tatyana was physically and emotionally abusive towards their children. Child Protective Services investigated statements the children made regarding physical abuse and determined the allegations were " 'founded.' " *Id.* at 603. John also obtained an emergency order granting him custody of the children while the modification was adjudicated. Tatyana's time with the children was diminished to supervised visitation.

¶8 The trial court appointed a guardian ad litem (GAL) to investigate the allegations. The GAL concluded that Tatyana engaged in actions that rose to the level of abuse and recommended that John remain the primary custodial parent while Tatyana maintained supervised visitation.

¶9 After several continuances, the matter proceeded to trial, during which Tatyana was represented by counsel. In addition to testimony from the parents and the GAL, the trial court heard testimony from Sandra Hurd, the children's former therapist. During trial, Hurd and the GAL testified regarding disclosures of abuse the children made to them. The trial court found this testimony credible. [497 P.3d 438]

¶10 On November 25, 2013, the trial court ruled that due to a substantial change in circumstances, modification of the parenting plan was in the children's best interest. It entered a finding of abuse regarding Tatyana under RCW 26.09.191.

¶11 The trial court also found that despite the prior domestic abuse finding against John in 2007, there was "no evidence to support any additional finding of domestic violence," and John did not continue to pose a current concern regarding his ability to provide care for the children. CP at 603. The trial court further found that Tatyana did not exercise all of the visitation she had available with her children as allowed by various court orders while the modification litigation was ongoing. In calculating child support obligations in light of the modified parenting plan, the trial court concluded that Tatyana was voluntarily unemployed and imputed income to her. Tatyana was ordered to pay $412.04 in child support to John for both children.

¶12 In addition, the trial court entered an order restraining Tatyana from contacting John and her children. However, the trial court found that the children would benefit from a healthy relationship with their mother and provided for a reunification plan. Tatyana could work with the children's new counselor and a therapist to rebuild the relationship, with a court case coordinator monitoring the progress.

III. TATYANA'S 2015 APPEAL

¶13 After the trial court denied Tatyana's motion for reconsideration, Tatyana appealed to this court. *In re Marriage of Mason* , No. 45835-7-II, slip op. at 1, 2015 WL 4094201 (Wash. Ct. App. July 7, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2% 2045835-7II% 20% 20Unpublished% 20Opinion.pdf. Tatyana argued that the trial court's findings were not supported by substantial evidence and that the trial court erred in denying her motion for reconsideration. *Id.* Tatyana did not appeal the trial court's imputation of income or its finding that she was voluntarily unemployed. We affirmed, holding that substantial evidence supported the trial court's findings of abuse and that the trial court did not abuse its discretion in denying her motion for reconsideration. *Id.* at 8. The mandate issued, terminating review of the case on August 7, 2015.

IV. TATYANA'S MOTION TO VACATE THE CHILD SUPPORT ORDER

¶14 Tatyana began the citizenship naturalization process on September 9, 2013 by submitting a form to the United States Citizenship and Immigration Services (USCIS), and she appeared for an interview on December 2, 2013. USCIS denied her application on May 5, 2014, because of the protection orders entered against her as well as the child support that she owed. During the interview, Tatyana explained that she did not apply for naturalization before the orders were entered because of the abusive and controlling behaviors she experienced while married to John, her difficulty understanding English, and the strain of the contentious divorce proceedings. USCIS explained that the circumstances she described were "difficult and not extenuating," and it informed Tatyana that to be eligible for naturalization, she had to demonstrate that the protection order was terminated and that she did not owe child support. CP at 774.

¶15 Tatyana was a conditional permanent resident, meaning Tatyana and John were required to jointly petition to remove the conditions on her residency and appear for an interview within two years of the date Tatyana became a conditional permanent resident. However, the conditions were never removed, terminating Tatyana's conditional resident status. 8 U.S.C. § 1186a(c)(2). In addition, as a result of Tatyana's past due child support, the Division of Child Support was unable to release her passport to her until she paid the balance in full.

¶16 On September 1, 2015, Tatyana filed a motion pro se, requesting that the trial court dismiss the amount of child support owed. She asserted that in the 2013 child support order, the trial court incorrectly imputed income to her and that the resulting impact on her immigration status prevented her from finding employment. The trial court construed Tatyana's motion as a motion to vacate the 2013 child support order under [497 P.3d 439] CR 60. Tatyana argued that the trial court should vacate the child support order because in entering the 2013 order, the trial court was not aware that John filed an I-864 affidavit in 1999, promising the United States government that he would provide continual financial support to Tatyana.

¶17 In response, John denied that he ever completed or filed the I-864 affidavit, raising the issue of whether the form existed at all. John further denied that he would have been required to complete an I-864 affidavit as part of the fiancé visa application. The trial court held a three-day hearing on the narrow issue of the form's existence. Following the hearing, the trial court found that the form did exist and that it was filed shortly after the parties were married as a necessary part of the process to convert Tatyana's fiancé visa to a permanent residency. It concluded that the I-864 affidavit represented a continuing obligation that John owed to Tatyana.

¶18 In addition, the trial court found that John and Tatyana failed to seek removal of the conditions within the two-year period, which the trial court attributed to the domestic abuse John had committed against Tatyana and John's waning desire to sponsor Tatyana's permanent residency. The trial court further found that Tatyana's immigration status rendered her unable to work and that the amount of child support

she owed would prevent her from ever attaining permanent residency.

¶19 The trial court concluded that John's support obligation to Tatyana through the I-864 affidavit was "such a significant factor in this case that to set child support without its consideration creates an unjust result." CP at 88. The trial court vacated the November 25, 2013 child support order as well as any amounts Tatyana owed pursuant to that order.

¶20 Separately, the trial court entered a factual finding noting that Tatyana had not had interpretive services in the divorce proceedings prior to the trial on the existence of the I-864 affidavit, during which she represented herself. The trial court was "persuaded that [Tatyana had] difficulty understanding and communicating in English," and that she "clearly benefited from the provision of interpretive services." *Id.* at 87.

¶21 Due to John's statements in a declaration denying the existence of the I-864 affidavit and the cost of litigation expended in determining whether the form existed, the trial court imposed CR 11 sanctions against John in favor of Tatyana. In its oral ruling, the trial court stated that while "clients are entitled to aggressive advocacy ... the advocacy in this case presented an untrue presentation to the court which created unnecessary litigation." *Id.* at 130.

V. JOHN'S 2018 APPEAL

¶22 John appealed to this court. *In re Marriage of Mason* , No. 49839-1-II, slip op. at 1, 2018 WL 3640848 (Wash. Ct. App. July 31, 2018) (unpublished) http://www.courts.wa.gov/opinions/pdf/D 2% 2049839-1II% 20Unpublished% 20Opinion.pdf. He challenged the trial court's decision to vacate the order of child support, the trial court's decision to award Tatyana expert witness fees under RCW 26.09.140, and the imposition of CR 11 sanctions. *Id* . We reversed, holding that under CR 60(b)(11), the revelation of the I-864 affidavit did not constitute an "extraordinary circumstance" warranting vacation of the final child support order. *Id.* at 15. In holding that the discovery of the I-864 affidavit did not amount to an extraordinary circumstance, we noted the lack of a trial court finding that John "knowingly withheld" the existence of the I-864 affidavit from Tatyana when her child support obligation was calculated in the 2013 modification proceedings. *Id.* at 13.

¶23 On review of the trial court's imposition of CR 11 sanctions, we held that the trial court did not provide sufficient findings to support imposition of CR 11 sanctions on John, though we affirmed the award of expert witness fees. *Id.* at 16, 17. While we observed that the trial court stated in its oral ruling that John had "improperly represented facts regarding filing the I-864 affidavit in a declaration statement," we acknowledged that the order neither included a finding to that effect nor incorporated the oral ruling. *Id.* at 17. [497 P.3d 440] ¶24 The supreme court denied Tatyana's petition for review on March 6, 2019. *In re Marriage of Mason* , 192 Wash.2d 1024, 435 P.3d 272 (2019).

VI. TATYANA'S TORT LAWSUIT

¶25 Tatyana filed a pro se complaint on March 13, 2017, which she later amended on June 30, 2017. She named both John and Robertson as defendants. Tatyana claimed that she was denied rights to procedural due process when she was not provided with an interpreter during any of the proceedings before the 2016 trial. In addition, Tatyana's complaint included allegations of abuse of process, fraudulent misrepresentation, alienation of affection, malicious prosecution, and intentional infliction of emotional distress. Tatyana also alleged that Robertson had committed a number of ethical violations under the Rules of Professional Conduct. Tatyana attached 26 exhibits to her complaint that included declarations, letters, and pages excerpted from prior trial court proceeding transcripts, among other types of documents.

¶26 Tatyana's complaint detailed the difficult circumstances she faced following the dissolution and modification proceedings. Tatyana explained that as a result of the dissolution proceedings, her immigration status was damaged such that she has been unable to obtain legal work authorization. Due to her lack of legal work authorization, Tatyana has no source of income and has become homeless. To meet her basic needs, Tatyana relies on assistance from "friends[] and strangers" who allow her to "couch surf[ ]" on occasion. CP at 3. In addition, as a result of the trial court's orders, Tatyana faces an intractable financial barrier to regaining contact with her children. The cumulative effect of her situation has caused Tatyana to suffer extensive damage to her mental health.

ROBERTSON'S MOTION TO DISMISS A.

¶27 In response to Tatyana's complaint, Robertson filed a motion to dismiss under CR 12(b)(6), and alternatively, a motion for summary judgment, arguing that each claim raised by Tatyana was barred under the doctrine of absolute immunity, res judicata or collateral estoppel, and the statute of limitations. Robertson also asserted that the claims did not survive CR 12(b)(6) or summary judgment on their merits. Robertson requested sanctions pursuant to RCW 4.84.185 and CR 11, alleging that Tatyana's claims were frivolous.

¶28 The trial court held a hearing on Robertson's motion on August 18, 2017, during which Tatyana presented her argument pro se. The trial court granted Robertson's motion to dismiss and awarded attorney fees and costs to Robertson in the amount of $4,283.50.

¶29 After the trial court's oral ruling, Tatyana filed a motion for reconsideration, this time represented by an attorney under a limited representation agreement. The trial court held an additional hearing on September 1, 2017, and Tatyana's attorney appeared on her behalf. Because the attorney was new to the case and the record was extensive, his briefing and argument focused on Tatyana's abuse of process claim. Tatyana argued that neither the statute of limitations nor absolute immunity barred her claims against Robertson and that the trial court erred in determining her claims were frivolous. Focusing on the abuse of process allegation, Tatyana argued that she raised a

claim in her complaint on which relief could be granted.

¶30 The trial court disagreed and upheld its earlier ruling. It granted Robertson's motion, but it reduced the attorney fee award from $4,283.50 to $3,500. In making its determination, the trial court considered the motions, briefs and memoranda in support or opposition, declarations, and filings from the underlying family law case. The trial court concluded that the statute of limitations had passed as to all claims and that Robertson was absolutely immune from suit, demonstrating that Tatyana had "failed to conduct a reasonable inquiry in the factual and legal basis of her claims." *Id.* at 40. In addition, the trial court found that Tatyana's initial pro se amended complaint and responsive briefing were "difficult to understand," but when "[c]ounsel appeared on her behalf for the her [sic] motion for [r]econsideration," the trial court was able to "reach a fuller understanding [497 P.3d 441] of [Tatyana's] claims and supporting arguments." *Id.* at 41.

