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64324-0

No. 64324-0-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ROGER L. SKINNER

Appellant

v.

CITY OF MEDINA , *et al*

Respondents

BRIEF OF APPELLANT

William J. Murphy
WSBA No. 19002
Attorney for Appellant

Law Office of William J. Murphy
P.O. Box 4781
Rollingbay, WA 98061
(206) 842-4810 (phone)
(206) 238-6905 (fax)

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COURT OF APPEALS
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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. SUMMARY OF ARGUMENT 5

E. ARGUMENT7

 Access To Justice Is A Fundamental Right Under The Constitution
 Of The State Of Washington And The United States Constitution. . 7

 A Strict Scrutiny Standard Is Applicable When Analyzing Statutes
 That Impair Fundamental Rights 8

 RCW 4.24.510 Is Unconstitutional As Applied In This Case And
 Cannot Serve As A Basis For Dismissal Of Skinner’s Claims 9

 RCW 4.96.020 Is Unconstitutional As Applied In This Case And
 Cannot Serve As A Basis For Dismissal Of Skinner’s Claims 12

 The Defendants’ Attorney Fees Request Was Not Properly Segregated
 And Was Not Reasonable 15

F. CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 66 (1987) 15

Burson v. Freeman , 504 U.S. 191,198, 112 S.Ct. 1846 (1992) 9

City of Redmond v. Moore, 151 Wn.2d 664, 668-9 (2004)..... 10

D.W. Close Co. v. L&I, 143 Wn.App.118, 137 (Div. 1 2008 12

Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50
(1986)..... 16

Gaglidari v. Denny’s Restaurants, Inc., 117 Wn.2d 426, 450 (1991)..... 15

Hunter v. North Mason High School, 85 Wn.2d 810, 814 – 815 (1975).... 8

John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772,780 (1991). 7

Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483 (1993).
..... 16

Loeffelholz v. Citizens for Leaders With Ethics & Accountability Now, 119
Wn.App. 665, 691 (Div. 2 2004).....15, 16

Marbury v. Madison 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803) 7, 8

McConiga v. Riches, 40 Wn. App. 532, 536, 700 P.2d 331 (1985). 7

Medina v. PUD 1 of Benton County, 147 Wn.2d 303, 312 (2002) 14

Nordstrom v. Tampourlos, 107 Wn.2d. 735, 744 (1987)..... 15

O'Donoghue v. State, 66 Wash.2d 787, 405 P.2d 258 (1965)..... 14

Pannell v. Food Servs. Of Am., 61 Wn.App. 418, 447 (Div. 1 1991) 16

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103
S.Ct. 948,74 L.Ed. 2d 794 (1983)..... 9

Putman v. Wenatchee Valley Medical Center, P.S. 166 Wn.2d 974, 979
(2009)..... 7

RCW 4.24.005..... 18

Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998)..... 7

Rickert v. PDC, et al, 161 W.2d. 843, 848 (2007) 9

Right-Price Recreation v. Connels Prarie, 146 W.2d 370, 382 (2002) ... 12

Robel v. Roundup Corp., 148 Wn.2d 35 (2001)..... 10

Rothwell v. Nine Mile Falls School District, 206 P.3d 347(Div. 3 2009) 11

State v. Harner, 153 Wash.2d 228, 235 (2004)..... 9

Travis v. Washington Horse Breeders Ass’n, 111 Wn.2d. 396, 410-411
(1988).....15, 16

*Wash. State Republican Party v. Wash. State Pub. Disclosure
Comm'n*, 141 Wash.2d 245 (2000)..... 10

Woody v. Stapp, 189 P.3d 807 (Div.3 2008)..... 11

STATUTES

RCW 4.24.510..... 1, 4, 5, 9, 10, 15, 17, 18, 19, 20
RCW 4.96.020..... 1, 5, 6, 12, 13, 14, 15, 17, 18, 20

OTHER AUTHORITIES

Laws of 1967, ch. 164, §§ 1, 4..... 14
RPC 1.5(a)..... 18

CONSTITUTIONAL PROVISIONS

Washington State Constitution, Article 2, Section 26..... 14
Washington State Constitution, Article 1, Section 12..... 5, 10, 11, 14, 15

