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No. 67864-7-I  
COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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SUZANNE L. WEINSTOCK,

Appellant,

v.

ALAMO RENTAL (US), INC., et al.,

Respondents.

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BRIEF OF APPELLANTS

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## A. INTRODUCTION

This appeal concerns the scope of the immunity provided against strategic lawsuits against public participation, or SLAPP suits, under Washington's anti-SLAPP statutes, RCW 4.24.500 – RCW 4.24.525, as well as limits on the monetary relief provided under those statutes.

On November 24, 2008, Respondent Alamo Rental (US), Inc. (Alamo) filed a stolen vehicle report with the Port of Seattle Police Department. In the report, Alamo told the police department that Appellant Suzanne L. Weinstock, who had rented a car from Alamo, was in possession of the car six weeks after it was due back, and that Alamo had tried, unsuccessfully, to contact Weinstock. Alamo knew that both of these allegations were false and misleading. Weinstock was arrested, incarcerated and charged with possession of stolen property. Eventually, all charges were dropped.

Weinstock brought a civil action against Alamo and two of its employees. Alamo filed a motion for summary judgment dismissal of Weinstock's lawsuit, arguing that it, and its employees, enjoy an absolute immunity against Weinstock's civil claims under the anti-SLAPP statutes. The trial court granted Alamo's motion. Later, the trial court awarded Alamo statutory damages of \$10,000.00, and \$39,149.90 in litigation expenses and attorneys' fees.

## **B. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

No. 1. The trial court erred in finding that Alamo's communication to the Port of Seattle Police Department is immune from civil suit pursuant to RCW 4.24.500 and RCW 4.24.510.

No. 2. The trial court erred in finding that all of Weinstock's claims arise from Alamo's communication to the Port of Seattle Police Department.

No. 3. Under the facts and circumstances of this case, the trial court erred in awarding \$10,000.00 in damages to Alamo despite the fact that the stolen car report that Alamo filed with the Port of Seattle Police Department was, to Alamo's knowledge, false and misleading.

No. 4. The trial court erred in finding that Alamo incurred \$39,149.90 in expenses and reasonable attorneys' fees in establishing the defense under RCW 4.24.510.

### **Issues Pertaining to Assignments of Error**

No. 1: Does RCW 4.24.510 provide absolute immunity against civil liability for claims based on communications that are not constitutionally-protected speech or petition? (Assignment of Error No. 1.)

No. 2: Does RCW 4.24.510 provide absolute immunity against

civil liability for claims that are not a sham? (Assignment of Error No. 1.)

No. 3: Are Weinstock's claims for outrage and violation of the Consumer Protection Act based upon the stolen car report filed with the Port of Seattle Police Department? (Assignment of Error No. 2.)

No. 4: Did the trial court abuse its discretion in awarding damages to Alamo despite the fact that Alamo knew that the stolen car report it filed with the Port of Seattle Police Department falsely and misleadingly reported that the car was six weeks overdue and that Alamo had tried, unsuccessfully, to contact Weinstock? (Assignment of Error No. 3.)

No. 5: Did the trial court abuse its discretion in awarding expenses and attorneys' fees without segregating those expenses and fees incurred in establishing the defense under RCW 4.24.510 from other expenses and fees in the case? (Assignment of Error No. 4.)

### **C. STATEMENT OF THE CASE**

#### **RELEVANT FACTS<sup>1</sup>**

This is an appeal from a summary judgment dismissal of Weinstock's lawsuit against Alamo. The procedure before the trial court

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<sup>1</sup> The trial court observed: "So, I don't have to get into the, to the facts of the case and because there is clearly factual dispute. But I am satisfied that as a matter of law the statute applies and therefore the motion by the defendants is well taken." RP p. 19, line 23 – p. 20, line 1. Since the trial court was deciding a motion on summary judgment, it "must view all facts and reasonable inferences in the light most favorable to the nonmoving party." *Hisle v. Todd Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citations omitted). Therefore, this statement of facts will describe the facts in the light most favorable to Weinstock, the nonmoving party, based on the record before the trial court.

will be discussed in more detail below.

On October 6, 2008, Weinstock rented a car from Alamo at its SeaTac location. Previously, she had spoken with Larry Peterson, an Alamo manager, and had told him she would need the car for several weeks, and requested that she be able to pay by check. Weinstock and Peterson agreed that Weinstock would pay the first week's charges with a credit card, and that Peterson could then authorize extensions on the rental which Weinstock would pay for by check when she returned the car. Peterson provided Weinstock with his company cell phone number. CP 58.

One week later, on October 13, 2008, Weinstock called Peterson's cell phone. The phone was answered by a woman, with whom Weinstock left a message for Peterson confirming that she was extending the rental for a few more weeks, as they had previously arranged. CP 59.

Three weeks later, on November 3, 2008, Weinstock tried to call Alamo's SeaTac counter to extend the rental another two weeks, but no one answered the phone. She called Alamo's customer service desk, and spoke with a manager who told Weinstock she would have the SeaTac facility process Weinstock's extension. CP 60.

Two weeks later, on November 14, 2008, Weinstock called Alamo's SeaTac counter and spoke with Peterson. Weinstock told

Peterson that she would be dropping off the car in Connecticut that night or the next morning. Peterson told her she might have trouble returning the car to another Alamo facility because there was no record of his agreement to accept payment by check or of the rental extensions. Peterson told Weinstock he wanted her to return the car to SeaTac. He asked how long it would take her to drive back to SeaTac. Weinstock replied that it would take her at least one week, but that the weather would be the determining factor, as she had heard that it had begun snowing along Interstates 90 and 94, which would be her route. Weinstock gave Peterson her cell phone number. Peterson told Weinstock that he would call her on November 21 if she had not yet arrived at SeaTac, to find out her location. CP 60.