¶31 The trial court then concluded that each claim alleged against Robertson must be dismissed with prejudice for failure to "plead or state any claim upon which relief can be granted." *Id.* It awarded Robertson attorney fees pursuant to RCW 4.84.185 and CR 11 because the claims were barred by the doctrine of absolute immunity and the statute of limitations. The court later struck $7.80 in costs that it had previously awarded to Robertson and reaffirmed the $3,500 attorney fee award that it granted prior to Tatyana's motion for reconsideration.

JOHN'S MOTION TO DISMISS B.

¶32 John, for his part, filed a motion to dismiss under CR 12(b)(6) and, alternatively, a motion for summary judgment. He argued that Tatyana's claims should be dismissed because they were barred under the doctrines of res judicata or collateral estoppel, witness immunity, and the statute of limitations. John asserted that even if the claims could not be dismissed on those grounds, they nevertheless failed on their merits.

¶33 Prior to filing his motion to dismiss, John moved to strike 11 of the 26 exhibits Tatyana had attached her complaint. He asserted that the evidence he identified should not be considered by the trial court under CR 56(e)[2] because it did not assert facts based on personal knowledge, it was based on hearsay, or it was conclusory in its allegations.

¶34 The trial court held a hearing on the motion to dismiss and the motion to strike Tatyana's exhibits and granted both motions. Tatyana was represented by counsel at this hearing. The trial court ruled that "there is no issue of material fact as to the relief sought," and that "the [c]omplaint should be dismissed based upon CR 12(b)(6) and CR 56." *Id.* at 71-72. The trial court agreed that the exhibits John alleged did not satisfy the requirements for competent evidence on summary judgment should be stricken. Lastly, the trial court concluded that Tatyana's lawsuit was "brought for an improper purpose, and that the lawsuit lacks any good faith basis in fact, or in law." *Id.* at 72. Consequently, the trial court entered sanctions against

Tatyana under CR 11 in the amount of $22,321.49.

¶35 Tatyana appeals the trial court's order dismissing claims against Robertson; the trial court's separate order awarding Robertson $3,500 in attorney fees; and the trial court's order dismissing her claims against John, striking her exhibits, and awarding him attorney fees and costs under CR 11.

DISCUSSION

I. STANDARD OF REVIEW

LEGAL PRINCIPLES A.

¶36 Dismissal under CR 12(b)(6) is only appropriate " 'if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.' " *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc* ., 180 Wash.2d 954, 962, 331 P.3d 29 (2014) (internal quotation marks omitted) (quoting *Kinney v. Cook* , 159 Wash.2d 837, 842, 154 P.3d 206 (2007)). The facts alleged in the complaint must be accepted as true, and a court may consider hypothetical facts that could support recovery. *Id.* Dismissal on this basis " 'should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable [497 P.3d 442] bar to relief.' " *J.S. v. Village Voice Media Holdings, LLC* , 184 Wash.2d 95, 100, 359 P.3d 714 (2015) (internal quotation marks omitted) (quoting *Cutler v. Phillips Petrol. Co* ., 124 Wash.2d 749, 755, 881 P.2d 216 (1994)). We review a dismissal under CR 12(b)(6) de novo. *FutureSelect* , 180 Wash.2d at 962, 331 P.3d 29.

¶37 Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). We review the decision to grant summary judgment de novo, and we engage in the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Associated Press v. Wash. St. Leg.* , 194 Wash.2d 915, 920, 454 P.3d 93 (2019).

¶38 A party may move for summary judgment either by setting forth its own version of the facts or by stating that the nonmoving party has failed to present sufficient evidence to support its claims. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.* , 162 Wash.2d 59, 70, 170 P.3d 10 (2007). A moving party proceeding using the latter approach must " 'identify those portions of the record, together with the affidavits, if any, which ... demonstrate the absence of a genuine issue of material fact." *Pac. Nw. Shooting Park Ass'n v. City of Sequim* , 158 Wash.2d 342, 351, 144 P.3d 276 (2006) (alteration in original) (quoting *Guile v. Ballard Cmty. Hosp* ., 70 Wash. App. 18, 22, 851 P.2d 689 (1993)).

¶39 Once the moving party has satisfied this initial showing, the burden then shifts to the nonmoving party to set forth admissible evidence demonstrating that a genuine issue of material fact exists. *Indoor Billboard* , 162 Wash.2d at 70, 170 P.3d 10. The nonmoving party is not permitted to rely on speculation or

argumentative assertions. *Brummett v. Wash.'s Lottery* , 171 Wash. App. 664, 674, 288 P.3d 48 (2012). Summary judgment is appropriate if the nonmoving party cannot satisfy this burden. *Indoor Billboard* , 162 Wash.2d at 70, 170 P.3d 10.

¶40 When deciding a motion to dismiss, consideration of materials in addition to the complaint on a CR 12(b)(6) motion "is permissible so long as the court can say, 'no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief.' " *Worthington v. Westnet* , 182 Wash.2d 500, 505, 341 P.3d 995 (2015) (quoting *Haberman v. Wash. Pub. Power Supply Sys.* , 109 Wash.2d 107, 121, 744 P.2d 1032, 750 P.2d 254 (1987)). Otherwise, if a superior court considers and does not exclude matters outside the pleadings, the CR 12(b)(6) motion must be treated as a motion for summary judgment. *Id.* at 505-06, 341 P.3d 995. We have previously held that where the superior court relied upon a declaration and attached exhibits filed in opposition to a motion to dismiss, the motion to dismiss was properly treated as a motion for summary judgment. *Brummett,* 171 Wash. App. at 674, 288 P.3d 48.

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¶41 Tatyana argues that because the trial court dismissed her claims against John and Robertson for failure to state a claim on which relief could be granted, we are required to treat John's and Robertson's motions as motions to dismiss under CR 12(b)(6) and apply the corresponding standard of review. We disagree.

¶42 Here, both Robertson and John characterized their motions as CR 12(b)(6) motions to dismiss, or alternatively, motions for summary judgment. In its order granting each motion, the trial court stated that it had reviewed declarations and filings in addition to the complaint. As discussed below, reliance on declarations and other documents is essential to resolve whether Tatyana's complaint was filed within the statute of limitations, an issue raised in both Robertson's and John's motions. The trial court expressly dismissed the complaint against Robertson in part based on the statute of limitations.

¶43 In addition, when granting John's motion, the trial court considered whether evidence Tatyana submitted in support of her claim satisfied the requirements for competent evidence under CR 56(c), and it concluded that there were no genuine issues of material fact and that John was entitled to [497 P.3d 443] judgment in his favor as a matter of law. Therefore, the record reflects that the trial court relied upon declarations and other filings in deciding both motions.

¶44 We treat both motions as motion for summary judgment and will apply that standard of review.

II. THE RIGHT TO AN INTERPRETER

¶45 Tatyana argues that she was denied a constitutional right and a statutory right to have an interpreter present during the 2011 parenting plan modification proceedings and during the trial court proceedings in this case. Neither Robertson nor John

address Tatyana's claim that she was entitled to an interpreter.

¶46 Whether Tatyana should have been appointed an interpreter during the prior family law proceedings is not properly before this court. In the 2011 case, the mandate terminating review was issued in August of 2015. Issues related to Tatyana's need for an interpreter should have been raised during her appeal from those proceedings. RAP 5.2(a). However, with respect to the trial court proceedings in the instant case, the trial court abused its discretion when it failed to determine whether Tatyana required an interpreter.

¶47 Although Tatyana argues that her right to an interpreter claim is grounded in due process under the United States Constitution, because this claim arose in the context of a civil proceeding, her right is statutory as opposed to constitutional in nature. In criminal contexts, Washington courts have recognized a due process right to an interpreter based on a criminal defendant's Sixth Amendment right to confront witnesses and to be present at trial. *State v. Gonzales-Morales* , 138 Wash.2d 374, 379, 979 P.2d 826 (1999). The rights arising under the Sixth Amendment are inapplicable to civil cases. *See In re Det. of Stout* , 159 Wash.2d 357, 369, 150 P.3d 86 (2007) (recognizing that "[i]t is well-settled that the Sixth Amendment right to confrontation is available only to criminal defendants.").

¶48 In civil contexts, the right to an interpreter is guaranteed under RCW 2.43.030(1)(c). This statute provides that "when a non-English-speaking person is involved in a legal proceeding, the appointing authority *shall* appoint a qualified interpreter." RCW 2.43.030(1)(c) (emphasis added).

¶49 The statutory right to an interpreter under ch. 2.43 RCW is designed to advance the declared policy of this state:

> to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.010. A " 'non-English-speaking person,' " is "any person involved in a legal proceeding who cannot readily speak or understand the English language." RCW 2.43.020(4).

¶50 Unless the "lack of fluency or facility" in English is apparent, a trial court does not have an affirmative obligation to appoint an interpreter. *Cuesta v. State Dep't of Emp't Sec.* , 200 Wash. App. 560, 567, 402 P.3d 898 (2017). However, where a trial court is put on notice that a party is not readily able to speak English, the trial court has a duty to make an inquiry into whether a court-appointed interpreter is, in fact, necessary. *See id.* ; *see also In re Pers. Restraint of Khan* , 184 Wash.2d 679, 690 n.4, 363 P.3d 577 (2015) ; *State v. Woo Won Choi* , 55 Wash. App. 895, 901–02, 781 P.2d 505 (1989). We will not disturb a trial court's decision regarding appointment of an interpreter absent an

abuse of discretion. *Cuesta* , 200 Wash. App. at 567, 402 P.3d 898.

¶51 Here, Tatyana put the trial court on notice of her lack of fluency in English by filing a complaint that included multiple statements expressing the difficulty she experienced understanding the prior legal proceedings due to her language limitations. Among the allegations in her pro se complaint, Tatyana explained that despite her challenges understanding English there was "no evidence that Tatyana ha[d] interpreter service" prior to the 2016 trial on the I-864 affidavit. CP at 3. Elsewhere, Tatyana [497 P.3d 444] alleged that the divorce and modification proceedings were like a "babble of voices," from her perspective, and that she struggled to communicate with her English speaking attorneys. *Id* . at 8.

¶52 In spite of such notice, the record before us lacks any indication that the trial court made an inquiry into Tatyana's need for an interpreter before the hearing on Robertson's motion to dismiss. In addition, the record reflects that the trial court failed to assess whether Tatyana could readily understand and communicate in English prior to dismissing each of Tatyana's claims against Robertson.

¶53 Although Tatyana's complaint was replete with references to her language difficulties, the trial court held a hearing on Robertson's motion to dismiss during which Tatyana appeared pro se and without the assistance of an interpreter. Following Tatyana's motion for reconsideration, the trial court entered a finding stating that it found "[Tatyana's] Amended Complaint and [] briefing difficult to understand." *Id* . at 41. Thus, despite its difficulty understanding Tatyana's complaint and briefing, and despite Tatyana's many statements indicating her language issues, the trial court moved forward with a hearing on a dispositive motion without inquiring into whether an interpreter was necessary.