ARTICLES

George W. Pring & Penelope Canan, *SLAPPS: Getting Sued for Speaking
Out* 8-9 (1996)..... 12

A. ASSIGNMENTS OF ERROR

The trial court erred in deciding that:

1. RCW 4.24.510 was not unconstitutional as applied in this case;
2. RCW 4.96.020 was not unconstitutional as applied in this case; and
3. The amount of defendants' attorney fee request was reasonable and defendants had properly segregated their attorney fees.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is RCW 4.24.510 unconstitutional as applied where individual employees of a governmental body use the statute as a shield for their individual benefit to prohibit a co-employee's access to justice in an employment law dispute?
2. Is RCW 4.96.020 unconstitutional as applied where individual employees of a governmental body use the statute as a shield for their individual benefit to prohibit a co-employee's access to justice in an employment law dispute?
3. Did defendants in the trial court (respondents here) fail to properly segregate their attorney fees claims thereby resulting in an improper award of attorney fees at the trial court level and was the amount of the fee request reasonable?

C. STATEMENT OF THE CASE

Appellant Roger Skinner served the City of Medina as a respected member of its police department for over 15 years, rising to the rank of lieutenant. Roger Skinner served the City and its citizens faithfully for over a decade and a half, during which time he consistently received “exceeds standards” in performance appraisals. CP 43-44.

Defendant Jeffrey Chen became Chief of Police at Medina in 2004. CP 142. At that time Skinner had served the City of Medina for over thirteen years. Despite Skinner’s exemplary performance over a period of fifteen years, he was abruptly terminated by City of Medina Police Chief Jeffrey Chen on February 15, 2006. CP 43-44.

Skinner believes the termination was based, in part, in retaliation for Skinner’s disclosure of improper remarks made by the Chief of Police and Skinner’s knowledge of the Chief Chen’s history of dishonesty. CP 43-44, 51. Defendant Jeffrey Chen, the Medina Chief of Police has a prior history of dishonesty as evidenced by documents obtained from the Seattle Police Department. While employed by the Seattle Police, Medina Police Chief Chen filed an expense report seeking reimbursement for hundreds of dollars in hotel charges that he had not actually incurred. CP 51, 55-58.

The termination of Skinner's employment was also based, in part, on statements made against Skinner, by Skinner's co-employees, alleging that Skinner made certain improper comments. Skinner contends that he was mis-quoted and that any statements made by him were mis-construed. CP 51. He also believes that the individuals making these statements were improperly motivated by the Chief of Police who approved performance awards to those individuals after they provided statements supporting the termination of Skinner's employment. CP 51-53, 59.

In addition to receiving performance awards after providing statements to the Chief of Police, certain of the individual defendants have testified as to their personal interest in making such statements. For example, defendant Briana Beckley testified that she was personally "disheartened" and that the termination of Skinner's employment was based, in part, on the complaint she filed against him. CP133-134. Linda Crum, another individual defendant testified that she was "disturbed and hurt." CP 122. These comments further indicate that the individual defendants were motivated, at least in part, by their own self-interests as co-employees of Roger Skinner.

Based in part on the statements by Skinner's co-employees, motivated by those individual's self-interest, statements made both prior to

and during a Civil Service Commission hearing, the City's Civil Service Commission entered a decision upholding the termination of Skinner's employment on September 1, 2006. CP 146.

Skinner thereafter filed suit against certain of the co-employees alleging, among other things, that his co-employees were liable for negligent infliction of emotional distress. CP 1-10.

The individual defendants filed for summary judgment arguing that they were immune from suit under RCW 4.24.510 and 4.96.020. CP 19-42. The trial court entered summary judgment in favor of the individual defendants. CP 73-75.

Thereafter the trial court awarded statutory damages to the individual defendants pursuant to RCW 4.24.510. CP 198-199.

Later, the trial court awarded attorneys fees pursuant to the same statute despite the fact that the defendants had not properly segregated their attorney fees as required by law and that the fees requested by the defendants were not reasonable. The trial court simply handwrote in its order "the ct (sic) reviewed all of the billing statements submitted + (sic) finds that the amounts requested are reasonable + (sic) that the claims have been segregated. The rate is consistent with that of comparable attorneys in the Puget Sound area." CP 337.