Peterson entered notes of this conversation in Alamo's computer system, stating:

Spoke with Suzanne Weinstock and she informed me that she has our car in Connecticut. She also informed me that she spoke with someone in our corporate customer service department about extending the car for another month, and the persn [sic] she spoke with said that was fine. I informed Susan [sic] that the card she is using is not going through, and that I wanted our vehicle back. She said she would bring it back asap, and that it would take about a week to get here. I informed her that we want it back by the 21<sup>st</sup> of November She said she would call me on the 20<sup>th</sup> to let me know when she would be arriving on the 21<sup>st</sup>. I also informed her that I would need cash in order to close the bill, a check would not be acceptable.

CP 31 – CP 32.

Marvin Bryant, also an Alamo employee, reports having spoken with Weinstock on November 14, 2008 as well. According to Bryant's notes of that conversation: "Cust called & said she was in Connecticut & needed the car longer. Cust was advised til 11/21 & no further extensions due to CC issues". CP 48. In his deposition, Bryant testified: "I gave her a week to – because of being on the East Coast, I told her – I says, 'I need to have the car back by the 21<sup>st</sup>.'" CP 38.

Weinstock drove across country to return the car to Alamo's SeaTac location. On November 20, 2008, she called the SeaTac counter from Bismarck, North Dakota, and spoke with an agent. Weinstock asked to speak with Peterson, but was told that Peterson was in a meeting and could not be interrupted. Weinstock told the agent that she was encountering hazardous winter weather conditions, and would not be able to return the car by November 21. Weinstock expressed a willingness to drop the car off in Bismarck, but the agent told her not to do so, and to continue onto SeaTac. The agent told Weinstock to take her time, and to drive safely. She also said that Peterson would call her if there were any problems. Weinstock never heard back from Peterson or anyone else at Alamo. CP 61.

On November 23, 2008, Bryant obtained authority from his

supervisor to report the rental car as stolen. CP 39 – CP 40. On November 24, 2008, Alamo – through Bryant – filed the report with the Port of Seattle Police Department. Bryant certified that he was Alamo’s lawful representative, and had Alamo’s authority to file the report and bind Alamo to the report. In the report, Alamo stated that the car had been due back on October 13, 2008 – six weeks earlier, and checked a box indicating that it had tried to contact Weinstock by telephone, but had been unable to do so because there was “no answer”. Bryant agreed to testify against Weinstock in criminal proceedings. CP 57. Bryant understood that by filing this report, the information would go out “that it was being reported as a stolen vehicle, failure to return a car rental.” CP 43.

On November 24, 2008, when Alamo reported that the car was six weeks overdue, and that it had tried, unsuccessfully, to contact Weinstock, Bryant (who had extended the rental to November 21) considered the car to actually be three days overdue. CP 43. The agent with whom Weinstock spoke on November 21 had told her to take her time returning the car and to drive safely. CP 61. As for communication between Alamo and Weinstock, as the above discussion of the record before the trial court shows, Weinstock had spoken with Alamo employees on several occasions between October 6 and November 20.

Even as Weinstock was driving the car back to Alamo's SeaTac facility, Alamo filed the stolen car report because, as Bryant testified at his deposition, he "felt that I had given her quite [sic] a bit of latitude, and she wasn't making any effort to get the car back when – when she was asked, the date she was asked to bring it back on." CP 45. Bryant clarified: "Well, it was an effort, but she still – she didn't meet the timeframe that was agreed upon." CP 46. Although Alamo's computer files stated that Weinstock was expected to call Alamo on November 20, CP 31 – CP 32, before filing the report, Bryant did not ask Peterson or anyone else as to whether they had spoken with Weinstock on November 20. CP 44. Had he done so, he presumably would have learned about the November 20 conversation between Weinstock and the Alamo agent who advised Weinstock to take her time returning the car to SeaTac and to drive safely. CP 61.

On November 25, 2008, Weinstock arrived in western Washington. Before going to SeaTac, she drove to Birch Bay, Whatcom County, where she arranged to have a real estate agent with whom she had been working cash a certified check that her bank would send. The cash would provide Weinstock with funds for her return trip to Connecticut. After meeting with her real estate agent, Weinstock began driving to SeaTac. She stopped at a supermarket in Burlington, Skagit County.

After leaving the supermarket, she was pulled over by a state trooper for a seat belt violation. Shortly after being pulled over, she was placed under arrest by the trooper, handcuffed, and taken to the Skagit County Jail, where she was booked for possession of stolen property. CP 61. She was not released until the following week, and spent the Thanksgiving holiday weekend in jail. CP 62. On January 5, 2012, the criminal charges brought against Weinstock were dismissed with prejudice.<sup>2</sup>

#### **PROCEDURE BELOW**

This matter comes before the Court on appeal from the trial court's summary judgment dismissal of the lawsuit for damages brought by Weinstock against Alamo, Alamo Financing L.P., and two Alamo employees Marvin L. Bryant, and Larry Peterson (collectively referred to as "Alamo"). CP 1 – CP 11. Alamo's motion for summary judgment argued, among other things, that its actions were absolutely privileged under RCW 4.24.510. Defendants' Motion to Dismiss Plaintiff's Complaint, pp. 5-11 (subdoc. # 71, filed Sept. 8, 2011).<sup>3</sup> On October 7, 2011, the motion came before the trial court, which heard oral argument thereon, and granted the motion. CP 63 – CP 64.