¶54 In waiting until after the motion for reconsideration to acknowledge Tatyana's language issues, the trial court contravened the declared purpose of ch. 2.43 RCW to ensure that those who cannot "readily understand or communicate in the English language," are "fully protected in legal proceedings." RCW 2.43.010. The issue of whether an interpreter is necessary should not be resolved in hindsight, after a party's language ability has been tested in a dispositive proceeding without the assistance of an interpreter, where the trial court had prior notice of a potential language difficulty. *See* RCW 2.43.010.

¶55 Here, it was not until after the motion for reconsideration, at which Tatyana was represented by an attorney, that the trial court stated that during the initial hearing on Robertson's motion to dismiss, Tatyana "articulated quite well. Her pleadings were difficult to understand, but she was articulate; unsuccessful, but articulate." Verbatim Report of Proceedings (VRP) (Nov. 3, 2017) at 7. In its findings, the trial court also struck the statement that it found Tatyana's complaint and briefing difficult to understand because of her "limited English proficiency." CP at 41. Regardless of whether the trial court accurately assessed Tatyana's ability to speak and understand English following her pro se argument, this evaluation was too late to

provide meaningful access to the right to an interpreter guaranteed under RCW 2.43.030(1)(c). The same is true of the fact that an interpreter was made available to Tatyana during the hearing on John's motion to dismiss and during the hearing on John's attorney fee and cost award. The trial court thus abused its discretion when it did not inquire into Tatyana's ability to understand and communicate in English until after the hearing on Tatyana's motion for reconsideration. On remand, the trial court must evaluate Tatyana's need for an interpreter in future proceedings.

III. STATUTE OF LIMITATIONS

¶56 Tatyana argues that the trial court erred in dismissing her claims based on the statute of limitations. She contends that the statute of limitations does not bar her claims because she filed her complaint on March 13, 2017, and she did not discover that John had failed to remove the conditions from her conditional permanent residency until February 27, 2015. Robertson responds that Tatyana's cause of action accrued in 2013, when the trial court entered the child support order, when Tatyana met with immigration officials while she applied for naturalization, or when Tatyana's attorney during the parenting plan modification proceedings agreed with the child support order imputing income on Tatyana. John contends that Tatyana's allegations pertain to acts that occurred between 2008 and 2011, and that the statute of limitations has long since expired for any tort claims arising from those acts. We agree with Tatyana that her claims are not barred under the applicable statute of limitations. [497 P.3d 445]

LEGAL PRINCIPLES A.

¶57 The statute of limitations for a tort action is three years. RCW 4.16.080(2). It begins to run at the point at which a plaintiff's cause of action accrues. *Nichols v. Peterson NW, Inc.* , 197 Wash. App. 491, 500, 389 P.3d 617 (2016). Generally, to determine when a cause of action accrues, a court will apply the "discovery rule." *Killian v. Seattle Pub. Schs.* , 189 Wash.2d 447, 454, 403 P.3d 58 (2017). Under the discovery rule, " 'a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action.' " *Id.* (quoting *Allen v. State* , 118 Wash.2d 753, 757-58, 826 P.2d 200 (1992)). The discovery rule postpones the running of a statute of limitations until the date that the plaintiff "through exercise of due diligence, should have discovered the basis for the cause of action, even if actual discovery did not occur until later." *Id.* at 455, 403 P.3d 58.

¶58 Whether the plaintiff knew or should have known that a cause of action has accrued through the exercise of due diligence is a question of fact. *Allen* , 118 Wash.2d at 760, 826 P.2d 200. However, "factual questions may be decided as a matter of summary judgment if reasonable minds can reach but one conclusion." *Id.*

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¶59 Tatyana's abuse of process and intentional infliction of emotional distress claims are both based on allegations that John and Robertson pursued the parenting plan modification in 2011 in order to continue John's pattern of abuse and control over Tatyana, culminating in

Tatyana's loss of legal permanent resident status resulting from the entry of the child support and protection orders against her. Therefore, Tatyana's causes of action accrued when Tatyana knew or should have known that the results of the parenting plan proceedings damaged her immigration status.

¶60 Robertson contends that Tatyana should have been on notice of the damage to her legal resident status during the naturalization interviews, which occurred more than three years before Tatyana filed her complaint. However, even if Tatyana was put on notice that her application for naturalization would be denied at that interview, this fact does not prove that Tatyana was also notified that her permanent resident status was in jeopardy at that time. The letter denying Tatyana's naturalization application describes Tatyana's interview and states that her naturalization application was denied as a result of the protection order and child support debt. This letter does not mention whether Tatyana's interviewer informed Tatyana that she would be unable to renew her permanent residency card for the same reason. Nor does that letter state that Tatyana was informed at the interview that she was a conditional permanent resident as opposed to a permanent resident. At minimum, the issue of whether Tatyana was put on notice that she would be ineligible to renew her permanent resident card during this interview is a question of fact on which reasonable minds could differ. *Id.* Summary judgment dismissal on this basis would have been improper. *See id.*

¶61 Here, Tatyana's cause of action accrued on May 5, 2014 at the earliest, when she was informed in the letter denying naturalization that "to be eligible for naturalization *and permanent resident card* [she] must demonstrate that [she is] a person of good moral character." CP at 774 (emphasis added). At that point, Tatyana should have known that because she was denied naturalization due to her protection order and child support debt, her permanent resident status could have been in jeopardy. Because Tatyana filed her complaint on March 13, 2017, within three years of receiving the May 5, 2014 letter, Tatyana's complaint is not barred by the statute of limitations. RCW 4.16.080(2) ; *see also Killian* , 189 Wash.2d at 455, 403 P.3d 58.

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

¶62 John and Robertson argue that the trial court properly dismissed Tatyana's claims because they are barred under the doctrines of res judicata and collateral estoppel. Tatyana contends that her tort claims are distinct from the family law proceedings and that neither res judicata nor collateral estoppel bar these claims. We agree with [497 P.3d 446] Tatyana that her claims are not barred under either res judicata or collateral estoppel.

COLLATERAL ESTOPPEL A.

¶63 Collateral estoppel only bars claims that were actually litigated. *Schibel v. Eymann* , 189 Wash.2d 93, 99, 399 P.3d 1129 (2017). A party arguing that collateral estoppel applies must show that "(1) the issue in the earlier proceeding is identical

to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice." *Id.*

¶64 Here, neither Tatyana's intentional infliction of emotional distress claim nor her abuse of process claim were "actually litigated" in the prior family law proceedings. *Id.* Nor are her tort claims "identical" to any issue addressed in the earlier family law proceedings. *Id.* Accordingly, collateral estoppel does not apply.

RES JUDICATA B.

¶65 Res judicata precludes the relitigation of an entire claim that was "litigated to a final judgment or [that] could have been litigated to a final judgment." *Richert v. Tacoma Power Util.* , 179 Wash. App. 694, 704, 319 P.3d 882 (2014). Courts considering res judicata must be careful not to deny a litigant their day in court. *Id.* A second claim is barred under the doctrine of res judicata if the claims are identical in "(1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made." *Id.*

¶66 John and Robertson both argue that Tatyana's tort claims are precluded by res judicata because CR 11 sanctions were available in the prior family law proceedings. This argument is without merit. A motion for CR 11 sanctions does not involve the same cause of action as either an abuse of process or intentional infliction of emotional distress claim. To determine if two claims share an identical cause of action, courts consider whether "(1) prosecuting the second action would destroy rights or interests established in the first judgment, (2) the evidence presented in the two actions is substantially the same, (3) the two actions involve infringement of the same right, and (4) the two actions arise out of the same transactional nucleus of facts." *Marshall v. Thurston County* , 165 Wash. App. 346, 354, 267 P.3d 491 (2011).

¶67 With the exception of the arising out of the same nucleus of transactional facts factor, these considerations weigh in Tatyana's favor. Advancing either tort claim against John and Robertson would not impact their rights established in the family law proceedings, the evidence required to prove a baseless filing in moving for CR 11 sanctions is qualitatively different than that required to prove abuse of process or intentional infliction of emotional distress, and distinct rights are implicated in the context of CR 11 than in Tatyana's tort claims. Accordingly, neither res judicata nor collateral estoppel justify dismissal of Tatyana's tort claims.

V. LITIGATION PRIVILEGE

¶68 Tatyana argues that the trial court erred when it dismissed her claims against Robertson on the basis of Robertson's immunity from liability arising pursuant to Robertson's role as John's attorney throughout the family proceedings. Robertson responds that she was entitled to immunity from liability and that the trial court properly dismissed each of Tatyana's claims on this basis. John contends that he

is entitled to immunity from liability, but his argument on this point is limited to Tatyana's intentional infliction of emotional distress claim.

¶69 While reviewing this case, pursuant to RAP 10.6(c), we invited interested parties to submit briefing as amicus curiae on the issue of "[w]hether an attorney enjoys absolute immunity from liability in a lawsuit alleging abuse of process." Letter from Derek M. Byrne, Clerk of the Court, Wash. Ct. of Appeals, Div. II, (Sept. 17, 2020), *Mason v. Mason* , No. 51642-0-II. Amici Northwest Justice Project, Columbia Legal Services, Northwest Immigrant Rights Project, and the Fred T. Korematsu Center for Law and Equality (collectively amici) responded to our [497 P.3d 447] invitation and argued that under certain circumstances, an attorney may engage in statements or conduct that are not immune from subsequent civil liability.

¶70 We agree with Tatyana and amici that an attorney is not always immune from liability for conduct or statements made when acting as an attorney. As applied to the particular facts of this case, we disagree with Robertson that she was entitled to immunity from Tatyana's allegations for both Tatyana's abuse of process and intentional infliction of emotional distress claims. We further disagree with John that his position as a party in a lawsuit entitles him to immunity from Tatyana's intentional infliction of emotional distress claim.

LEGAL PRINCIPLES A.

¶71 Where an individual is entitled to the shield of "absolute privilege" or "immunity," the individual is absolved of all liability. *Bender v. City of Seattle* , 99 Wash.2d 582, 600, 664 P.2d 492 (1983). "Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity." *Id.* Therefore, to substantiate "the extraordinary breadth of an absolute privilege," there must be some "compelling public policy justification." *Id.*

¶72 Immunity from civil liability afforded to witnesses, attorneys, and parties in a lawsuit is available only if the complained-of statements or conduct bear " 'some relation' " to a judicial proceeding. *Deatherage v. Examining Bd. of Psychol.* , 134 Wash.2d 131, 135, 948 P.2d 828 (1997) (discussing litigation privilege for expert witnesses) (quoting Restatement (Second) of Torts § 588 (1977)); *see also McNeal v. Allen* , 95 Wash.2d 265, 267, 621 P.2d 1285 (1980) (discussing litigation privilege for attorneys and parties). For example, in the defamation context, "[a]llegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged *if they are pertinent or material to the redress or relief sought* ." *McNeal* , 95 Wash.2d at 267, 621 P.2d 1285 (emphasis added). Therefore, although immunity for witnesses, attorneys, and parties is often discussed as "absolute immunity," or "absolute privilege," *see e.g.* , *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wash.2d 123, 137, 776 P.2d 666 (1989) (plurality opinion), we believe the term "litigation privilege," is a more apt descriptor in this context. Accordingly, where litigation privilege applies,

witnesses, attorneys, and parties are immune from liability.

