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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GARY FILION,
Respondent,
vs.
JULIE JOHNSON, et al.,
Appellant.

CASE # 63978-1-I

[King County Superior Court
Case # 07-2-06353-6 SEA]

APPELLANT'S REPLY BRIEF

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There is no need for this court to engage in a constitutional analysis regarding whether the legislature’s treatment of “good faith” under RCW 4.24.500 - .510 violates the state or federal constitution:

As in *Segaline v. Dep't of Labor & Indus.*, 144 Wn.App. 312, 325, 182 P.3d 480 (2008), there is no evidence in this case that Ms. Johnson acted in bad faith by calling 911 for protection from Mr. Filion’s August 1, 2006 restraining order violation. Here, as in *Segaline*, there is no need to engage in a state or federal constitutional analysis of the good faith issue under RCW 4.24.500-510.

Dismissal of the case under CR 41(a) after the arbitration award was filed, and after Ms. Johnson filed for trial de novo was improper and must be reversed:

Mr. Filion’s reliance on the case of *King County Council v. King County Personnel Board*, 43 Wn.App. 317, 716 P.2d 322 (1986) is misplaced. Its reasoning does not apply here. It was an appeal from the trial court’s refusal to dismiss an RCW Ch. 7.16 writ of review proceeding. The appellate court pointed out that RCW 7.16.340 expressly makes the rules of civil procedure applicable to writ of review proceedings:

“Except as otherwise provided in this chapter, the provisions of the code of procedure concerning civil actions are applicable to and constitute the rules of practice in the proceedings in this chapter.”

Therefore, the court in *King County Council* held that the plaintiff in a writ of review proceeding has an absolute right to dismissal under CR 41.

There is no similar provision under RCW Chapter 7.06 or under the Mandatory Arbitration Rules. MAR 1.3(b)(4) allows the arbitrator to dismiss an action under CR 41(a) until the arbitration award has been filed:

“Voluntary Dismissal. The arbitrator shall have the power to dismiss an action, under the same conditions and with the same effect as set forth in CR 41(a), at any time prior to the filing of an award.”

Once the arbitrator’s award has been filed, the right to dismiss under CR 41(a) is lost.

RCW 7.06.050 provides that when a party has timely filed a written notice of appeal and request for trial de novo, then “*Such trial de novo shall thereupon be held, including a right to jury, if demanded.*”

RCW Chapter 7.06 has no provision for dismissal under CR 41 after a party has timely filed a notice of appeal and request for trial de novo. This makes sense because the proceeding is now an appeal by way of trial de novo in superior court. Ms. Johnson, the appealing party, paid the \$250 trial de novo filing fee with her request for trial de novo. (CP

213) At that point, the case was no longer subject to dismissal at the discretion and whim of Mr. Fillion, the non-appealing party.

The case of *Polello v. Knapp*, 68 Wn.App.809, 847 P.2d 20 (1993), cited at page 8 of respondent's brief, is wholly inapposite. *Polello* addresses the question whether the trial court's refusal to dismiss the action upon defendant's CR 41(b)(1) motion to dismiss for want of prosecution was proper. The *Polello* court reversed, holding that when all conditions for mandatory dismissal under CR 41(b)(1) exist, the court must dismiss the case and has no discretion to refuse dismissal.

This court has jurisdiction to review the trial court's November 21, 2008 order denying Ms. Johnson's CR 12(b)(6) motion for dismissal (summary judgment):

Mr. Fillion cites *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wash.2d 800, 699 P.2d 217 (1985) (p. 12 of respondent's brief). However, *Sea-Pac* does not preclude the court from considering the trial court's denial of Ms. Johnson's interlocutory motion for summary judgment on this appeal.

The question whether the denial of a motion for summary judgment is appealable has been addressed in a number of Washington cases.

In *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988) the court held that

“a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact.”

and

“[w]e join the vast majority of other jurisdictions which have ruled that an order denying summary judgment, based upon the presence of material, disputed facts, will not be reviewed when raised after a trial on the merits.” (citations omitted) 53 Wn.App. at 306.

and

“The second ground for refusing review is related to the purpose and nature of summary judgment proceedings. The primary purpose of a summary judgment procedure is to avoid a useless trial.” (citations omitted) 53 Wn.App at 307.