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<sup>2</sup> Weinstock asks this Court to take judicial notice of the fact that on January 5, 2012, an order of dismissal with prejudice was entered in *State v. Weinstock* (Skagit County Cause No. 08-1-00933-4). A certified copy of the order accompanies this Brief at Attachment A.

<sup>3</sup> Weinstock has filed a supplemental designation of clerk's papers, which includes the cited document.

Alamo moved for an award of \$10,000.00 in statutory damages, and \$49,755.75 in attorneys' fees. Defendants' Motion for Attorney Fees and Statutory Damages, pp. 1 and 3 (subdoc. # 91, filed Oct. 20, 2011).<sup>4</sup> Alamo's counsel provided redacted billing records to the trial court in support of its motion for attorneys' fees. CP 126 – CP 186. The first entry in those records indicating work on the anti-SLAPP defense was on July 5, 2011. CP 171. On December 6, 2011, trial court awarded Alamo statutory damages in the amount of \$10,000.00, and \$149.90 in expenses and \$39,000.00 in attorney fees. CP 187 – CP 190.

#### **D. SUMMARY OF ARGUMENT**

Washington's anti-SLAPP statutes provide qualified immunity to a person who, in furtherance of his or her constitutional right to free speech or to petition the government, communicates with a government agency on a matter reasonably of concern to that agency. The qualified immunity is a defense against civil liability based on the communication to the extent that the lawsuit alleging such liability is merely a sham.

Immunity under the Anti-SLAPP statutes applies only to claims based on communications to government agencies, and is not a defense against claims, such as for outrage or violations of the Consumer Protection Act, where the gravamen of the claim is not fundamentally

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<sup>4</sup> Weinstock's supplemental designation of clerk's papers includes the cited document.

about a communication.

In this case, even if the anti-SLAPP defense were applicable, no reasonable person would, in addition to dismissing the claims against Alamo, also award Alamo \$10,000.00 in statutory damages, given that Alamo knowingly and recklessly communicated false information to the police department, resulting in Weinstock's arrest and incarceration as well as in criminal proceedings brought against her.

Finally, if the anti-SLAPP defense applies, Alamo is entitled to recover only those litigation expenses and attorneys' fees incurred in establishing the defense.

#### **E. ARGUMENT**

The trial court granted Alamo's motion to dismiss based on its finding that "all Plaintiff's claims arise from Defendants' communications to the Port of Seattle Police Department and that Defendants' communication to the Port of Seattle Police Department is immune from civil suit pursuant to RCW 4.24.500 and 4.24.510." CP 64. The trial court committed error because it misinterpreted the anti-SLAPP statutes in two respects. First, it misinterpreted the statutes by immunizing a communication that does not implicate constitutional rights of free speech or petition. This issue is discussed in this part of Appellant's Brief. Second, the trial court misinterpreted the statutes by treating the immunity

as absolute, rather than as conditional immunity that may be defeated by a showing that the claims are not merely a sham. This second issue is discussed in Part 2 of Appellant's Brief.

Because Weinstock's appeal of the trial court's order dismissing her claims challenges the trial court's interpretation of the anti-SLAPP statutes, review is de novo. *State Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) ("The meaning of a statute is a question of law reviewed de novo."). In ascertaining the meaning of a statute, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10 (citations and internal quotation marks omitted). "[T]he plain meaning ... is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11. This is known as the whole act interpretation method, in which "the entire act must be read together because no part of the act is superior to any other part." 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.02, at 212 (6<sup>th</sup> ed. 2000). "[T]his formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146

Wn.2d at 11-12. In ascertaining a statute’s plain meaning, it is appropriate to consider an uncodified – but enacted – statement of purpose. *In re Personal Restraint of Dalluge*, 162 Wn.2d 814, 819, 177 P.3d 675 (2008).

1. **THE ANTI-SLAPP STATUTES ESTABLISH A QUALIFIED IMMUNITY FOR CONSTITUTIONALLY PROTECTED COMMUNICATIONS**

RCW 4.24.510 provides, in pertinent part, as follows: “A person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency ... regarding any matter reasonably of concern to that agency ....” This is an affirmative defense. *Doe v. Gonzaga University*, 99 Wn. App. 338, 351, 992 P.2d 545 (2000), *aff’d in part and rev’d in part*, 143 Wn.2d 687, 24 P.3d 390 (2001), *rev’d* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). It applies “when a communication to influence a governmental action results ‘in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations ... on (c) a substantive issue of some public interest or social significance.’” *D.W. Close Co., Inc. v. State Dep’t of Labor and Industries*, 143 Wn. App. 118, 137, 177 P.3d 143 (2008), quoting *Right-Price Recreation, LLC v. Connells Prairie Community*

*Council*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002).<sup>5</sup>

The question presented here is whether it was the Legislature's intention to immunize a person for any communication to a governmental agency that relates to the agency's jurisdiction or mission? That is the effect of the trial court's broad interpretation of the statute. But when account is taken for all that the Legislature has said in its anti-SLAPP enactments, it becomes evident that the Legislature's intent was specifically to immunize constitutionally protected communications, that is, communications implicating the right of free speech or petition.