D. SUMMARY OF ARGUMENT

RCW 4.24.510 was enacted to protect the right of citizens to communicate with their government. The law is commonly known as the anti-SLAPP statute where SLAPP stands for Strategic Lawsuits Against Public Participation. In the case at hand there is no issue of public participation in the governmental process. The case merely presents the issue of whether an employee can file a lawsuit against a co-employee alleging a tort claim.

The Washington State Constitution, Article I, Section 12, prohibits granting any class of citizens (here, employees who happen to work for a governmental body) any privilege or immunity not afforded to citizens not in that class (i.e., employees of private employers). In this case, RCW 4.24.510 was unconstitutionally applied to provide immunity to the defendants in this case from lawsuits, immunity not available to other citizens of this state, thereby eliminating Skinner's access to justice in this matter. As access to justice is a fundamental right in this state, a strict scrutiny analysis of the statute's constitutionality is applicable.

RCW 4.96.020 is similarly unconstitutional as applied. That statute provides that any lawsuits against government entities must be preceded by a 60-day notice of claim filed with the government. The statute has been found constitutional because, according to precedent of

this state's courts, a government is immune from suit as a sovereign power and can therefore regulate the extent to which it can be sued.

RCW 4.96.020 has been extended by the legislature to include government employees in their capacity as representatives of the government. In this case however, the matter of underlying sovereignty does not exist with respect to the individual defendants acting for their own self-interest – they have no foundation of sovereign immunity to serve as the basis for the restrictions imposed by RCW 4.96.020. Thus the analysis underlying the Washington courts's prior analysis of the constitutionality of RCW 4.96.020 is inapplicable to the individual defendants in this case, given the facts of this case. Again, the decision of the trial court provides an unconstitutional privilege to the individual defendants in this case that is not available to other citizens of this state.

Finally, the defendants failed to properly segregate their claim for attorney fees and, therefore, the trial court erred (despite the boilerplate language added by the trial court) in simply awarding fees to the defendants without specific findings as required by law. Furthermore, the amount of fees sought by defendants, and awarded by the trail court was unreasonable.

E. ARGUMENT

An order by the trial court, granting summary judgment, is reviewed *de novo* by the appellate court, which engages in the same inquiry as the trial court. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). In reviewing a summary judgment decision, the appellate court draws all reasonable inferences from the facts in the light most favorable to the nonmoving party, in this case Appellant Skinner. *McConiga v. Riches*, 40 Wn. App. 532, 536, 700 P.2d 331 (1985).

1. ACCESS TO JUSTICE IS A FUNDAMENTAL RIGHT UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON AND THE CONSTITUTION OF THE UNITED STATES

The Supreme Court of the State of Washington has repeatedly held that access to justice is a fundamental right. “The people have a right of access to courts; indeed it is **‘the bedrock foundation** upon which rests all the people’s rights and obligations” *Putman v. Wenatchee Valley Medical Center, P.S.* 166 Wn.2d 974, 979 (2009) (emphasis added), citing *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772,780 (1991).

This holding is in accord with the holding of the United States Supreme Court in *Marbury v. Madison* regarding the U.S. Constitution

The very essence of civil liberty certainly consists in the

right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

The right to be compensated for personal injuries has been held to be a substantial and fundamental right under the Constitution of the State of Washington as well. *Hunter v. North Mason High School*, 85 Wn.2d 810, 814 – 815 (1975).

2. A STRICT SCRUTINY STANDARD IS APPLICABLE WHEN ANALYZING STATUTES THAT IMPAIR FUNDAMENTAL RIGHTS

Strict scrutiny analysis is required where a fundamental right is burdened by the challenged law. *State v. Harner*, 153 Wash.2d 228, 235 (2004). Strict scrutiny analysis requires that the challenged statute 'is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' *Rickert v. PDC, et al*, 161 W.2d. 843, 848 (2007) citing *Burson v. Freeman*, 504 U.S. 191,198, 112 S.Ct. 1846 (1992) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed. 2d 794 (1983)).

3. RCW 4.24.510 IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE AND CANNOT SERVE AS A BASIS FOR DISMISSAL OF SKINNER’S CLAIMS

RCW 4.24.510 is part of Chapter 24 of Title 4 of the Revised Code of Washington. Chapter 24 is entitled “Special Rights of Action and Special Immunities.”