In *Dill v. Michelson Realty Co.*, 152 Wn.App. 815, 219 P.3d 726

(2009), the court stated that

“There is no mechanism for reconsideration of a mandatory arbitration award. 15A Karl B. Tegland & Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure: § 79.3, authors' cmt. at 612 (2008-09). The arbitrator may amend an award ‘to correct an obvious error made in stating the award,’ but only if done within the time for filing the award or upon application of the superior court to amend. MAR 6.2; 15A Washington Practice: Washington Handbook on Civil Procedure: at 612. Amendments are permitted to adjust the award in matters of form rather than substance, such as to correct an inadvertent miscalculation or description. 15A Washington Practice: Washington Handbook on Civil

Procedure: at 612-13. Parties who fail to request a trial de novo " may not alter [an arbitration award] by requesting action by the Superior Court which would amend that award." *Trusley v. Statler*, 69 Wash.App. 462, 465, 849 P.2d 1234 (1993)."

and

"The remedies for an unsatisfactory arbitration award are 'limited to a trial de novo ... and, in very limited circumstances, a motion to vacate the judgment on the award.' 15A Washington Practice: Washington Handbook on Civil Procedure: at 613; MAR 6.3, 7. 1."

In *Cook v. Selland Constr., Inc.*, 81 Wn. App. 98, 912 P.2d 1088 (1996), an arbitration award was entered, but rather than request a trial de novo in superior court, Selland filed a direct appeal from the trial court's denial of Selland's pretrial motion for summary judgment. The court held that Selland, which did not request a trial de novo, may not appeal the trial court's interlocutory order denying its motion for summary judgment and thereby avoid the requirements of MAR 7.1. Selland's appeal was dismissed.

In the instant case, the policy expressed in the cases cited above would not be served by forcing the parties to a useless trial. It would better serve the interests of judicial economy for this court to consider and decide Ms. Johnson's appeal of the 10/21/2008 order denying her motion for summary judgment.

This court should review and reverse the trial court's November 21, 2008 order denying her motion for summary judgment:

The standard of review of a trial court's decision on a motion for summary judgment is de novo. In reviewing an order of summary judgment the appellate court engages in the same inquiry as the trial court. *Escalante v. Sentry Ins.*, 49 Wash.App. 375, 743 P.2d 832 (1987); *Hostetler v. Ward*, 41 Wash.App. 343, 704 P.2d 1193 (1985). Summary judgment is proper only when the pleadings, depositions and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). If reasonable minds could reach but one conclusion, an issue of fact may be determined as a matter of law. All facts and reasonable inferences are considered most favorably to the nonmoving party. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). The moving party must meet this burden by setting out its version of the facts and alleging there is no genuine issue as to the facts offered. *Hash v. COH*, 110 Wash.2d 912, 916, 757 P.2d 507 (1988). Once there has been an initial showing of the absence of any genuine issue of material fact, the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.

Trane Co. v. Brown-Johnston, Inc., 48 Wash.App. 511, 513-14, 739 P.2d 737 (1987).

In the instant case, the parties had a full hearing on the merits in arbitration and the arbitrator filed an award (CP 189 – 190). Ms. Johnson timely appealed by filing a written request for trial de novo. (CP 321-323; CP 324-325) Now, the parties face another trial on the merits unless this matter can be resolved upon the record of Ms. Johnson’s motion for summary judgment which was denied by the trial court on November 21, 2008. (CP 187-188)

The trial court’s 11/21/2008 order denying Ms. Johnson’s motion for summary judgment (CP 188) does not reveal the basis of its decision. Because the uncontroverted evidence shows there are no genuine issues of material fact, it logically follows that the trial court must have denied summary judgment based upon its view of the law, though the trial court’s view of the applicable law is not stated in the November 21, 2008 order (CP 187 & 188) or otherwise appears anywhere in the record.