Since 1989, when the Washington Legislature enacted the nation's first anti-SLAPP law, the Legislature has shown that its concern is not with barring legitimate claims brought against true wrongdoers, but rather with claims brought to chill citizens' legitimate communications with their government. First, the purpose of the statutes is not to protect persons who knowingly file false reports, but, rather, it "is to protect individuals

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<sup>5</sup> The source of the *Right-Price Recreation* language quoted in the text is GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996). *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d at 382. It has been said that this language "merely discussed the general characteristics of SLAPP suits and did not address whether the legislature intended to restrict the scope of RCW 4.24.510." *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 374, 85 P.3d 926 (2004). However, shortly before *Right-Price Recreation* was decided, the Legislature used virtually identical language to express its intent: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance." Laws of 2002, chp. 232, § 1.

who make good-faith reports to appropriate governmental bodies.” RCW 4.24.500. Second, the Legislature is not trying to protect every type of communication, but, rather, those addressing “a substantive issue of some public interest or social significance.” Laws of 2002, chp. 232, § 1. Its concern is with “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Laws of 2010, chp. 118, § 1. Applying these legislative statements, enacted over the years as part of the Legislature’s development of the anti-SLAPP statutes, to RCW 4.24.510, the legislative intent is clear to see: immunity against civil liability is provided to persons with respect to their communications with government agencies that are protected by the constitutional guarantees of free speech and the right of petition.

Such a limitation directly addresses the Legislature’s concern with lawsuits aimed at chilling such constitutional rights. It similarly goes to protection of communications addressing issues of public interest or social significance, which certainly are among those protected by the Speech and Petition Clauses. And it accords with RCW 4.24.500’s emphasis on good faith, because “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997,

41 L.Ed.2d 789 (1974), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The state Supreme Court's *Segaline* decision heads in this direction. Although the issue in that case was whether a government agency is a "person" who may assert the defense under RCW 4.24.510, the plurality opinion reached its holding that agencies are not person as follows:

The purpose of the statute is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights under article I, section 5 of the Washington State Constitution. RCW 4.24.510, Historical and Statutory Notes. A government agency does not have free speech rights. It makes little sense to interpret "person" here so that an immunity, which the legislature enacted to protect one's free speech rights, extends to a government agency that has no such rights to protect. L & I is not privy to the RCW 4.24.510 immunity.

*Segaline v. State Dep't of Labor and Industries*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010). Chief Justice Madsen, concurring in the result, concluded that government agencies are not covered by the anti-SLAPP statutes because government agencies are not subject to the same potential intimidation against the exercise of constitutionally-protected communications as individual persons or organizations:

The reason for the immunity, as well as for the attorney fees, costs, and statutory damages, is to remove the threat and burden of civil litigation that would otherwise deter the speaker from communicating. RCW 4.24.500, .510; *see*

Laws of 2002, ch. 232, § 1 (referring to the fact that SLAPP suits are designed to intimidate the exercise of rights under the First Amendment and article I, section 5 of the Washington State Constitution). This intimidation factor does not, in my view, affect government agencies in the way that it does private individuals and organizations, and therefore this reason for the statutes does not apply to government entities as it does to individual persons or private organizations.

*Segaline v. State Dep't of Labor and Industries*, 169 Wn.2d at 482 (Madsen, C.J., concurring).

The trial court considered *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999) controlling in the present case. RP p. 19, line 16 – p. 20, line 2. *Dang*, however, did not address this issue. Rather, the discussion in *Dang* is limited to the question of whether immunity under RCW 4.24.510 applies strictly to the communication, or whether it extends to those actions that led to the communication. *Dang* does not discuss whether such immunity is limited to communications made to influence a government action or outcome on a substantive issue of some public interest or social significance, undoubtedly because the decision predates the 2002 amendments in which the Legislature expressed this intent. Laws of 2002, chp. 232, § 1.

The consequences of the trial court's broad interpretation are significant. For example, the Department of Health is reasonably concerned about the ethics of physicians – does RCW 4.24.510 grant

immunity from civil liability to a person who, with knowing falsity, reports to the Department of Health that a physician sexually assaulted him or her? The Department of Agriculture is reasonably concerned about the safe use of pesticides – does RCW 4.24.510 grant immunity from civil liability to a person who illegally disposes of pesticides on a neighbor’s property, then reports to the Department of Agriculture that the neighbor dumped the pesticides? The Department of Social and Health Services is reasonably concerned about the safety and welfare of children – does RCW 4.24.510 grant immunity from civil liability to a person who, falsely and with malice, reports to the Department of Social and Health Services that a custodial parent is mistreating his or her children? If the only limitation on the scope of immunized communications is that they be reasonably of concern to the agency to which the communication is directed, then the answer in each case is that the person making such communications – despite knowing them to be false – is immunized from civil liability. Moreover, if the wronged individual brings a claim, the true offender (i.e., the person who knowingly communicated false information) will be entitled to recover litigation expenses and attorneys’ fees from the true victim (the person falsely accused) and will possibly be awarded \$10,000 in damages as well.

These wrong-headed results obtain only if RCW 4.24.510 is read

in isolation from the rest of what the Legislature has said about the anti-SLAPP defense. But, as discussed above, the rule in this state is that “the plain meaning of a statute “is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 11. And what the Legislature has said is that its intent is to protect communications addressing “substantive issue[s] of some public interest or social significance” against “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Laws 2002, chp. 232, § 1; Laws 2010, chp. 118, § 1.