¶73 Litigation privilege as applied to "witnesses in judicial proceedings" protects witnesses "from suit based on their testimony." *Id. at* 125, 776 P.2d 666. In *Bruce* , the supreme court extended the litigation privilege afforded witnesses defending against defamation claims to preclude any potential claim for civil liability, reasoning that "the chilling effect of the threat of subsequent litigation," is the same no matter the theory on which the suit is based. *Id.* at 132, 776 P.2d 666.

¶74 As it applies to attorneys, litigation privilege is based on "a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients." *McNeal* , 95 Wash.2d at 267, 621 P.2d 1285. In addition to defamation claims, Division Three of this court has applied litigation privilege to bar claims of interference with a business relationship, outrage, infliction of emotional distress, and civil conspiracy filed against an attorney. *Jeckle v. Crotty* , 120 Wash. App. 374, 386, 85 P.3d 931 (2004).

¶75 For parties involved in a judicial proceeding, litigation privilege is predicated on the public policy interest in providing "the utmost freedom of access to the courts of justice for the settlement of their private disputes." *McNeal* , 95 Wash.2d at 267, 621 P.2d 1285. In *McNeal* , where the supreme court extended litigation privilege traditionally afforded witnesses to include parties and attorneys, the court did not distinguish between the scope of the privilege available to a party as opposed to an attorney. 95 Wash.2d at 267, 621 P.2d 1285.

¶76 Where a tort claim is predicated on testimony or statements made during a judicial proceeding, litigation privilege [497 P.3d 448] "has traditionally been limited to situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct." *Twelker v. Shannon & Wilson, Inc.* , 88 Wash.2d 473, 476, 564 P.2d 1131 (1977). Safeguards inherent to the judicial process, such as swearing an oath, cross-examination, and the threat of perjury, ensure the reliability of testimony. *Bruce* , 113 Wash.2d at 126, 776 P.2d 666. In addition, an attorney or party who submits an allegedly libelous statement is not entitled to do so with impunity because the statement may be stricken and the court may "reprimand, fine and punish, as well as expunge from the records statements which exceed proper bounds." *McNeal* , 95 Wash.2d at 268, 621 P.2d 1285.

¶77 Beyond statements and testimony, litigation privilege can preclude liability arising from conduct related to a lawsuit. *See Bruce* , 113 Wash.2d at 136-37, 776 P.2d 666 ; *Jeckle* , 120 Wash. App. at 386, 85 P.3d 931. In addition to the testimony itself, litigation privilege for witnesses applies to the "acts and communications which occur in connection with the preparation of that testimony." *Bruce* , 113 Wash.2d at 136, 776 P.2d 666. Division Three of this court has relied on the doctrine of litigation privilege to bar tort claims arising from an attorney's acts because the acts were pertinent to

litigation. *Jeckle* , 120 Wash. App. at 386, 85 P.3d 931.

APPLICATION B.

1. LITIGATION PRIVILEGE DOES NOT ALWAYS BAR AN ABUSE OF PROCESS CLAIM FILED AGAINST AN ATTORNEY

¶78 Tatyana argues that litigation privilege does not always preclude liability for abuse of process claims for attorneys. Because abuse of process claims necessarily depend on allegations related to a lawsuit, Tatyana contends that an abuse of process claim could never succeed if litigation privilege applied. Moreover, Tatyana asserts that the public policy justifications that support application of litigation privilege for attorneys in other contexts do not apply to abuse of process claims.

¶79 Amici argue that an attorney may be liable for abuse of process where the attorney has intentionally engaged in an act removed from the legitimate purposes of the litigation because litigation privilege does not extend to such circumstances. Discussing Ninth Circuit cases pertaining to qualified immunity including *Lanuza v. Love* , 899 F.3d 1019 (9th Cir. 2018) and *Reynaga Hernandez v. Skinner* , 969 F.3d 930 (9th Cir. 2020), amici provide several examples in which the court held that an attorney or judge who, in contravention of the law, deliberately harmed a person's immigration status in an act disconnected from the underlying litigation could be liable for that act in tort.[3]

¶80 Robertson responds that an attorney is entitled to litigation privilege, precluding liability for an abuse of process claim, unless the attorney "no longer acts as an attorney in any[ ]way." Resp't Robertson's Br. in Response to Amici at 3. To remove the shield of litigation privilege, Robertson contends that a plaintiff claiming abuse of process would have to demonstrate that the attorney intentionally and unlawfully threatened or coerced a litigant to attain an end unrelated to the lawsuit. Robertson further argues that in any event, an attorney cannot be liable for abuse of process if the legal action that forms the basis of a claim was judicially reviewed and approved.

¶81 We agree with amici's characterization of litigation privilege as it applies to an abuse of process claim filed against an attorney. We [497 P.3d 449] also agree with Tatyana's assertion that the traditional public policy considerations that justify application of litigation privilege to bar other tort claims filed against attorneys do not apply in the narrow context of abuse of process.

¶82 Abuse of process is a type of tort that involves the misuse of a judicial proceeding to accomplish an end for which the process was not designed. *Maytown Sand & Gravel, LLC v. Thurston County* , 191 Wash.2d 392, 439, 423 P.3d 223 (2018), *abrogated on other grounds by Yim v. City of Seattle* , 194 Wash.2d 682, 702, 451 P.3d 694 (2019). "The crucial inquiry in abuse of process claims is therefore 'whether the judicial system's process, made available to insure the presence of the defendant or his property in court, has been misused to achieve another, inappropriate end.' " *Id.* (quoting *Gem Trading Co., Inc. v. Cudahy Corp.* , 92 Wash.2d 956, 963 n.2, 603 P.2d 828 (1979)).

¶83 Abuse of process claims necessarily include allegations that involve conduct related to a judicial proceeding. *See id.* But litigation privilege does not inexorably apply to all abuse of process claims; otherwise, no abuse of process claim could ever lie whether raised against an attorney or a party to a lawsuit.

¶84 Instead, the foundation of an abuse of process action is that the process must be used " 'to accomplish some end which is without the regular purview of the process.' " *Batten v. Abrams* , 28 Wash. App. 737, 747, 626 P.2d 984 (1981) (quoting 1 Am. Jur. 2d *Abuse of Process* § 4, at 253 (1962)). " 'The purpose for which the process is used, once it is issued, is the only thing of importance.' " *Id.* at 745-46, 626 P.2d 984 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 121 (4th ed. 1971)). Integral to an abuse of process claim, the complained of conduct, by its nature, must not be related to the legitimate purposes of a judicial proceeding. *See id.* at 747-48, 626 P.2d 984. Consequently, litigation privilege does not apply, and an attorney can be liable for abuse of process where the attorney was alleged to have intentionally employed legal process for an inappropriate and extrinsic end.[4]

¶85 *Fite v. Lee* , 11 Wash. App. 21, 28, 521 P.2d 964 (1974), establishes that an attorney is not always entitled to litigation privilege as a defense to an abuse of process claim. In *Fite* , the plaintiff sued his former wife and her attorneys who had represented her in prior divorce proceedings for abuse of process. *Id* . at 22, 521 P.2d 964. He alleged that both his former wife and her attorneys served writs of garnishment to various financial institutions for ulterior purposes. *Id.* at 31, 521 P.2d 964. At trial, the former wife testified that she did not know of or consent to issuing the writs of garnishment. *Id.* at 24, 521 P.2d 964. The former wife moved for summary judgment, and the trial court dismissed her as a defendant. *Id.* The attorneys immediately moved for dismissal on the basis of res judicata, asserting that the attorney-client agency relationship meant that dismissal of their client nullified any claim of abuse of process as to them. *Id.* The trial court agreed with the attorneys and dismissed Fite's claims as to all defendants. *Id.*

¶86 On Fite's appeal, the issue before us was whether, if the client is found not at fault for an action giving rise to abuse of process, the claim is necessarily precluded against her attorneys. Relying, in part, on *Hoppe v. Klapperich* , 224 Minn. 224, 241, 28 N.W.2d 780 (1947), we explained that an attorney's private duty to provide zealous representation must yield to his or her public duty "to further the administration of justice" as an officer of the court. *Id.* at 28, 521 P.2d 964. When an attorney engages in conduct that, by definition, constitutes abuse of process, [497 P.3d 450] the attorney violates his or her duty to act as a public officer of the court. *Id.* Therefore, if an attorney, "without the knowledge or consent of his client, abused process to the damage of another, the attorney acts outside the scope of his agency and the client should not be derivatively liable." *Id.* A claim against the attorney for abuse of process is thus not automatically precluded under the doctrine of res judicata where the client has been absolved of all wrongdoing. *Id.*

¶87 In *Fite* , we recognized that a claim may lie against an attorney whose conduct rises to the level of abuse of process where the client did not know of or approve of that process. *Id.* We did not address whether an attorney could be liable for abuse of process where the client was aware of and consented to the process because that issue was not before us.

¶88 In *Hoppe* , however, the Minnesota Supreme Court held that an attorney was not entitled to litigation privilege for abuse of process where an attorney and the attorney's client conspired to use legal process to extort assets from the plaintiff. 224 Minn. at 228-29, 28 N.W.2d 780. There, the attorney, his client, a municipal court judge, and a sheriff, acted in concert to knowingly issue a baseless warrant for Hoppe's arrest in order to compel Hoppe into surrendering an envelope containing bonds and other assets. *Id.* After separately discussing the applicable immunities from liability of the municipal court judge, the sheriff, and the attorney in turn, the Court held that "[a]n attorney is likewise personally liable to a third party if he maliciously participates with others in an abuse of process or if he maliciously encourages and induces another to act as his instrumentality in committing an act constituting an abuse of process." *Id.* at 243, 28 N.W.2d 780. The acts that form the basis of the claim must be the attorney's "own personal acts, or the acts of others wholly instigated and carried on by [the attorney]." 224 Minn. at 243, 28 N.W.2d 780 (quoting 1 AM. JUR. *Abuse of Process* § 31 (1936)).

¶89 Denying litigation privilege in this narrow context is reinforced by the fact that the public policy justifications that support application of litigation privilege and, thus, immunity in other circumstances do not apply with equal force to abuse of process claims. But a grant of absolute immunity from liability requires a "compelling public policy justification." *Bender* , 99 Wash.2d at 600, 664 P.2d 492.