The relevant text of RCW 4.24.510 is as follows:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, **is immune** from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization . . .
(emphasis added)

The full text of Article I, Section 12 of the Washington State Constitution is as follows:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or **immunities** which upon the same terms shall not equally belong to all citizens, or corporations.

RCW 4.24.510 does not appear subject to a facial constitutional challenge in that its language purports to apply equally to all citizens. However, in the context of an employment dispute among government employees, the statute is unconstitutional as applied.

The Washington State Supreme Court has held:

An “as applied” challenge to the constitutional validity of a statute is characterized by a party’s allegation that the application of the statute in the specific context of the party’s actions or intended actions is unconstitutional. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 141 Wash.2d 245 (2000). Holding a statute unconstitutional as applied, prohibits future application of the statute of the statute in a similar context but the statute is not totally invalidated.

City of Redmond v. Moore, 151 Wn.2d 664, 668-9 (2004).

The Supreme Court has recognized that private corporations are not immune from civil actions for negligent infliction of emotional distress or defamation, arising out of employment matters. See *Robel v. Roundup Corp.*, 148 Wn.2d 35 (2001). Likewise, co-employees may be held liable for negligent infliction of emotional distress. See *Rothwell v. Nine Mile Falls School District*, 206 P.3d 347(Div. 3 2009) and *Woody v. Stapp*, 189 P.3d 807 (Div.3 2008)(re co-employee liability for defamation).

In the case at hand, the individual defendants are claiming immunity for statements they made as co-employees of Mr. Skinner. If these same defendants were not employees of the City of Medina, but were employees of a private corporation, they would not enjoy such immunity. The defendants are claiming a special immunity under RCW Title 4, Chapter 24, entitled “Special Rights of Action and Special Immunities.”

Article I, Section 12 of the Washington State Constitution expressly prohibits granting immunities to a class of citizens (in this case, government employee) which upon the same terms shall not belong equally to all citizens (employees of private corporations, for example). Because employees of private corporations are subject to suit for negligent infliction of emotional stress (and other claims based in tort) so must the employees of government entities be subject to those types of lawsuits.

The statute, as applied, does not serve a compelling government interest as is required under the strict scrutiny standard. While there may be compelling interest in ensuring public participation in governmental affairs (the reason the statute was enacted) there is no compelling governmental interest in protecting individual governmental employees who negligently inflict emotional distress upon co-employees.

In fact, the Washington Supreme Court has noted that the immunity provided by RCW 4.25.510, arises from communications made which result “in (a) a civil complaint or counterclaim (b) filed against non-governmental individuals or organizations . . . on (c) a substantive issue of some public interest or social significance.” (emphasis added) *Right-Price Recreation v. Connells Prarie*, 146 W.2d 370, 382 (2002) (quoting George W. Pring & Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* 8-9 (1996)). Holding that the statute was inapplicable for other reasons, the Washington State Court of Appeals nevertheless adopted this language in *D.W. Close Co. v. L&I*, 143 Wn.App.118, 137 (Div. 1 2008). Under these cases, the statute protects non-governmental individuals but affords no immunity to governmental defendants, as is the case here.

Furthermore, the statute is not narrowly tailored. If the government's interest is in protecting its citizens' right to public participation in governmental affairs, the statute could have set forth requirements that defendants must meet in order to gain the immunity allegedly offered by the statute. For instance, the immunity could have been made available only in defined instances, such as comments submitted to governments in connection with permit or license applications or other instances involving citizens' participation in a public process. The statute is not narrowly tailored in this or any other manner and therefore does not survive strict scrutiny review.

**4. RCW 4.96.020 IS UNCONSTITUTIONAL AS APPLIED
IN THIS CASE AND CANNOT SERVE AS A BASIS
FOR DISMISSAL OF SKINNER'S CLAIMS**

Similarly, RCW 4.96.020 purports to provide favored treatment to government employees as compared to employees of private corporations.

The relevant text of RCW 4.96.020 provides:

(1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity.

.

(4) No action shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period. (*emphasis added*).