To avoid a useless trial de novo, Ms. Johnson asks this court to decide the summary judgment issue de novo. Forcing the parties to trial in view of the undisputed facts of this case would be a waste of judicial resources. Under the applicable case law and statutes, Ms. Johnson was entitled to judgment of dismissal and an award of attorney fees, expenses,

and statutory damages, based on her absolute immunity under RCW 4.24.500 & .510.

Evidence and information considered by the trial court on the motion for summary judgment:

The trial court considered the following materials on Ms. Johnson's motion for summary judgment:

- Decree of Dissolution entered 06/01/2006 (CP 19 -28, particularly pp 26 – 27)
- Olson's July 26, 2006 letter to Filion's lawyer Peter Jorgensen (CP 53-54, CP 173-174)
- Olson's July 28, 2006 letter to Filion's lawyer Peter Jorgensen (CP 55, CP 175)
- Filion's original complaint filed 02/21/2007 (CP 3 – 4)
- Filion's 1st amended complaint filed 04/09/2007 (CP 5 – 6)
- Johnson's answer filed 05/16/2007 (CP 8 – 10)
- Filion's 2nd amended complaint filed 08/15/2007 (CP - 12)
- Olson's 11/30/2007 answer to 2nd amended complaint (CP 13 – 16)
- Olson's 12/10/2007 declaration (CP 17 – 33)
- Filion's 01/17/2008 response to Olson's Motion to Dismiss (CP 38 – 62)
- Johnson's motion to dismiss filed 10/24/2008. (CP 115 – 123)

- Pat Dornay's declaration filed 10/24/2008 (CP 143 – 147)
- Filion's 10/27/2008 motion to strike Johnson's hearing (CP 149 – 151)
- Johnson's 10/29/2008 response to Filion's motion to strike (CP 153 – 162)
- Filion's 11/07/2008 response in opposition to Johnson's motion to dismiss (CP 165 – 175)
- Filion's declaration filed 11/07/2008 (CP 176 – 177)
- Peter Jorgensen's 11/07/2008 declaration (CP 178 – 180)
- Johnson's 11/134/2008 declaration (CP 181 – 185)
- Order Dismissing Olson & Olson entered 02/08/2008 (CP 91)
- Police Reports (CP 56 – 62)

Ms. Johnson acted in good faith when she called 911 to ask for protection from Mr. Filion's Violation of the restraining order:

In reply to the statement at Footnote 5, p. 11, of respondent's brief: The criminal prosecution against Mr. Filion was not filed by Ms. Johnson. She called 911 in a panic when Mr. Filion appeared at her doorstep on August 1, 2006 in violation of the dissolution decree's restraining orders. (CP 181 – 185) Ms. Johnson did not in any way lure, entice, or deceive Mr. Filion to come to her home in violation of the restraining order. She

had expressly warned Mr. Filion through her realtor Pat Dornay not to come to her premises. (CP 143-147; CP 181-185)

Mr. Filion ignored the warning and came upon the premises in violation of the two-year restraining order which had been entered only 61 days prior as part of the parties' decree of dissolution of marriage. (CP 19-28, specifically CP 26-27). Mr. Filion chose to flaunt the restraining order. There was no necessity for him to do so. He was accompanied by two adult moving men and his parents, none of whom were restrained from coming upon Ms. Johnson's premises. Mr. Filion could easily have had the moving men and his parents go up the driveway to Ms. Johnson's home and retrieve his personal property while personally remaining off the premises and the requisite distance away. (See declaration of Julie Ms. Johnson, CP 181-185, specifically paragraphs 11 to 14)

There is no language in the dissolution decree (CP 19-28) or in the correspondence exchanged between the parties (CP 29-33) which gives Mr. Filion permission to violate the restraining order.

The following undisputed statements in the declaration of the parties' realtor Pat Dornay (CP 143 – 147) establish that Mr. Filion was notified that Ms. Johnson would be at her residence until 9:00 p.m. on August 1, 2006, and that Mr. Filion should not come onto the premises that afternoon. In her declaration, Ms. Dornay states, inter alia, that:

“7. I was aware that Julie and Gary Filion were in contentious dissolution and the situation between was volatile. I used my best judgment in communicating between them to try and keep things as calm as possible. I was aware of the court-issued restraining order.