¶90 In other contexts, litigation privilege for attorneys is justified by the public interest in preserving in attorneys, as officers of the court, the freedom to pursue justice on behalf of their clients. *McNeal* , 95 Wash.2d at 267, 621 P.2d 1285. But as recognized by this court in *Fite* , an attorney's duty to zealously represent his or her client "must yield" to the attorney's duties to the public "as an officer of the court to further the administration of justice" where such duties conflict. *Fite* , 11 Wash. App. at 28, 521 P.2d 964. If an attorney intentionally misappropriates a judicial proceeding to achieve an improper and extrinsic end, immunizing those who might otherwise be liable neither preserves "integrity of the judicial process," *Bruce* , 113 Wash.2d at 126, 776 P.2d 666, nor "further[s] the administration of justice." *Fite* , 11 Wash. App. at 28, 521 P.2d 964.

¶91 To the extent that Robertson relies on *Fite* to argue litigation privilege always precludes liability for abuse of process claims raised against an attorney if a court reviewed the process and determined it was proper, we disagree. Robertson relies on the portion of this court's holding in *Fite* wherein we held that although Fite's abuse of process claim as to the attorneys was not technically precluded, because the trial court approved the writs as issued in the dissolution proceedings, there was no

abuse of process in that case. *Id.* at 31-32, 521 P.2d 964. We stated broadly that "[w]here process is judicially reviewed and sanctioned, and where the court acts within its statutory authority in sanctioning the process, an action against the attorneys who instituted the process is wholly groundless." *Id.* at 32, 521 P.2d 964.

¶92 However, an action for abuse of process may lie "although the process is issued upon a valid judgment for a just cause[] and is valid in form." *Rock v. Abrashin* , 154 Wash. 51, 53, 280 P. 740 (1929) ; *see also Batten* , 28 Wash. App. at 747, 626 P.2d 984 [497 P.3d 451] (recognizing a pattern in multiple cases from various jurisdictions that "regularity or irregularity of the initial process is irrelevant"). We see no public policy justification that supports precluding liability in such circumstances for an attorney but not for the attorney's client and decline to treat these actors differently.[5]

2. LITIGATION PRIVILEGE DOES NOT BAR TATYANA'S ABUSE OF PROCESS CLAIM AGAINST ROBERTSON

¶93 Tatyana argues that the trial court erred when it dismissed her abuse of process claim against Robertson based on litigation privilege. Robertson responds that she was entitled to litigation privilege because Tatyana did not allege or present any evidence that Robertson used the family law proceedings to intentionally threaten or coerce Tatyana.

We agree with Tatyana that the trial court misapprehended the law when it ruled that Tatyana's abuse of process claim against Robertson was precluded by Robertson's litigation privilege. Therefore, dismissing Tatyana's abuse of process claim was error.

> ¶94 In ruling that *Fite* does not stand for the proposition that Robertson is "absolutely immune" from tort liability, the trial court explained, [*Fite*] is a case with a very distinct and unusual fact pattern that can be argued and is argued as an exception to the doctrine of immunity. That case is very fact specific. As the allegations apply in the instant case against Ms. Robertson, she is absolutely immune from tort liability as alleged by Ms. Mason.

VRP (Sept. 1, 2017) at 14-15.

¶95 As described above, *Fite* provides for a narrow exception to litigation privilege for abuse of process claims alleged against an attorney. 11 Wash. App. at 27-28, 521 P.2d 964. In *Fite* , we did not constrict our holding to the particular circumstances of that case. *Id.* Instead, we articulated rules of broader applicability by discussing the public policy implications of an attorney's duty as an officer of the court. *Id.* at 28, 521 P.2d 964. Although *Fite* was factually distinct from the instant case, these distinctions did not render Robertson immune from Tatyana's abuse of process claim.

¶96 Contrary to the trial court's statement in its oral ruling, litigation privilege does not apply here because Tatyana alleged that John and Robertson engaged in [497 P.3d 452] the complained of conduct to accomplish an end unrelated to the underlying judicial proceeding. *See Bruce,* 113 Wash.2d at 136-37, 776 P.2d 666 ; *Jeckle* , 120 Wash. App. at 386, 85 P.3d 931. Tatyana argued that Robertson and John conspired to pursue the parenting plan modification proceedings to further control and abuse her and, when coupled with John's alleged intentional damage to her immigration status, to place her in an inescapable quagmire with little hope for gaining stability. A parenting plan is created to divide parental roles and responsibilities. *King v. King* , 162 Wash.2d 378, 386, 174 P.3d 659 (2007). Once those roles and responsibilities are established, a court may not modify a parenting plan absent a finding that modification is in the best interests of the child. *In re Custody of Halls* , 126 Wash. App. 599, 607, 109 P.3d 15 (2005). Therefore, if Tatyana's allegation as to Robertson's purpose in engaging in the family law proceedings is proven, that purpose would be unrelated to the legitimate goals of the legal proceedings, and Robertson is not entitled to litigation privilege.

3. LITIGATION PRIVILEGE DOES NOT BAR TATYANA'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS AGAINST JOHN OR ROBERTSON

¶97 Tatyana argues that litigation privilege does not apply to her intentional infliction of emotional distress claim against John. Tatyana also contends that we should decline to consider John's argument regarding litigation privilege because the trial court did not rule on John's immunity.

¶98 Robertson defends the trial court's decision to apply absolute immunity in dismissing Tatyana's intentional infliction of emotional distress claim because Robertson was not a party to the underlying family law proceedings. Robertson asserts further that even if she had engaged in any inappropriate conduct, redress for such conduct is limited to sanctions or disciplinary action by the Bar Association.

¶99 John argues that he is entitled to litigation privilege for Tatyana's intentional infliction of emotional distress claim. John contends that even if he provided false or misleading testimony in the family law proceedings, he cannot be held liable in tort and may only be subject to sanctions or a prosecution for perjury.

¶100 We disagree with Tatyana's assertion that we cannot consider whether litigation privilege precludes John's liability from her intentional infliction of emotional distress cause of action because, although the trial court did not address the issue in its order granting John's motion, John raised the issue before the trial court. This issue is thus properly before us because we can affirm the trial court on any basis supported by the record. *In re Marriage of Rideout* , 150 Wash.2d 337, 358, 77 P.3d 1174 (2003).

¶101 However, we also disagree with John and Robertson. Because Tatyana's intentional infliction of emotional distress claim is based, in part, on her allegation

that John and Robertson acted with intent to control and abuse her, such conduct, if proven, is unrelated to the underlying family law proceedings and would not be covered by litigation privilege.

¶102 In *Jeckle* , we applied absolute immunity to bar a doctor's claim of outrage and intentional infliction of emotional distress against an attorney who had filed a class action lawsuit against him. 120 Wash. App. at 386, 85 P.3d 931. The doctor, who had been under investigation by the Medical Quality Assurance Commission for prescribing a harmful weight-loss supplement, claimed that the attorney improperly used the investigation file to solicit clients and to ask him questions during a deposition. *Id.* at 377-78, 85 P.3d 931.

¶103 In holding that the attorney was entitled to litigation privilege, the *Jeckle* court relied on a defamation case from Minnesota wherein that court dismissed a claim filed against an attorney who had solicited clients in good faith in anticipation of litigation. *Id.* at 386, 85 P.3d 931 (citing *Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling* , 535 N.W.2d 653, 657–58 (Minn.Ct.App.1995)). The court explained that because soliciting clients and asking questions in a deposition was conduct pertinent to a lawsuit, the defendant [497 P.3d 453] attorney was absolutely immune from liability. *Id.*

¶104 Conduct that is extreme and outrageous may be privileged, and "[t]he actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." Restatement (Second) of Torts § 46 cmt. g (1965). But the supreme court has recognized that although such privilege will often preclude a claim for intentional infliction of emotional distress, it does not "per se immunize one's conduct." *Reyes v. Yakima Health Dist.* , 191 Wash.2d 79, 91, 419 P.3d 819 (2018). The Court acknowledged that a claim for intentional infliction of emotional distress would not be precluded where "the manner of invoking a legal power intentionally inflicts emotional distress." *Id.* at 92, 419 P.3d 819.

¶105 Here, Tatyana's intentional infliction of emotional distress claim stems from allegations that Robertson and John conspired to place Tatyana in intractable circumstances both with regard to her immigration status and finances, causing severe emotional distress. With respect to John, Tatyana also claimed that John took advantage of her limited English proficiency and lack of legal knowledge in order to advance an action that would result in such damage.

¶106 Although the tortious conduct involves filing and pursuing a legal action, unlike in *Jeckle* , the complained of actions were alleged to have been undertaken to accomplish an end unrelated to the lawsuit. *See* 120 Wash. App. at 386, 85 P.3d 931. As we discuss in section V(B) *supra* regarding a claim for abuse of process, litigation privilege does not apply where the actions were undertaken for some purpose unrelated to a lawsuit.

¶107 Moreover, Tatyana claims that John and Robertson did not merely act in

genuine pursuit of John's legal rights during the modification and vacation proceedings; instead, Tatyana alleges that the legal proceedings were an instrumentality employed to abuse and control her. Therefore, as alleged, litigation privilege does not preclude Tatyana's intentional infliction of emotional distress claim against John or Robertson. *See Deatherage* , 134 Wash.2d at 135, 948 P.2d 828 ; *Jeckle* , 120 Wash. App. at 386, 85 P.3d 931.

4. REMEDY

¶108 In dismissing each of Tatyana's claims as alleged against Robertson, the trial court ruled that Robertson was absolutely immune from liability. But as explained above, litigation privilege does not, in this case, present " 'some insuperable bar to relief' " justifying dismissal as a matter of law. *J.S.* , 184 Wash.2d at 100, 359 P.3d 714 (internal quotation marks omitted) (quoting *Cutler* , 124 Wash.2d at 755, 881 P.2d 216). The trial court therefore erred when it applied litigation privilege and dismissed Tatyana's claims against Robertson on that basis. *See id.* Because the trial court's order dismissing Tatyana's claims against Robertson was incorrect due to an error of law, Tatyana is entitled to a remand to proceed absent that legal error.

¶109 With respect to John's claims, although John raised immunity in his motion to dismiss, the trial court did not similarly state, in its order granting John's motion, that its ruling was based on John's immunity from liability. We therefore move forward to consider whether the trial court properly granted John's motion to dismiss on other grounds.

¶110 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

¶111 Unpublished text follows.

We concur:

LEE, C.J.

GLASGOW, J.

Notes:

[1] This opinion will refer to members of the same family by their first names to avoid confusion.

[2] CR 56(e) provides that,

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit

> affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[3] Amici's brief addressed the legal issue set forth in the invitation letter without commenting on how that legal issue applies to the facts of this case, as is proper in light of amici's role. *See Teamsters Loc. 839 v. Benton County* , 15 Wash. App. 2d 335, 352, 475 P.3d 984 (2020). However, both Robertson's and Tatyana's responsive briefing in answer to amici contained extensive discussion of contested factual issues and other aspects of the case. Pursuant to RAP 10.1(e) a party is permitted to file a brief in answer to an amicus brief. But here, the parties have filed briefs that go well beyond the scope of any arguments contained in the brief submitted by amici. We decline to consider these additional arguments to the extent that they are duplicative attempts at arguing factual matters of the case that the parties had the opportunity to address in their initial briefing to this court.