**2. THE QUALIFIED IMMUNITY UNDER THE ANTI-SLAPP STATUTES APPLIES ONLY TO SHAM LITIGATION**

In enacting the anti-SLAPP statutes, the Legislature’s objective has been to “protect individuals who make good faith reports to appropriate governmental bodies” and to “[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern ....” RCW 4.24.500; Laws of 2010, chp. 118, § 1. The Legislature’s target has not been legitimate lawsuits that seek redress for actual wrongs, but rather retaliatory litigation meant to intimidate. According to the Legislature, SLAPP suits “are

typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities ....” *Id.* Therefore, the Legislature has authorized a special motion to strike alleged SLAPP claims, but has provided that the person bringing the claim may defeat the special motion by showing by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24.525(4)(b). Thus, even if a lawsuit is based upon a communication for which the anti-SLAPP statutes provide immunity from civil liability, that immunity is qualified in that it does not apply where the lawsuit seeks redress for actual wrongs – at least if the plaintiff can show by clear and convincing evidence a probability of prevailing.

In determining the meaning of the anti-SLAPP statutes, this Court should, if at all possible, read them in a manner that allows them to meet constitutional requirements. *In re Detention of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011) (en banc), quoting *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985) (“[W]henver possible, ‘it is the duty of this court to construe a statute so as to uphold its constitutionality.’”). For the anti-SLAPP statutes to pass constitutional muster, something like RCW 4.24.525(4)(b) is required, because, as discussed below, the First Amendment to the U.S. Constitution protects a person’s right to petition the state courts to redress private wrongs unless the lawsuit is a mere sham

filed for an improper purpose.

“The right of access to the courts is rooted in the petition clause of the First Amendment to the United States Constitution.”<sup>6</sup> *In re Addleman*, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000), citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In addition, article 1, section 4 of the Washington Constitution provides: “The right of petition and of the people peaceably to assemble for the common good shall never be abridged.” Some years ago, the Washington Supreme Court held that this provision is not applicable to the judicial process. *Housing Auth. Of King County v. Saylor*, 87 Wn.2d 732, 742, 557 P.2d 321 (1977). Given *Addleman*’s recognition that the federal Petition Clause guarantees access to the courts, the Supreme Court should revisit the issue to ensure that the state constitution is at least as protective of individual liberties as its federal counterpart. But regardless of the scope of protection under the Washington Constitution, access to the courts clearly is protected under the First Amendment to the federal constitution.

*Addleman* cited *California Motor Transport*, in which the U.S. Supreme Court held that if federal antitrust laws were construed to prevent

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<sup>6</sup> “Congress shall make no law ... abridging ... the right of the people ... to petition the government for a redress of grievances.” U.S. CONST. amend. I.

groups with common interests from bringing lawsuits in the courts, “it would be destructive of rights of association and petition”. *California Motor Transport v. Trucking Unlimited*, 404 U.S. at 510-11. However, this constitutional right may give way where the action “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor ....” *Id.* at 511, quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In other words, as the Court later described its holding:

[W]e recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff’s anticompetitive intent or purpose in doing so, unless the suit was a “mere sham” filed for harassment purposes.

*Bill Johnson’s Restaurants, Inc. v. Nat’l Labor Rel. Bd.*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). In *Bill Johnson’s Restaurants*, the Court applied this rule to lawsuits filed under the National Labor Relations Act, holding: “The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff’s desire to retaliate against the defendant for exercising rights protected by the Act.” *Id.* at 743.

[Although] motivated by a desire to discourage the exercise of NLRA rights, [the restaurant] was asserting in state court a personal interest in its own reputation that was protected by state law. If the Court had upheld the Board in the case, it would have left the employer with no forum in which to pursue a remedy for an actual injury. The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a right of access to the courts for redress of alleged wrongs.

*Sure-Tan, Inc. v. Nat'l Labor Rel. Bd.*, 467 U.S. 883, 897, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) (citations, and internal quotation marks and ellipsis omitted).

As this Court has said: “The constitutional right of access to the courts is a well established facilitative right designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief. The right of access to the courts is implicated where the ability to file suit was delayed, or blocked altogether.” *Musso-Escude v. Edwards*, 101 Wn. App. 560, 566, 4 P.3d 151 (2000) (citations and internal quotation marks omitted).

Here, the trial court’s dismissal of Weinstock’s claims blocked altogether her ability to have the court make a determination on the merits of her claim, and to order the appropriate relief. The effect of the trial court’s action is fundamentally the same as that of the NLRB in *Bill*

*Johnson's Restaurant*, where the Board required the restaurant “to withdraw its state-court complaint and to reimburse the defendants for all their legal expenses in connection with the suit.” *Bill Johnson's Restaurants, Inc. v. Nat'l Labor Rel. Bd.*, 461 U.S. at 737. Weinstock was thereby denied her constitutional right to seek redress from the courts for a meritorious claim.

What constitutes a sham lawsuit in these circumstances? In the antitrust context, a lawsuit is a sham if it meets a two-part definition:

[F]irst, it “must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits”; second, the litigant's subjective motivation must “concea[l] an attempt to interfere *directly* with the business relationships of a competitor ... through the use [of] the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon.” For a suit to violate the antitrust laws, then, it must be a sham *both* objectively and subjectively.

*BE & K Const. Co. v. Nat'l Labor Rel. Bd.*, 536 U.S. 516, 526, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) (emphasis in original), quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). Similarly, in the labor relations context, a lawsuit is a sham if it is a “baseless suit[ ] brought with a retaliatory motive ....” *Id.* at 527.