“8. I phoned Mr. Filion and told him that Julie would not be out of the house until 9:00 p.m. that evening, at which time the house would be turned over to the buyers. Mr. Filion told me he was going over to the house at 4:00 pm with a truck to pick up some furniture & personal belongings.

“9. I phoned Julie back and told her that Gary Filion had said he was planning to come over to pick some things. Julie told me "He better not or I'll call the cops!"

“10. Mr. Filion called me back and asked me if I had told Julie he was coming over. I told him "Yes, I did". He said, "What did she say?" I told him she said, "He better not!" and that the house is a mess and it will be a small miracle if Julie completes her move by the 9:00 p.m. deadline.”

(CP 125-126)

Mr. Filion states in his declaration dated November 7, 2008, that:

“3. * * * . On August 1, 2006 I spoke with Pat Dornay, and she told me that she had told Julie Johnson that I was coming over on that day and that Ms. Johnson said in response ‘I hope he doesn’t’.”

(CP 176)

Mr. Filion does not controvert Ms. Dornay's testimony that he was informed Ms. Johnson would be at her residence until later that evening. (CP 124 – 125) Nor does he controvert Ms. Johnson's declaration dated November 14, 2008. (CP 181 – 185).

Therefore, it is undisputed that Mr. Filion, who was fully aware of the requirements of the June 1, 2006 restraining order, willfully violated that order by coming onto the premises of Ms. Johnson's residence on August 1, 2006, knowing that she and her children would be present.

Nothing in the correspondence exchanged between the parties' lawyers authorizes Mr. Filion to violate the restraining order. If Mr. Filion's lawyer misled him about whether he had permission to violate the express terms of the June 1, 2006 restraining order, that's a matter between him and his counsel, but it does not render Ms. Johnson's frantic call to 911 in the afternoon of August 1, 2006 an act of bad faith.

For Mr. Filion to assert that Ms. Johnson's act of reporting his deliberate violation of a domestic violence restraining order to the 911 call center, after having warned him not to come to her residence, was done in bad faith is utter nonsense and rubbish. Mr. Filion's brief on this appeal conveniently fails to address the fact that he was warned by Pat Dornay not to come to Ms. Johnson's residence on the afternoon of August 1,

2006. Why does Mr. Filion ignore that salient fact? Because it is fatal to his assertion that Ms. Johnson acted in bad faith.

Mr. Filion does not deny that Pat Dornay informed him that Ms. Johnson would still be at the residence until 9:00 p.m. that evening and he should therefore not go her residence that afternoon. He simply ignores that fact, perhaps hoping the court will do likewise.

The restraining order expressly protects Ms. Johnson and her children from what Mr. Filion knowingly did that afternoon. (CP 26 line 18 to CP 27 line 16).

Mr. Filion's actions clearly violated the restraining order and subjected him to arrest and prosecution under RCW 26.50.110(1) as in effect on August 1, 2006, which provides that

“Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW * * * and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the

terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.”

RCW 26.50.110(2) as in effect on August 1, 2006 provides

that

“A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.”

RCW 10.31.100(2)(a) as in effect on August 1, 2006, provides that

“A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

“(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting

the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person;”

Because the undisputed facts establish that Mr. Filion committed a criminal violation of the June 1, 2006 restraining orders set forth in dissolution decree (CP 26 l. 26 to CP 27 l. 16), it follows that Ms. Johnson was justified in calling 911 for help when Mr. Filion showed up at the door of her residence that afternoon after having been warned not to come onto the property since she would still be present.

Mr. Filion’s violation of the RCW Chapter 26.09 restraining order is a matter of public concern:

The restraining orders were issued under the authority of RCW 26.09.050(1) which provides that

“In entering a decree of dissolution of marriage * * * the court shall determine the marital * * * status of the parties, * * * make provision for any necessary continuing restraining orders including the provisions contained in RCW 9.41.800, make provision for the issuance within this action of the restraint provisions of a domestic violence protection order under chapter 26.50 RCW or an antiharassment protection order under chapter 10.14 RCW, and make provision for the change of name of any party.”