[4] We disagree with Robertson's formulation of litigation privilege as it applies to an abuse of process claim to the extent that she suggests an attorney is entitled to litigation privilege unless the attorney has used the process to threaten or coerce the plaintiff. In so arguing, Robertson places improper emphasis on extortion. Evidence of extortion is not always required to sustain an abuse of process claim. *Hough v. Stockbridge* , 152 Wash. App. 328, 344, 216 P.3d 1077 (2009). Moreover, Robertson's argument pertains to whether a plaintiff has presented the correct type of evidence to make out an abuse of process claim, which is distinct from the issue of whether an attorney is entitled to litigation privilege from conduct that might otherwise be actionable as abuse of process.

[5] In reviewing and approving process, it is possible that a court might not be made aware of certain facts that would indicate the process has been instituted to achieve an inappropriate and extrinsic end. For example, in a context where an opposing party is an undocumented immigrant, there could be an occasion in which an attorney has filed a motion to modify a parenting plan—a motion that is not baseless on its face—for the sole purpose of ensuring that the undocumented opposing party is present in court and available for apprehension by a federal agency.

Indeed, warrantless civil immigration arrests of individuals in courthouses, or of individuals arriving to or leaving from courthouses, have occurred with sufficient frequency in Washington that the

Legislature passed a bill on February 7, 2020 prohibiting such arrests. Laws of 2020, ch. 37. In addition, General Rule 38, which became effective on April 21, 2020, now prohibits "civil arrest without a judicial arrest warrant or judicial order for arrest" of individuals who are in Washington courts, or who are traveling to or from Washington courts. As of 2016, more than 50 warrantless civil immigration arrests in Washington courthouses have been reported in 16 different counties, though it is likely that many more warrantless arrests have taken place that have not been reported. *Justice Compromised: Immigration Arrests at Washington State Courthouses* , U. Wash. Ctr. for Hum. Rts. (Oct. 16, 2019), https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrest [https://perma.cc/U2Z3-2M99].

If, in filing a motion, the attorney's intent was to facilitate detention of the undocumented former spouse by the United States Immigration and Customs Enforcement so that his or her client would have full custody by default, such use of process, with sufficient proof, could meet the elements of abuse of process. *See Maytown* , 191 Wash.2d at 439, 423 P.3d 223. In this hypothetical situation, the trial court may have reviewed and approved the attorney's motion to modify without any reason to suspect that such process was not issued in earnest but to instead ensure the former spouse's arrest and deportation. This conduct is violative of the attorney's public duty to further the administration of justice as an officer of the court. *See Fite* , 11 Wash. App. at 28, 521 P.2d 964. If an attorney's conduct rises to the level of abuse of process, the fact that the trial court approved of that process does not alter the analysis or preclude liability for an otherwise actionable claim.

Appendix-B. A copy of the published Court of Appeals decisions, filed 07Nov2022. Fn: 2022.11.07-828282 - Opinion - Unpublished

Appendix-B. .

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

SEAN KUHLMEYER, a single person, Appellant, v. ISABELLE LATOUR, marital status unknown; KARMA LOUISE ZAIKE, aka KARMA LOUISE JOSEPH, marital status unknown; MICHAEL BUGNI, marital status unknown, both in his individual capacity, and as owner of the law firm Michael Bugni and Associates; NANCY WEIL, marital status unknown; and DOUGLAS and DANIELLE KISKER, and the marital community composed therewith, Respondents, Other potential defendants as discovered facts determine, possibly including ERIKA REICHLEY, marital status unknown; DONA HARRIS, marital status unknown; TRESSE TODD, marital status unknown; and unknown other potential defendants, known or unknown, as discovered and as amended, so named hereafter, if any exist, Defendants.	No. 82828-2-I (consolidated with 83312-0-I) UNPUBLISHED OPINION

BOWMAN, J. — Sean Kuhlmeyer appeals the trial court's dismissal of his lawsuit against his ex-wife and several professionals involved in their dissolution as abusive litigation. He also seeks relief from future filing restrictions ordered

under the abusive litigation act (ALA), chapter 26.51 RCW. Kuhlmeyer argues the ALA is unconstitutional and the court misapplied the ALA to his lawsuit. Finding no error, we affirm.

FACTS

Kuhlmeyer and Isabelle Latour divorced in May 2018. Kuhlmeyer, who is an attorney, has litigated dissolution related issues ever since. See In re Marriage of Kuhlmeyer, No. 78765-9-I (Wash. Ct. App. Jan. 21, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/787659.pdf; In re Marriage of Kuhlmeyer, No. 81002-2-I (Wash. Ct. App. Mar. 8, 2021) (unpublished), https://www.courts.wa.gov/ opinions/pdf/810022.pdf.

In July 2020, Kuhlmeyer sued Latour; her dissolution attorney, Karma Zaike; Zaike's law partner, Michael Bugni; the guardian ad litem (GAL), Nancy Weil; and Latour's friends, Douglas and Danielle Kisker.[1] In the 399-page complaint, Kuhlmeyer variously asserts more than 30 tort claims against the defendants. Each claim is rooted in facts related to Kuhlmeyer and Latour's dissolution proceeding.

In January 2021, Latour moved the court for an order restricting Kuhlmeyer from engaging in abusive litigation under the ALA. The court held a hearing on the motion, and as a threshold matter, found by a preponderance of the evidence that Kuhlmeyer and Latour were in a prior intimate partner

[1] Kuhlmeyer also named as "potential defendants" Erika Reichley, Dona Harris, and Tresse Todd, all employees of the Law Offices of Michael W. Bugni & Associates PLLC. But Kuhlmeyer never served them with the complaint, and they did not participate in the proceedings below.

relationship and that Kuhlmeyer committed domestic violence against Latour. It then found that the ALA applied to Kuhlmeyer and set the matter for an evidentiary hearing in April to determine whether it should dismiss his lawsuit as abusive litigation.

After the hearing, on May 7, 2021, the court issued an "Order Restricting Abusive Litigation of Attorney Sean Kuhlmeyer." It determined that (1) Kuhlmeyer advanced his lawsuit primarily to harass, intimidate, or maintain contact with Latour; (2) the parties already litigated all the claims in the dissolution proceeding; and (3) a court previously found the allegations to be without the existence of evidentiary support. The court dismissed the lawsuit with prejudice under both the ALA and its inherent authority to control the conduct of litigants who impede orderly proceedings. It then awarded the defendants attorney fees and costs. The court also ordered that Kuhlmeyer must obtain permission from the court before filing a new case or a motion in an existing case for 72 months.

Kuhlmeyer appeals.[2]

[2] Latour, Zaike and Bugni collectively, and the Kiskers responded. Weil did not. Two groups filed amicus briefs in support of the respondents. Amici curiae Sexual Violence Law Center, Legal Voice, Coalition Ending Gender-Based Violence, DOVE Project, King County Sexual Assault Resource Center, YWCA, and New Beginnings argue that the trial court properly applied the ALA and that the act is constitutional. Amici curiae Northwest Justice Project, Jewish Family Service, Eastside Legal Assistance Program, King County Bar Association, and Snohomish County Legal Services argue that the ALA should apply to filings in the court of appeals.

ANALYSIS

Constitutional Claims

Kuhlmeyer argues that the ALA is unconstitutional because it violates the separation of powers doctrine and restrains his fundamental due process right to access courts.

We review the constitutionality of statutes de novo. Afoa v. Dep't of Lab. & Indus., 3 Wn. App. 2d 794, 804, 418 P.3d 190 (2018). We presume statutes are constitutional, and the burden is on the party challenging the statute to prove beyond a reasonable doubt that the statute is unconstitutional. Id.

1. Separation of Powers

Kuhlmeyer argues that the ALA violates the separation of powers doctrine. We disagree.

Under the separation of powers doctrine, the legislature cannot make judicial determinations, it must legislate. City of Tacoma v. O'Brien, 85 Wn.2d 266, 271-72, 534 P.2d 114 (1975).

> "A judicial [determination] investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter."

Id. at 272 (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908)).

Kuhlmeyer argues that because courts already have inherent authority to respond to abusive litigation tactics, the ALA amounts to an unconstitutional

legislative encroachment on a judicial function.[3] But the fact that courts already have methods of curbing abusive litigation does not render legislation designed to prevent abusive litigation as a foray into judicial powers.

By enacting the ALA, the legislature provided "the courts with an additional tool to curb abusive litigation and to mitigate the harms abusive litigation perpetuates." RCW 26.51.010. The ALA does not limit the court's inherent authority to control the conduct of litigants or the orderly conduct of proceedings. See RCW 26.51.060(3) ("Nothing in this section or chapter shall be construed as limiting the court's inherent authority to control the proceedings and litigants before it."). The separation of powers doctrine does not prevent the legislature from creating a law that supplements a court's inherent authority to address abusive litigation.

2. Due Process

Kuhlmeyer argues the court's order under the ALA that he obtain permission before filing a new case renders the statute unconstitutional as applied. According to Kuhlmeyer, the right to earn a living is a fundamental right protected under due process, and the broad prefilling restriction unconstitutionally infringes on his ability to practice law. We disagree.

The pursuit of an occupation or profession is a liberty interest protected by the Fourteenth Amendment's due process clause. Conn v. Gabbert, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999); U.S. CONST. amend XIV.

[3] See Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) (courts have "inherent power to control the conduct of litigants who impede the orderly conduct of proceedings").

Citing Duranceau v. City of Tacoma, 27 Wn. App. 777, 780, 620 P.2d 533 (1980), Kuhlmeyer argues the pursuit of a profession is a fundamental right, the regulation of which is subject to strict scrutiny. But "neither [the Washington Supreme Court] nor the United States Supreme Court has characterized the right to pursue a particular profession as a fundamental right." Amunrud v. Bd. of App., 158 Wn.2d 208, 220, 143 P.3d 571 (2006), abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.3d 694 (2019); see also Conn, 526 U.S. at 291-92 ("the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, . . . a right which is nevertheless subject to reasonable government regulation"). So restrictions need only rationally relate to a legitimate state interest. Amunrud, 158 Wn.2d. at 222.

Here, the court ordered:

> . . . Pursuant to RCW 26.51.070, Mr. Kuhlmeyer -for the next 72 months- is subject to prefiling restrictions. If he wishes to file a new case, or a motion in a now-existing case, he must first make application before [this Court,] Department 28 of the King County Superior Court. Such application shall be in the form of a one-page document, in twelve-point type, that provides a summary of the parties involved and the proposed claims or issues. The proposed complaint or motions shall be attached to the summary; no other exhibits or attachments may be included. The Court will follow the procedures set forth in RCW 26.51.070 in determining whether the filing shall be permitted.
> . . . If the filing of a new case is permitted, the subsequently-assigned Department will thereafter oversee all motions associated with the case. If Mr. Kuhlmeyer seeks to "add parties, amend the complaint, or is otherwise attempting to alter the parties and issues involved in the litigation in a manner that the [assigned] judicial officer reasonably believes would constitute abusive litigation, the judicial officer shall stay the proceedings and refer the case back" to Department 28 for further review. See RCW 26.51.070(5). If Ms. Latour is served with a pleading filed by Mr. Kuhlmeyer, and

> the pleading does not have an attached order allowing the pleading, she may respond by simply filing a copy of this Order.[4]

Judicial oversight of Kuhlmeyer's ability to file pleadings is rationally related to the legitimate state interest in preventing abusive litigation. See RCW 26.51.010 (legislature's intent in enacting the ALA was to "curb abusive litigation and to mitigate the harms abusive litigation perpetuates"). And Kuhlmeyer overstates the order's impact on his ability to practice law. The only restriction on Kuhlmeyer's ability to file a new case is that he first obtain permission of the court. If the case is not designed to harass or intimidate Latour, his ability to litigate on behalf of his client can proceed unrestricted. Kuhlmeyer fails to show an unconstitutional restriction on his ability to earn a living.[5]

Application of the ALA

Kuhlmeyer argues that the trial court erred by concluding that his lawsuit amounts to abusive litigation because substantial evidence does not support the trial court's finding that he committed domestic violence against Latour or its conclusion that the primary purpose of his lawsuit was to harass, intimidate, or maintain contact with Latour. He also argues that the ALA required the trial court to assess the merits of his lawsuit, and that even if his claims against Latour were abusive, the court should not have dismissed his claims against Zaike, Bugni, Weil, and the Kiskers. We address each argument in turn.