By analogy, then, for Weinstock's lawsuit to be considered a sham, and therefore not entitled to constitutional protection, it must be both (1)

baseless, and (2) brought for a retaliatory motive. This standard accords with the Legislature's target in the anti-SLAPP statutes, as expressed most recently in 2010, where the Legislature expressed its "concern[ ] about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" which are "typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities ...." Laws of 2010, chp. 118, § 1.

**3. RCW 4.21.510 DOES NOT PROVIDE A DEFENSE AGAINST THE OUTRAGE OR CONSUMER PROTECTION ACT CLAIMS**

RCW 4.24.510 provides immunity from civil liability only with respect to those claims that are based upon a communication to an agency. The trial court dismissed all of Weinstock's claims. CP 64. Not all of those claims, however, are based upon the communication to the agency (i.e., the stolen car report filed with the police department). In dismissing all claims, it may be that the trial court was relying upon *Dang*, to which it referred. RP p. 19, lines 6-11.

Weinstock concedes that *Dang* stands for a broad interpretation of the phrase "immune from civil liability on claims based upon the communication to the agency". This Court, in *Dang*, rejected the

argument that the phrase means “that the bank has immunity only with respect to its call to the police, not its retention of Ms. Dang’s driver’s license and its attempt to keep her in the branch while the police were summoned.” *Dang v. Ehredt*, 95 Wn. App. at 681-82. “A more reasoned interpretation,” said the Court, “and one that is in keeping with the purpose for which the statute was enacted is that the term ‘based upon’ as used in RCW 4.24.510 refers to the starting point or foundation of the claim.” *Id.* at 682. According to *Dang*:

[A]llowing a cause of action for the events surrounding the communication to the police, while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute. ... [N]o meaningful distinction can be drawn between the cause of action based on the bank’s communication to the police and a cause of action based on the method of arriving at the content of the communication.

*Id.* at 683. Division 2 of the Court of Appeals views *Dang* as holding that “immunity under RCW 4.24.510 is not limited solely to communications.” *Segaline v. State Dep’t of Labor and Industries*, 144 Wn. App. 312, 326, 182 P.3d 480 (2008), *aff’d in part and rev’d in part*, 169 Wn.2d 467, 238 P.3d 1107 (2010). Weinstock urges this Court to hold that RCW 4.24.510 does not provide immunity from civil liability for a claim, such as one for outrage or violation of the Consumer Protection Act, where the gravamen, the material part, of the claim is not fundamentally about a

communication, even if, under the particular facts of a given case, such a communication is relevant to the establishment of one or more elements of the claim.

In this case, Weinstock has brought claims against Marvin Bryant and Larry Peterson for outrage.<sup>7</sup> The tort of outrage is not one fundamentally arising out of a communication. “The basic elements of the tort are (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987), citing Restatement (Second) of Torts § 46 (1965). Several courts have held that causing a person to be wrongfully arrested and imprisoned may form the basis for the tort of outrage. *See, e.g., Foster v. Trentham’s, Inc.*, 458 F.Supp. 1382, 1383-84 (E.D. Tenn. 1978) (applying Tennessee law) (“The alleged institution of unwarranted criminal proceedings certainly must be considered a false ‘public imputation of dishonesty’. Accordingly, this complaint does sufficiently allege a course of conduct on the part of the defendant which could be characterized as outrageous.”); *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, 593-94, 595 P.2d 975, 983 (Cal. 1979), *abrogated by statute as to matters not relevant*

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<sup>7</sup> To the extent that Weinstock’s claim for outrage is not subject to a defense under RCW 4.24.510, likewise her claim of Alamo’s agency liability is not subject to that defense.

here, Calif. Penal Code § 70(c)(2) (allegations that defendant arrested plaintiff “either with knowledge that plaintiff had not committed any offense or with reckless disregard for whether he had or not” is sufficient to make out a claim for intentional infliction of emotional distress). Presumably, the arrest must be wrongful; however, the presence of probable cause for an arrest is not a complete defense. *Fondgren v. Klickitat County*, 79 Wn.App. 850, 861, 905 P.2d 928 (1995). An appellate court in Georgia, reviewing a case with facts strikingly similar to those here, held that –

– a rational and impartial jury could decide that it is both atrocious and utterly intolerable in a civilized society for the lessor of a valuable motor vehicle to demand the arrest of its lessee for conversion, simply because the lessee did not return the vehicle to the designated place at the designated time and did not return to claim a cash deposit, where, as in this case, the lessor has imputed knowledge of all the additional and extenuating circumstances as reported by Fleming to the 1-800 operator. The trial court erred in concluding as a matter of law that the facts authorized by this record do not rise to the requisite level of outrage and egregiousness in character, and extremity in degree, that no reasonable person is expected to endure.

*Fleming v. U-Haul Company of Georgia*, 246 Ga.App. 681, 685, 541 S.E.2d 75, 80 (Ga. App. 2000).

Nor is Weinstock’s claim against Alamo for violation of the Consumer Protection Act based on the communication to the police department. A private plaintiff establishes a Consumer Protection Act

violation by showing five elements: “(1) an unfair or deceptive act or practice; (2) occurring within trade or business; (3) affecting the public interest; (4) injuring plaintiff’s business or property; and (5) a cause relation between the deceptive act and the resulting injury.” *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn.App. 104, 113, 22 P.3d 818 (2001).

Even if this Court holds that RCW 4.24.510 immunizes Alamo from liability for the defamation and invasion of privacy claims, it should reverse the trial court’s dismissal of the claims against Bryant and Peterson for outrage (and the accompanying claim against Alamo for agency liability), as well as the claim against Alamo for violation of the Consumer Protection Act.

