68345-4

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No. 68345-4-I

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

SCOTT AKRIE, et al.,

Respondents,

v.

JAMES GRANT, et al.,

Appellants.

APPELLANTS' REPLY BRIEF

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A. Akrie Is Not Entitled to Affirmative Relief Because He Does Not Seek Review of the Trial Court's Decision

The vast majority of Respondents' brief consists of various arguments as to why the trial court was supposedly incorrect on the merits of the anti-SLAPP motion. But Respondents Akrie and Volcan Group, Inc. d/b/a NetLogix ("Akrie") withdrew their appeal of that decision and therefore cannot seek affirmative relief to modify it. As noted in Appellants' opening brief, Akrie initially filed a Notice of Appeal shortly after entry of the judgment and Defendants Grant, et al. filed a cross-appeal. Akrie subsequently withdrew his appeal, at which point the Court of Appeals re-designated Grant, et al. as Appellants and Akrie and NetLogix as Respondents. *See* Opening Brief, p. 3.

RAP 2.4(a) provides that "the appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case." Here, Akrie withdrew his Notice of Appeal, so he clearly does not "seek[ ] review of the decision" by way of a timely-filed notice of appeal. Further, Akrie points to nothing in the record of this case that would justify treatment under subpart (2) of the rule. Indeed, there are no "necessities of the case" that require the Court to award affirmative relief to Akrie at this point. *See, e.g., Ortblad v. State*, 88 Wn.2d 380, 561 P.2d 201 (1977) (respondent's argument that denial of damages was error

would not be considered because respondent had not filed a notice of appeal); *Simpson Timber Co. v. Aetna Casualty & Surety Co.*, 19 Wn. App. 535, 576 P.2d 437 (1978) (trial court granted summary judgment as to some of plaintiff's claims but denied it as to others; on plaintiff's appeal, the court refused to consider defendant's argument that denial of summary judgment on certain claims was error because defendant had not filed for cross review); *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 680 P.2d 425 (1984) (appellate court refused to consider respondent's request to disallow certain offsets because it was a request for affirmative relief and the respondent had not filed a separate notice of appeal).

Even if Akrie's arguments were up for consideration, they have no merit. Indeed, when his Opposition Brief is stripped of hyperbole and *ad hominem* attacks, what is left is simply a rehash of the same factual arguments that he made unsuccessfully to the trial court. *See* CP 32 – 45. The trial court properly rejected those arguments, finding that "defendants have shown by a preponderance of the evidence that the claims herein are based on an action involving public participation and petition." CP 177.

Akrie had an opportunity to appeal the trial court's decision on the merits of the anti-SLAPP motion. By failing to do so, he has forfeited the right to seek any affirmative relief from this Court, and the bulk of Akrie's arguments have no relevance to the appeal actually before this Court. RAP 2.4(a).

B. Akrie's Only Responsive Argument Fails

There are only two pages in his 21-page brief in which Akrie actually addresses the sole issue on appeal, i.e., whether the trial court erred in awarding a single $10,000 penalty when RCW 4.24.525(6)(a) requires an award to "a moving party" who prevails. In those pages he makes only one responsive argument: "The cases cited by the defendants are unpublished and should not be considered by this Court." He cites no authority for either point, and he is wrong on both.

The Washington rule addressing citation to unpublished opinions is GR 14.1, which Akrie ignores. For purposes of GR 14.1(b), an unpublished opinion is one that is "designated 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like that has been issued by any court from a jurisdiction other than Washington state[.]" *Id.* But none of the three cases cited by Grant, et al.—*Castello v. City of Seattle*, 2010 U.S. Dist. LEXIS 127648, 2010 WL 4857022 (W.D. Wash. 2010); *Eklund v. City of Seattle*, 2009 U.S. Dist. LEXIS 60896, 2009 WL 1884402 (W.D. Wash. 2009); and *Phoenix Trading, Inc. v. Kayser*, 2011 U.S. Dist. LEXIS 81432, 2011 WL 3158416 (W.D. Wash. 2011)—bears any such designation; they are *not* "unpublished" for purposes of GR 14.1.

Even if one or more of these decisions had been designated as "unpublished" by the issuing court, GR 14.1(b) would still permit it to be cited because "citation to that opinion is permitted under the law of the jurisdiction of the issuing court." *Id.* Each of the cited cases is a decision by the U.S. District Court for the Western District of Washington.

Pursuant to Fed. R. App. P. 32.1, federal courts may not prohibit or restrict citation of federal judicial opinions issued on or after January 1, 2007 that have been designated as "unpublished," etc. Thus, the Drafter's Comment to GR 14.1 concluded that once this "federal rule goes into effect, new GR 14.1 will allow litigants in Washington courts to cite post-2006 unpublished federal decisions." Karl B. Tegland, 2 WASH. PRAC., RULES PRACTICE, GR 14.1 (6th ed.).

Of course, the federal cases are not binding on this Court. But cases decided in this district by thoughtful federal judges interpreting this particular statute are persuasive, at least. In fact, the legislative history of RCW 4.24.525 supports the federal judges' interpretation. *See* Bruce E. H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 517 – 18 (2012) (Senator Adam Kline, Chair of the Senate Judiciary Committee who sponsored the bill, incorporated in drafting the statute suggestions from a WSTLA article that included a recommendation that when defendants prevail, each plaintiff should be liable for fines and fees, and any award should be *per defendant*).

Finally, Akrie attempts to distinguish one of the three cases, *Castello*, factually. But whether the underlying facts at issue in *Castello* are different from or analogous to the facts here is irrelevant, because the only issue on appeal is a pure question of law: Does RCW 4.24.525(6)(a) require an award of $10,000 to *each* successful moving party, or does it

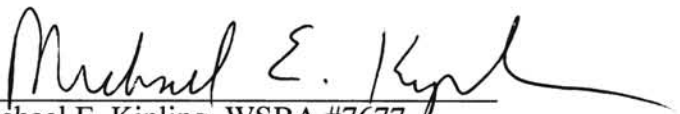
allow for one $10,000 award to all successful moving parties collectively? On the narrow issue presented by this appeal, the cases cited by Appellants are indistinguishable.

C. Conclusion

For all the reasons set forth above and in the Opening Brief, Appellants Grant, et al. request that the Court reverse and remand this matter to trial court with a direction to award statutory damages in the amount of $10,000 to each of the five moving defendants who prevailed on the anti-SLAPP Motion in the trial court.

DATED this 16 day of July, 2012.

KIPLING LAW GROUP PLLC

By: 
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CERTIFICATE OF SERVICE

I do hereby certify that on this 16TH day of July, 2012, I caused to be served a true and correct copy of the foregoing *Appellants' Reply Brief* by method indicated below and addressed to the following:

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