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[4] Fourth alteration in original.

[5] Kuhlmeyer also summarily asserts that the ALA is facially unconstitutional under the due process clause and that it is unconstitutionally vague as applied. But he does not support his argument with legal authority or analysis. "We will not consider an inadequately briefed argument." Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

1. Substantial Evidence

Kuhlmeyer argues the trial court erred by finding Latour was a victim of domestic violence. We disagree.

We review a trial court's findings of fact to determine whether substantial evidence supports them and, if so, whether the findings of fact support the trial court's conclusions of law. Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). The party challenging a finding of fact bears the burden of showing that substantial evidence does not support the finding. Nordstrom, 120 Wn.2d at 939-40. We review conclusions of law de novo. Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The legislature enacted the ALA, recognizing that "individuals who abuse their intimate partners often misuse court proceedings in order to control, harass, intimidate, coerce, and/or impoverish the abused partner," and that "[c]ourt proceedings can provide a means for an abuser to exert and reestablish power and control over a domestic violence survivor long after a relationship has ended." RCW 26.51.010. So, under the ALA, a party to litigation may seek an order restricting abusive litigation "if the parties are current or former intimate partners and one party has been found by the court to have committed domestic violence against the other party." RCW 26.51.030(1).

When a party moves for an order restricting abusive litigation, the court must "attempt to verify that the parties have or previously had an intimate partner relationship and that the party raising the claim of abusive litigation has been found to be a victim of domestic violence by the other party." RCW 26.51.040(1). If the court "verifies that both elements are true, or is unable to verify that they are not true," it must "set a hearing to determine whether the litigation meets the definition of abusive litigation." Id. Under RCW 26.51.020(1)(a), litigation is abusive if

> (i) The opposing parties have a current or former intimate partner relationship;
>
> (ii) The party who is filing, initiating, advancing, or continuing the litigation has been found by a court to have committed domestic violence against the other party pursuant to: (A) An order entered under chapter 7.105 RCW or former chapter 26.50 RCW; (B) a parenting plan with restrictions based on RCW 26.09.191(2)(a)(iii); or (C) a restraining order entered under chapter 26.09, 26.26A, or 26.26B RCW, provided that the issuing court made a specific finding that the restraining order was necessary due to domestic violence; and
>
> (iii) The litigation is being initiated, advanced, or continued primarily for the purpose of harassing, intimidating, or maintaining contact with the other party.

Here, the trial court found Kuhlmeyer committed domestic violence against Latour because "the [dissolution] court entered a restraining order pursuant to RCW 26.09[.060], in which it found that Mr. Kuhlmeyer, the restrained person, 'represents a credible threat to the physical safety' of Ms. Latour." Substantial evidence supports that finding.

The record shows that in June 2018, the dissolution court issued a restraining order under RCW 26.09.060. The order prohibited Kuhlmeyer from contacting Latour for five years. And the court explicitly found that Kuhlmeyer is

"a former spouse" of Latour and that Kuhlmeyer "represents a credible threat to the physical safety of" Latour.

Kuhlmeyer argues that the "credible threat" finding in the restraining order is itself not supported by substantial evidence. But Kuhlmeyer challenged whether the restraining order was proper in his first appeal of the dissolution. See Kuhlmeyer, No. 78765-9, slip op. at 8-9. We rejected that claim. Id. Any ability to challenge the underlying basis of the restraining order has long since expired. See RAP 5.2(a), 12.7(a).

Kuhlmeyer also argues that the trial court erred by concluding that the primary purpose of his lawsuit was to harass, intimidate, or maintain contact with Latour. Again, we disagree.

The ALA creates a rebuttable presumption that litigation is being initiated, advanced, or continued "primarily for the purpose of harassing, intimidating, or maintaining contact with the other party" if there is evidence that "[t]he same or substantially similar issues between the same or substantially similar parties have been litigated within the past five years," or if courts have sanctioned the alleged abusive litigant "for filing one or more cases, petitions, motions, or other filings . . . that were found to have been frivolous, vexatious, intransigent, or brought in bad faith involving the same opposing party."[6] RCW 26.51.050(1), (3).

Here, the court found that Kuhlmeyer litigated the "facts surrounding the Dissolution . . . repeatedly and obsessively," and that "King County Superior

[6] The statute also imposes the rebuttable presumption if the "same or substantially similar issues between the same or substantially similar parties have been raised, pled, or alleged in the past five years and were dismissed on the merits or with prejudice." RCW 26.51.050(2).

Court judicial officers have held Mr. Kuhlmeyer in contempt, have found him in violation of CR 11, have found him in violation of the Rules of Professional Conduct, and have imposed prefiling restrictions." Those findings support a rebuttable presumption that Kuhlmeyer advanced the litigation primarily to harass, intimidate, or maintain contact with Latour. RCW 26.51.050(1)-(3). Kuhlmeyer offered no evidence to rebut that presumption.

2. Merits of the Claims

Kuhlmeyer argues that the trial court erred by dismissing his lawsuit without first analyzing the merits of his claims. We disagree.

We review issues of statutory interpretation de novo. West v. Dep't of Fish & Wildlife, 21 Wn. App. 2d 435, 441, 506 P.3d 722 (2022). Our goal is to give effect to the legislature's intent. Id. We first look to the plain meaning of a statute as an expression of intent. Id. If the language is plain and unambiguous, our inquiry ends. Id.

Under the ALA, litigation is abusive if it meets the factors of RCW 26.51.020(1)(a) and "at least one of" these factors apply:

> (i) Claims, allegations, and other legal contentions made in the litigation are not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law, or the establishment of new law;
> (ii) Allegations and other factual contentions made in the litigation are without the existence of evidentiary support; or
> (iii) An issue or issues that are the basis of the litigation have previously been filed in one or more other courts or jurisdictions and the actions have been litigated and disposed of unfavorably to the party filing, initiating, advancing, or continuing the litigation.

RCW 26.51.020(1)(b).

Kuhlmeyer argues that RCW 26.51.020(1)(b)(i) "requires the court analyze the evidence of [his] alleged complaints." But the plain language of the statute provides three alternative factors that can support an abusive litigation finding. And the court held that Kuhlmeyer's complaint amounts to abusive litigation under RCW 26.51.020(1)(b)(ii) and (iii).

The court found that "Kuhlmeyer filed over 700 pages of pleadings in opposition to the entry of an [ALA] bar order," which were "entirely devoted to [his] theory that the tort claims will allow him [to] recompense for what he perceives to be errors of fact and law in the Dissolution." It then concluded that "these allegations have previously been determined to be 'without the existence of evidentiary support' " under RCW 26.51.020(1)(b)(ii),[7] and that the claims " 'have previously been filed in one or more other courts or jurisdictions and the actions have been litigated and disposed of unfavorably to the party filing, initiating, advancing, or continuing the litigation' " under RCW 26.51.020(1)(b)(iii). As discussed above, substantial evidence supports those determinations.

3. Dismissal of Non-Latour Defendants

Kuhlmeyer argues the ALA restricts only litigation naming former intimate partners as a party, so the court erred by dismissing his claims against Zaike, Bugni, Weil, and the Kiskers. We need not reach that issue because the court properly dismissed his claims under its inherent authority to control the proceedings before it.

[7] Kuhlmeyer also argues that the defendants "were required to prove" that he "had no possibility of proving his claims . . . on the evidence." But he cites no authority for that contention, and the plain language of the statute provides otherwise, so we do not consider it. Norcon, 161 Wn. App. at 486.

"In Washington, every court of justice has inherent power to control the conduct of litigants who impede the orderly conduct of proceedings." Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008). A court may place reasonable restrictions on any litigant who abuses the judicial process. Id. Trial courts have the authority to enjoin a party from engaging in litigation "upon a 'specific and detailed showing of a pattern of abusive and frivolous litigation.' " Id. (quoting Whatcom County v. Kane, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981)). "When issuing an injunction, the trial court 'must be careful not to issue a more comprehensive injunction than is necessary to remedy proven abuses, and if appropriate the court should consider less drastic remedies.' " Id. (quoting Kane, 31 Wn. App. at 253). We review a court's exercise of its inherent power to control litigants for an abuse of discretion. Id. (citing In re Marriage of Giordano, 57 Wn. App. 74, 78, 787 P.2d 51 (1990)).

When the court dismissed Kuhlmeyer's claims against the non-Latour defendants, it explained that "[e]ven if any defendants are not eligible for dismissal and injunctive relief pursuant to RCW 26.51.010 et seq," it is proper to dismiss Kuhlmeyer's claims using its inherent power. It determined that Kuhlmeyer's claims against the non-Latour defendants result from his "obsessive and destructive conduct arising from the Dissolution," and since he "exhausted his remedies in the Dissolution matter . . . , Mr. Kuhlmeyer is now using tort claims to relitigate the facts associated with his divorce" and to "gain power over" Latour. And "[n]o [previous] interventions by the Court have proven successful in curbing [Kuhlmeyer's] behavior."

The record supports that decision. Kuhlmeyer's claims against Zaike all arose out of her representation of Latour at dissolution. His claims against Bugni arose from his supervision of Zaike in her representation of Latour during the dissolution. His claims against Weil arose from her work as the GAL in the dissolution. And his claim against the Kiskers arose from a disputed piece of property allocated at dissolution. Each claim sought to vindicate instances Kuhlmeyer perceives as injustices associated with the dissolution action. And each claim ensnares Latour as a possible witness. The court did not abuse its discretion by dismissing Kuhlmeyer's claims against the non-Latour defendants.[8]

Attorney Fees

Kuhlmeyer, Latour, Zaike, Bugni, and the Kiskers seek attorney fees and costs on appeal. Under RAP 18.1, a party may seek reasonable attorney fees on appeal. We may award attorney fees on appeal if a contract, statute, or recognized ground in equity permits recovery of attorney fees at trial and the party substantially prevails. Judges of the Benton & Franklin Counties Superior Court v. Killian, 195 Wn.2d 350, 363, 459 P.3d 1082 (2020). Here, the ALA authorizes an award of attorney fees and costs. RCW 26.51.060(2)(b) (court must award "reasonable attorneys' fees and costs of responding to the abusive litigation"). Because Latour, Zaike, Bugni, and the Kiskers prevail on appeal, we

[8] Kuhlmeyer also argues the trial court erred by refusing to consider his summary judgment motion. But because the court properly dismissed Kuhlmeyer's lawsuit, we do not reach that issue. And Kuhlmeyer contends that the judge erred by "not disclosing she had relationships with named defendants and an identified witness within [three degrees] of separation." But he did not assign error to the claim on appeal, so we do not consider it. RAP 10.3(a)(4); Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co., 160 Wn. App. 912, 922, 250 P.3d 121 (2011). In any event, his assertion lacks merit and the record does not support it.

grant their requests for attorney fees and costs. Because Kuhlmeyer does not, we deny his request.