In this case, the statute does not provide an absolute immunity from suit although it does provide what might be considered a sixty-day immunity. The statute does unquestionably provide government employees with a privilege not afforded to employees of private corporations. That is, the statute purports to allow the class of citizens that are government employees a sixty day advance notice of a lawsuit. There is no such privilege available to the class of citizens that are employees of private companies.

Certain prior cases have upheld the constitutionality of RCW 4.96.020 with respect to governmental bodies, noting that governmental bodies are immune as sovereign powers and therefore can regulate the manner in which they are sued.

The Washington Legislature waived sovereign immunity as to the political subdivisions of the State and its municipalities in 1967. See Laws of 1967, ch. 164, §§ 1, 4. Thus, the right to bring suit was created by statute and is not a fundamental right. See *O'Donoghue v. State*, 66 Wash.2d 787, 405 P.2d 258 (1965) (since the State, as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon that right). The Washington State Constitution specifically reserves the right of the legislature to regulate law suits against governmental entities by providing that the legislature "shall direct by law, in what manner, and in what courts, suits may be brought against the state." Washington State Constitution Art. 2, Section 26

Medina v. PUD 1 of Benton County, 147 Wn.2d 303, 312 (2002) .

The above analysis supports the constitutionality of RCW 4.96.020 with respect to government entities. It fails however to provide any basis to provide such privileges to individuals who are acting for their own benefit. Such individuals have no foundation of sovereign immunity upon which to base their claim for the privilege afforded by RCW 4.96.020.

Again, Article I, Section 12 of the Washington State Constitution provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

The privilege purportedly afforded by RCW 4.96.020 to government employees acting for their own benefit is in direct violation of Article I, Section 12 of the Washington State Constitution. Therefore RCW 4.96.020 cannot be the basis for dismissal of Mr. Skinner's claims against the individual government employees in this matter. The Defendants' Motion for Summary Judgment, with respect to the individual defendants, based on RCW 4.96.020 should have been denied using the same constitutional analysis as discussed above with respect to RCW 4.24.510

5. THE DEFENDANTS' ATTORNEY FEES REQUEST WAS NOT PROPERLY SEGREGATED AND WAS NOT REASONABLE

In cases where multiple claims are presented, the burden is on the prevailing party to segregate the amount of fees associated with the claims for which it is entitled to attorney fees, from those fees associated with claims for which attorneys fees are not recoverable.

If, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. *Loeffelholz v. Citizens for Leaders With Ethics & Accountability Now*, 119 Wn.App. 665, 691 (Div. 2 2004) citing *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450 (1991); *Travis v. Washington Horse Breeders Ass'n*, 111 Wn.2d. 396, 410-411 (1988); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66 (1987); *Nordstrom v. Tampourlos*, 107 Wn.2d. 735, 744 (1987); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50 (1986); *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483 (1993).

[T]he court must separate the time spent on those theories essential to [the cause of action for which attorney fees are properly awarded] and the time spent on legal theories relating to other causes of action . . . This must include, on the record, a segregation of the time allowed for the [separate] legal theories . . . *Id.* citing *Travis*, 111 Wn.2d at 411. (emphasis added)

The segregation must be quantified; it cannot be simply an arbitrary portion of the total amount of fees incurred. In *Loeffelholz*, the prevailing party originally sought attorney fees in the amount of \$98,105.50. 119 Wn.App. at 689. The trial court requested a segregation

and the prevailing party submitted a new request for \$77,627.50. Id. The Appellate Court noted the prevailing party's reduced request but held:

[W]e hold that the trial court was required to “include, on the record, a segregation of the time allowed for the separate legal theories.” It failed to do that, and thus abused its discretion. As a result, the award made here was arbitrary and not supported by the record . . . If the defendants fail or refuse to segregate, the trial court shall deny fees.
Id. at 692. (emphasis added)

Division 1 of the Appellate Court has held that no segregation is required only where the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made. *Pannell v. Food Servs. Of Am.*, 61 Wn.App. 418, 447 (Div. 1 1991) review denied 118 Wn.2d. 1008 (1992).