These statutes establish a clear public policy of protecting victims of domestic violence and punishing persons who violate restraining orders. As such, the violation of restraining is clearly a matter of public concern.

The public policy underlying RCW 26.50.110 and related statutes is extensively discussed in the case of *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 193 P.3d 128 (Wash. 2008)

The purpose of the restraining orders was to protect Ms. Johnson and her children from Mr. Filion. The dissolution court's Findings of Fact and Conclusions of Law entered June 1, 2006, finds at sections 2.8 and 2.9 (CP 66 & 67) that Mr. Filion has no credibility, and at section 2.13 (CP 70) that

“A continuing restraining order against both parties is necessary because the Husband has used intimidating behavior towards the Wife and the children.”

Mr. Filion's assertion at footnote 10 of respondent's brief that “Johnson is not entitled to its protections [RCW 4.24.510 et seq] since Johnson called the police with knowledge that Filion was not in violation of a criminal law, and therefore, Johnson's reporting was made in bad faith” has been shown to be groundless. In fact, Mr. Filion knowingly and willfully violated the restraining order and committed the gross misdemeanor defined by RCW 26.50.110.

As shown above, Ms. Johnson did not refuse Mr. Filion access to the premises to retrieve his personal property. What she refused him was access in violation of the domestic violence restraining orders contained in the dissolution decree. Mr. Filion had the means to achieve lawful access on the fateful day. The only access he was denied was the form of access prohibited by the decree of dissolution.

The suggestion that Mr. Filion could have “pre-empted Johnson’s call to the police by calling the police [himself] when Johnson refused to allow him access” is nonsense. The domestic violence restraining order which was in the criminal justice system would have immediately alerted any police officers to the fact that Mr. Filion is prohibited from entering or coming within 500 feet of Ms. Johnson’s and the children’s residence.

Mr. Filion refuses to concede that he understood the dissolution decree’s restraining orders. The language specified in the dissolution decree for retrieving personal property is not uncommon. When coupled in a decree which also has restraint provisions, such as in this case, the steps taken to retrieve the personal property must be in compliance with the restraint provisions. Any person of common understanding would grasp that simple concept, and any normally prudent dissolution lawyer would have explained this to his client. As much as Mr. Filion urges to the contrary, there is no language in any of the correspondence between

the parties' dissolution lawyers that gives Mr. Filion license to violate the dissolution decree's restraining provisions.

It is unknown why the prosecuting attorney dismissed the criminal charges against Mr. Filion. It is apparent that the prosecuting attorney had input only from Mr. Filion and his criminal defense counsel when that decision was made. It is also apparent that the prosecuting attorney did not have the benefit of Pat Dornay's input when making that decision. Did Mr. Filion inform the prosecuting attorney that he had been warned not to come onto the premises of Ms. Johnson's residence that afternoon? We will never know.

The only act for which Mr. Filion sued Ms. Johnson was her call to 911 reporting his violation of the restraining order. Must a victim of domestic violence who is protected by a restraining order weigh the threat of a lawsuit for damages before seeking protection by reporting a violation to the relevant authorities?

Ms. Johnson is entitled to the protection of absolute immunity under RCW 4.24.510:

The admitted and uncontested facts establish that Ms. Johnson's call to 911 was justified. One may strain at gnats all day under an appropriate case, but there is no occasion to do so under the established

facts of this case. Ms. Johnson's call to 911 was clearly and squarely protected by the absolute grant of immunity under RCW 4.24.500 - .510.

The case of *Silberg v. Anderson*, 50 Cal.3d 205, 786 P.2d 365 (1990) cited at page 22 of respondent's brief is not an anti-SLAPP case. The statute dealt with in *Silberg* is California Civil Code section 47(2) which grants immunity for certain statements made during the course of judicial proceedings. It bars subsequent lawsuits for damages based on privileged statements made in connection with a prior lawsuit. It has marginal, if any, relevance to the issues in this case.