**4. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING DAMAGES DESPITE ALAMO’S BAD FAITH<sup>8</sup>**

RCW 4.24.510 provides: “A person prevailing upon the defense provided for in this section ... shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.” At least in the context of alleged defamation, this requires a “show[ing] by clear and

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<sup>8</sup> If this Court holds, as argued above, that, under the circumstances of this case, Alamo does not qualify for the defense under RCW 4.24.510, then Alamo is entitled to neither the statutory damages nor the expenses and attorneys’ fees authorized under that statute. In that case, the trial court’s award of damages, and expenses and attorneys’ fees, should simply be reversed for that reason, and the Court need not further consider Weinstock’s arguments under this Part or Part 5 of Appellant’s Brief.

convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence, that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.” *Gilman v. MacDonald*, 74 Wn. App. 733, 738-39, 875 P.2d 697 (1994).

On November 23, 2008, Marvin Bryant sought, and obtained, permission from his supervisor to file a stolen car report on the rental car in Weinstock’s possession. CP 96 – CP 97; CP 112. The report was filed on November 24, 2008 with the Port of Seattle Police Department; with Bryant certifying, under penalty of perjury, that the contents thereof are true and correct, and agreeing “to testify as a witness against the defendant when he/she is charged with a crime.” CP 114.

In the report, Alamo alleged that Weinstock had failed to return a vehicle that was due back on October 13, 2008. CP 114. This would make it six weeks overdue. But Bryant – and, by extension, Alamo – knew this to be a false statement. Bryant admitted that on November 24, 2008, when he reported the car stolen, the car was at that point only three days late. CP 100. The record shows that Bryant says he extended the rental period to November 21. In his deposition, he testified: “I gave her a week to – because of being on the East Coast, I told her – I says, ‘I need to have the car back by the 21<sup>st</sup>.’” CP 94 – CP 95. Three days late is a far cry

from the six weeks that Alamo reported to the police department. Moreover, Bryant knew that Weinstock was driving the car back to SeaTac. He reported the car stolen, however, because “she didn’t meet the timeframe that was agreed upon.” CP 102 – CP 103.

In the report filed with the police department, Bryant checked a box indicating that Alamo had attempted to contact Weinstock by telephone, but that there had been no answer. CP 114. Again, Bryant – and Alamo – knew this statement to be false, or, at least, materially misleading. As discussed above, Bryant himself had spoken to Weinstock when he extended the lease to November 21. In addition, on November 14, 2008, Larry Peterson recorded that he had spoken with Weinstock, and told her to return the car. His notes entered in an Alamo computer file states: “I informed her that we want it back by the 21<sup>st</sup> of November. She said she would call me on the 20<sup>th</sup> to let me know when she would arrive on the 21<sup>st</sup>.” CP 88 – CP 89. Although this information was in Alamo’s computer file on the Weinstock rental, Bryant made no effort to determine whether or not Weinstock had spoken to Peterson – or anyone else at Alamo – on November 20, 2008. CP 101. Had he done so, he presumably would have learned that on November 20, Weinstock had called Alamo and asked to speak with Peterson. Learning that Peterson was in a meeting and could not be interrupted, Weinstock explained that she was in

Bismarck, North Dakota, was experiencing hazardous weather condition, and would not be able to return the vehicle by November 21. Weinstock offered to drop the car off at the nearest Alamo facility, but she was told to continue onto to SeaTac, and to take her time and drive safely. CP 61. Thus, the police department received a stolen car report that said that Alamo had tried to contact Weinstock by telephone, and that left the clear impression that it had not been able to communicate with her, notwithstanding the fact – known to Bryant and Alamo – that there had been repeated telephone conversations between Alamo and Weinstock.

On November 24, 2008, Alamo knew the car was not overdue and it knew it had been in regular communication with Weinstock. Bryant and Peterson had extended the rental to November 21, and the agent with whom Weinstock spoke on November 20<sup>th</sup> told her to continue driving the car to SeaTac, taking the time she needed to drive safely. Still, Alamo reported to the police that the car was six weeks overdue and implied that it had been unable to contact Weinstock. Surely, this constitutes clear and convincing evidence that Bryant and Alamo knew of the falsity of the information provided to the police, or that they acted with reckless disregard as to its falsity. This constitutes bad faith.

Nevertheless, the statute says that upon a showing that the communication was made in bad faith “[s]tatutory damages *may* be

denied”. RCW 4.24.510 (emphasis added). Presumably, this makes the choice of whether to deny the statutory damages, even upon a showing of bad faith, a matter for the trial court’s discretion. The question, then, is whether, under these facts, the trial court abused its discretion by awarding statutory damages. “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard ....” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citations omitted). “A trial court’s decision is manifestly unreasonable if it adopts a view that no reasonable person would take.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010) (citations and internal quotation marks omitted).

Here, the stakes were high. On November 25, 2008, as a result of Alamo having filed the stolen car report, knowing it to contain false and misleading information, Weinstock was arrested, handcuffed and booked for possession of stolen property. CP 61. She spent the Thanksgiving holiday weekend in jail. CP 62. This was the foreseeable consequence of Alamo’s bad faith. If this Court were to decide, in spite of the arguments presented above, that Alamo enjoys absolute immunity from civil liability in this case, that is enough. Under these facts, no reasonable person

would, in addition, give Alamo a \$10,000 windfall, rewarding it for its egregious behavior and its callous indifference to Weinstock's rights and her freedom.