We conclude Kuhlmeyer fails to show the ALA is unconstitutional, and the trial court properly applied the ALA to his lawsuit. We affirm the trial court and award attorney fees and costs to Latour, Zaike, Bugni, and the Kiskers.

Brunner, J.

WE CONCUR:

Birk, J.

Coburn, J.

Appendix-C. The order denying reconsideration dated 13Dec2022. Fn: 2022.12.13 82828-2 Deny Reconsideration

Appendix-C. .

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEAN KUHLMEYER, a single person,

Appellant,

v.

ISABELLE LATOUR, marital status unknown; KARMA LOUISE ZAIKE, aka KARMA LOUISE JOSEPH, marital status unknown; MICHAEL BUGNI, marital status unknown, both in his individual capacity, and as owner of the law firm Michael Bugni and Associates; NANCY WEIL, marital status unknown; and DOUGLAS and DANIELLE KISKER, and the marital community composed therewith,

Respondents,

Other potential defendants as discovered facts determine, possibly including ERIKA REICHLEY, marital status unknown; DONA HARRIS, marital status unknown; TRESSE TODD, marital status unknown; and unknown other potential defendants, known or unknown, as discovered and as amended, so named hereafter, if any exist,

Defendants.

No. 82828-2-I
(consolidated with No. 83312-0-I)

DIVISION ONE

ORDER DENYING MOTION TO RECONSIDER

Appellant Sean Kuhlmeyer filed a motion to reconsider the opinion filed on November 7, 2022. A majority of the panel has determined that the motion should be denied.

Appellant's suggestion that Judge Birk should have recused and should not participate in reconsideration is deemed a motion for recusal and is denied as untimely and unwarranted. The statements submitted in support of appellant's request for recusal do not support a basis for recusal under CJC 2.11.

Now, therefore, it is hereby

ORDERED that the motion to reconsider is denied.

FOR THE COURT:

Judge

Appendix-D. The order awarding attorney's fees dated 19Dec2022. Fn: 2022.12.19 828282 Award Atny Fees

Appendix-D.

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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Case #: 828282
Sean Kuhlmeyer, Appellant v. Isabelle Latour et al, Respondents
King County Superior Court No. 20-2-11957-1

Counsel:

The following attached notation ruling by Commissioner Masako Kanazawa of the Court was entered on December 19, 2022, regarding Attorney's Fees and Costs.

Sincerely,

Lea Ennis
Court Administrator/Clerk

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

SEAN KUHLMEYER, a single-person,

Appellant,

v.

ISABELLE LATOUR, marital status unknown, and Karma Louise Zaike, aka Karma Louise Joseph, marital status unknown, and Michael Bugni, marital status known, both in his individual capacity, and as owner of the law firm Michael Bugni and Associates, and Nancy Weil, marital status unknown, and Douglas and Danielle Kisker, and the marital community composed therewith,

Respondents,

Other potential defendants as discovered facts determine possibly including Erika Richley, marital status unknown, Dona Harris, marital status unknown, Tresse Todd, marital status unknown, and Unknown other potential defendants, know or unknown, as discovered and as amended so named hereafter, if any exist.

Defendants.

No. 82828-2-I
(consolidated with 83312-0-I)

COMMISSIONER'S RULING AWARDING ATTORNEY FEES AND COSTS

On November 7, 2022, this Court issued an unpublished opinion affirming the trial court's dismissal as abusive litigation of appellant (attorney pro se) Sean Kuhlmeyer's lawsuit against his former wife and several professionals involved in their

dissolution. This Court rejected Kuhlmeyer's argument that the abusive litigation act (ALA), chapter 26.51 RCW, is unconstitutional and affirmed the future filing restrictions ordered against him. This Court awarded attorney fees under the ALA to respondents Isabelle Latour, Karma Zaike, Michael Bugni, and Douglas and Danielle Kisker. On December 13, 2022, this Court denied Kuhlmeyer's motion for reconsideration.

Meanwhile, counsel for Latour, counsel for Zaike and Bugni, and counsel for the Kiskers each filed a declaration and a cost bill. Latour requests an award of attorney fees in the amount of $116,916.50 ($91,416.50 + $25,500) and costs in the amount of $1,546.87, totaling $118,463.37. Zaike and Bugni request attorney fees in the amount of $11,040 and costs in the amount of $200, totaling $11,240. The Kiskers request attorney fees in the amount of $36,763 and costs in the amount of $618.63, totaling $37,381.63. The Kiskers also request additional fees in the amount of $2,220 for finalizing their fee application and responding to Kuhlmeyer's anticipated objection.

Kuhlmeyer filed an untimely objection to the requested attorney fees and costs. An objection to a fee declaration or a cost bill must be filed within ten days after service. RAP 14.5 (cost bill), RAP 18.1(e) (fee declaration). The fee declarations and cost bills were filed on November 17, 2022. Kuhlmeyer filed an objection on December 8, 2022, more than ten days after service of the fee declarations and cost bills. Latour filed a reply, arguing, among other things, that this Court should not consider Kuhlmeyer's untimely objection. But I consider Kuhlmeyer's untimely objection. See RAP 1.2(c) (The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c)).

Kuhlmeyer argues this Court should "deny" attorney fees. He argues he already

has a debt from the trial court proceedings and may not be able to pay the additional fees requested. But this Court awarded attorney fees under the ALA. Kuhlmeyer's request that this Court deny attorney fees should have been brought in his merits brief or motion for reconsideration, not in an objection under RAP 18.1(e).

Kuhlmeyer argues the requested attorney fees are not reasonable. Reasonable attorney fees are based on the number of hours reasonably spent, multiplied by a reasonable hourly rate. Berryman v. Metcalf, 177 Wn. App. 644, 660, 312 P.3d 745 (2013). This calculation does not turn solely on what the prevailing party's firm can bill. Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." Berryman, 177 Wn. App. at 657 (quoting Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998)).

Kuhlmeyer argues the attorneys' hourly rates are too high. But he does not specify which attorneys' rates are too high. Latour's attorneys' hourly rates range from $300 to $475. Kiskers' attorneys' hourly rates are $185 and $225. Zaike and Bugni's attorney's hourly rate is $600. Although $600 is a very high rate, counsel for Zaike and Bugni spent limited time on this appeal (18.4 hours), much less than the hours spent by counsel for Latour or the Kiskers. An hourly rate should reflect the attorney's "ability to produce results in the minimum time." Berryman, 177 Wn. App. at 664 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

Counsel for Latour at Foster Garvey billed $91,416.50 for this appeal and co-counsel at Family Violence Appellate Project billed $25,500. Latour thus request

attorney fees totaling $116,916.50. Zaike and Bugni request fees totaling $11,040, and the Kiskers request fees totaling $38,983. Collectively, they request about $167,000, which is a significant amount for an appeal. Latour's fees are particularly high.

On the other hand, Kuhlmeyer raised a number of constitutional issues in this appeal, requiring the other parties to fully respond. In particular, Latour appears to have taken the primary role. Two groups filed amici briefs. Latour's counsel notes that in addition to constitutional challenges, Kuhlmeyer raised a number of frivolous claims and unsupported factual assertions, which required counsel to search through an unnecessarily lengthy record and spend time refuting his arguments. Kuhlmeyer has also filed a motion for discretionary review of a trial court order that denied permission to note a motion for a new trial. The Kiskers filed a response to Kuhlmeyer's motion for discretionary review. Although the order was later consolidated with this appeal, Kuhlmeyer did not appear to specifically challenge it in his merits brief. Kuhlmeyer is an attorney and should be well aware of the risk of attorney fees.

Latour's counsel at Foster Garvey states counsel omitted or reduced time entries to avoid duplicative billing and administrative tasks. Counsel served as pro bono counsel for Latour and worked on this appeal with discounted hourly rates, reflecting a 15% discount. Counsel at Family Violence Appellate Project also used a reduced hourly rate ($300) and omitted half of the time spent on this appeal.

In light of the nature and history of this case and counsel's declarations, I decline to reduce the amount of attorney fees requested by Latour and Zaike and Bugni. The Kiskers' fee request appears to include time spent on trial court matters, about $565. This Court does not award fees incurred in the trial court. I also decline to award

additional fees of $2,220, which represent the Kiskers' counsel's "anticipated" time to be spent in finalizing the fee application and responding to Kuhlmeyer's anticipated objection. The additional fees are not appropriate when the Kiskers did not file a reply to Kuhlmeyer's objection, and their counsel did not provide the number of hours actually spent in finalizing the fee application. Otherwise, I allow the Kiskers' fees as requested. Accordingly, attorney fees totaling $116,916.50 are awarded to Latour, attorney fees totaling $11,040 are awarded to Zaike and Bugni, and attorney fees totaling $36,198 are awarded to the Kiskers.

As to the cost bills, Latour requests $1,386.87 for copies of clerk's papers and $160 for preparing the brief, totaling $1,546.87. These costs are allowed under RAP 14.3(a). Zaike and Bugni request an award of statutory attorney fee as costs ($200). But statutory attorney fee may not be awarded as costs, in addition to a separate attorney fee award. Accordingly, Zaike and Bugni's request for a cost award is denied. The Kiskers also request $200 in statutory attorney fee, which is not allowed here as explained above. They also request $411.63 for copies of clerk's papers and $7 for "court charges for brief of Respondent." This Court did not charge the Kiskers for reproducing their brief. The Kiskers appear to request reimbursement of the trial court's fee associated with the clerk's papers. I allow this cost as part of the cost for obtaining copies of clerk's papers. Accordingly, costs in the amount of $1,546.87 are awarded to Latour and costs in the amount of $418.63 are awarded to the Kiskers.

Therefore, it is

ORDERED that attorney fees and costs in the amount of $118,463.37 are awarded to respondent Isabelle Latour. Appellant Sean Kuhlmeyer is liable for this

award and shall pay this amount. It is further

ORDERED that attorney fees in the amount of $11,040 are awarded to respondents Karma Zaike and Michael Bugni. Appellant Sean Kuhlmeyer is liable for this award and shall pay this amount. It is further

ORDERED that attorney fees and costs in the amount of $36,616.63 are awarded to respondents Douglas and Danielle Kisker. Appellant Sean Kuhlmeyer is liable for this award and shall pay this amount.

Masako Hanzawa, Commissioner