Furthermore, the express language of RCW 4.24.510 requires that any fees awarded must be reasonable.

a. The Fee Request Has Not Been Properly Segregated

Defendants have failed to properly segregate their fees and therefore are not entitled to an award of attorney fees. Defendants counsel made only a conclusory and arbitrary statement in her declaration that defendants were seeking \$27,024.30 in fees while their total cost of defense was \$38,895.70. (Interestingly, although her declaration claims

total fees of \$38,895.70, the fee statements attached to her declaration show total fees of only \$37,680.70.). CP 223,225-249, 254.

In addition to the claims presented under RCW 4.24.510, defendants also made claims under RCW 4.96.020. This court's order of October 16, 2009 (CP 73-75) states:

IT IS HEREBY ORDERED that Defendants Beckley, Crum, Schulze, Yourkoski and Chen are entitled to immunity under RCW 4.25.510 and their motion for Summary Judgment is GRANTED and all claims against these defendants are dismissed with prejudice.

IT IS FURTHER ORDERED that Defendants Beckley, Crum, Yourkoski and Schulze's Motion for Summary Judgment based on RCW 4.96.020 is GRANTED.

IT IS FURTHER ORDERED that Defendants City of Medina and Chen's Motion for Summary Judgment based on RCW 4.96.020 is GRANTED.

Thus, of the three bases for Summary Judgment, only one provided a basis for an award of attorney fees yet there was no segregated accounting for the fees associated with the RCW 4.96.020 counterclaim.

Furthermore, defendants also were pursuing another counterclaim for malicious prosecution which they maintained until January 21, 2010. There is no segregated accounting for the fees associated with that counterclaim.

Defendants' failed to segregate their fees related to the RCW 4.96.020 counterclaim and the malicious prosecution counterclaim. The

arbitrary request for \$27,024.30 does not provide the quantified segregation necessary for this court to make an award of attorney fees.

b. The Fees Requested Are Not Reasonable

The factors affecting the reasonableness of attorney fees are set forth in RCW 4.24.005 and RPC 1.5(a). These factors include, among other things, the time and labor involved (subsection 1) and the ability of the lawyer (subsection 7). In this case, defendants claimed immunity under RCW 4.24.510. All that was required under the statute was a motion to dismiss yet defendants requested and were awarded substantial attorney fees unrelated to the motion to dismiss.

The fee invoices submitted by defendants indicate charges that seemingly do not relate to defendant's RCW 4.24.510 counterclaim. For instance, there are charges for telephone calls to lawyers in other firms who are not part of this litigation (Greg Rubstello, Michael Tomkins). Calls are also shown to Jason Barney and Ann Bennett with no discussion of who these individuals are or why such calls are reasonably related to the RCW 4.24.510 dismissal. There are charges in the fee invoices related to Defendants Motion for Disclosure of Physical Address, which motion was ill-conceived and later withdrawn by defendants' counsel and has no relation to RCW 4.24.510. There is also billing related to telephone call(s) with Donna Hanson although she is not a defendant in this case. There is

a 4.2 hour charge on August 19, 2009 and another 1.2 hour charge on August 20, 2009, for the review of the transcript of the civil service commission hearing held in 2006, although that hearing has no relevance to the RCW 4.24.510 counterclaim filed by defendants. All in all, defendants have simply provided a pack of invoices to the court with no explanation as to their relevance. CP 225-249.

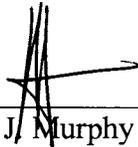
That the trial court simply accepted the invoiced amounts as reasonable and assumed all invoiced amounts were related to the RCW 4.24.510 dismissal and did not provide on the record a segregation of the time spent on other issues in this case is an abuse of discretion. For this reason, Skinner respectfully requests this court to reverse the trial court's decision regarding attorney fees.

F. CONCLUSION

RCW 4.24.510, as applied in this case, is unconstitutional and cannot support the trial court's summary judgment dismissal of Skinner's claims against the defendants. Likewise, RCW 4.96.020, as applied in this case, is unconstitutional and cannot support the trial court's summary judgment dismissal of Skinner's claims against the defendants. Finally, the amount of attorney fees requested by defendants was unreasonable; and the defendants and the trial court failed to properly segregate the

defendants' attorney fee requests on the record and therefore the trial court's award of attorney fees was an abuse of discretion.

Respectfully submitted this 23rd day of March, 2010



William J. Murphy
WSBA No. 19002
Attorney for Appellant