The case of *Albertson v. Raboff*, 46 Cal.2d 375 (1956) cited at page 22 of respondent's brief is not an anti-SLAPP case.

Mr. Filion characterizes Division 2 of this court's reasoning in the case of *Segaline v. Dep't of Labor & Indus.*, 144 Wn.App. 312, 182 P.3d 480 (2008), cited at pages 22 to 25 of respondent's brief, as "specious". In *Segaline* the Dept of Labor & Industries ("L&I") had served Mr. Segaline with a "no trespass" notice after several employees became fearful that he would physically assault them. Mr. Segaline none-the-less went to L&I offices in violation of the "no trespass" notice and the employees called 911. Mr. Segaline was arrested and charged with criminal trespass, but the charges were later dismissed. Mr. Segaline then sued L&I for tort damages. The trial court summarily dismissed all of Mr. Segaline's

claims and awarded L&I statutory damages under RCW 4.24.510. Mr. Segaline appealed. Division 2 affirmed and held, among other things, that making a request for protection to a law enforcement agency is the kind of communication protected by the absolute privilege of RCW 4.24.510.

Mr. Filion's statement at page 23 of respondent's brief that the *Segaline* court "made reference to RCW 4.24.500-510 without any analysis" is belied by the text of the *Segaline* decision which is entirely devoted to analysis of that statute. The *Segaline* decision specifically references and adopts Division 1 of this court's reasoning in the case of *Dang v. Ehredt*, 95 Wn.App 670, 977 P.2d 29 (1999). *Segaline*, 144 Wn.App. at 326.

Mr. Filion persistently and deliberately mischaracterizes the facts by accusing Ms. Johnson of "*utilizing RCW 4.24.500 as a sword to bludgeon him in an attempt to obtain her fees and statutory award.*" It was Mr. Filion who filed a SLAPP lawsuit against Ms. Johnson. It was Mr. Filion who persisted in pursuing the SLAPP lawsuit even after the absolute immunity defense was raised by Ms. Johnson in October 2008. Had Mr. Filion acted wisely, he would have moved for dismissal at that time. But he did not do so. Now Mr. Filion predictably blames Ms. Johnson for his current predicament and insists that she must bear the burden of the expense and legal fees he has caused her to incur in

defending against his unjustified litigation against her for doing no more than calling 911 for protection against his restraining order violation.

Ms. Johnson's claim for attorney fees on appeal is grounded in her request that this court review the trial court's denial of her motion for summary judgment and decide in her favor under RCW 4.24.510:

Regarding attorney fees, Ms. Johnson is not claiming attorney fees under circumstances similar to those in the case of *Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital, a Washington Corporation v. Deanna D. Kraft*, 165 Wash.2d 481, 200 P.3d 683 (2009) cited at pages 8, 9 and 13 of respondent's brief. Rather, her request for attorney fees is premised on RCW 4.24.510 which provides that:

“ * * * A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. * * *.”

CONCLUSION

Appellant respectfully asks this Court to:

1. Reverse the trial court's order of dismissal;
2. Reverse the trial court's November 21, 2008 denial of Ms.

Johnson's motion for summary judgment, and rule in Ms. Johnson's favor on the basis that there is no genuine issue of material fact and that Ms. Johnson is entitled under RCW 4.24.510 to judgment of dismissal and an

award of her reasonable attorney fees and expenses, and statutory damages as a matter of law;

3. Award Ms. Johnson her expenses and reasonable attorney fees on this appeal;

4. Award Ms. Johnson her reasonable expenses and attorney fees in the trial court.

5. Award Ms. Johnson the statutory damages of \$10,000 provided for by RCW 4.24.510.

Respectfully submitted this 23rd day of June, 2010.

A handwritten signature in black ink, appearing to be 'Helmut Kah', written in a cursive style with several loops and a long horizontal stroke extending to the left.

Helmut Kah, WSBA # 18541
Attorney for Appellant