This is not a case of an over-eager citizen embellishing the facts in his or her testimony against a development project. This is not a case of a whistleblower reporting to an agency some hearsay information on workplace safety. This is not a case of an environmental group reporting pollution from an industrial source without first verifying the report. Perhaps in those circumstances, there may be facts that could be characterized as showing some "bad faith" by the reporter, and yet that would justify an award of statutory damages. There may be such cases where a SLAPP suit was such an overreaction to the "bad faith" communication, that the statutory damages serve the legislative purpose of deterring retaliatory lawsuits that really are designed to do nothing other than "intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution." Laws of 2002, chp. 232, § 1. There may be such cases, but this case is not one of them. Given the facts of this case, the trial court's award of statutory damages was outside the range of acceptable choices; it was a decision no reasonable person would take; it was manifestly unreasonable, and therefore an abuse of discretion. This Court should reverse the award of

statutory damages.

**5. RCW 4.21.510 DOES NOT AUTHORIZE AN AWARD OF EXPENSES AND ATTORNEYS' FEES OTHER THAN THOSE REASONABLY INCURRED IN ESTABLISHING THE ANTI-SLAPP DEFENSE**

RCW 4.24.510 provides: “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 ....” This provision entitles a person who successfully establishes the anti-SLAPP defense with respect to a claim “to reasonable attorney fees incurred to establish immunity on the ... claim ....” *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 688, 82 P.3d 1199 (2004). Stating it even more directly is Judge Pechman, of the U.S. District Court for the Western District of Washington, who found that “[t]he meaning of this provision is plain: Defendant ... is only entitled to reasonable fees that were incurred ‘in establishing the defense’ provided by RCW 4.24.510. The statute does not allow fees for other matters outside this narrow category.” *Crann v. Carver*, 2006 WL 3064943, \*7 (W.D. Wash. 2006) (copy attached at Attachment C).

That attorneys’ fees under RCW 4.24.510 are limited, as the statute says, to those “incurred in establishing the defense” is also shown by comparison to other statutory attorney fees provisions, where the

Legislature showed that it knows how to authorize an award of attorney fees for an entire lawsuit. Examples include, but are not limited to: the Consumer Protection Act (providing for an award of “the costs of *the suit*, including a reasonable attorney’s fee.” RCW 19.86.090 (emphasis added)); the Public Records Act (providing for an award of “all costs, including reasonable attorney fees, incurred in connection with *such legal action*.” RCW 42.56.550(4) (emphasis added)); and the Hazardous Waste Management Act (authorizing the court to “award reasonable attorneys’ fees to a prevailing injured party in *an action* under this section.” RCW 70.105.097 (emphasis added)). In RCW 4.24.510, however, a person who successfully invokes the defense is entitled only “to recover expenses and reasonable attorneys’ fees incurred *in establishing the defense* ....” (Emphasis added.)

To determine the reasonable attorneys’ fee, it is necessary to first calculate the appropriate “lodestar” figure. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. at 688-89. Under the lodestar method, the fee is “calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result, [and] may, in rare instances, be adjusted upward or downward in the trial court’s discretion.” *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). “[A] a court must first

determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Id.* “Under this methodology, the party seeking fees bears the burden of proving the reasonableness of the fees.” *Id.*

“If attorney fees are recoverable for only some of a party’s claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.” *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. at 690, quoting *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000), *review denied*, 142 Wn.2d 1029, 21 P.3d 1150 (2001). The only exception to this is if it is not possible to make a reasonable segregation. *Id.* “The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees.” *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. at 690.

Alamo’s request did not properly segregate the time spent in establishing the defense under RCW 4.24.510 from other fees and expenses it incurred in the case. As discussed above, Alamo began incurring fees related to the anti-SLAPP defense on July 5, 2011. From

there, it appears that the total time spent in establishing that defense was between 19.2 and 39.5 hours: 19.2 hours were spent on matters exclusively related to establishing the defense, and an additional 20.3 hours were spent on matters that may have included some time on the defense, but were not limited to that defense (e.g., time spent on other issues raised in Alamo's motion for summary judgment that did not form the basis for the trial court's dismissal of Weinstock's claims). CP 72 – CP 73; CP 75 – CP 77.

If one were to multiply the actual time spent in establishing the defense<sup>9</sup> (that is, between 19.2 and 39.5 hours) by the hourly rates charged by Alamo's counsel, the total fee award would be somewhere between \$2,970.00 and \$6,130.00. CP 77.

That the reasonable amount of time needed to establishing the anti-SLAPP defense would fall within the range of hours discussed above is reinforced by the result in the *Crann* case before Judge Pechman. In that

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<sup>9</sup> Weinstock does not concede that the actual number of hours spent on establishing the anti-SLAPP defense in this case (i.e., between 19.2 and 39.5 hours) is the reasonable number of hours. As noted above, in arriving at the lodestar figure, the court should exclude those actual hours expended that were wasteful. *Mahler v. Szucs*, 135 Wn.2d at 434. In this case, some of the time spent by Alamo's counsel clearly was wasteful. For example, on September 30, 2011, counsel spent an hour comparing the differences between the Washington statute to its California counterpart, and revising its Reply to incorporate this research. CP 77. This apparently refers to a page or two in the Reply in which Alamo argued that the California statutory approach does not apply. This work was wasteful and unnecessary because Weinstock never even cited California authority with regard to the anti-SLAPP issue, much less argued for its application here. On remand, the trial court should be instructed to exclude from the reasonable hours any time, such as this, that was spent wastefully.

case, the defendant, who had successfully asserted the anti-SLAPP defense, submitted a request for \$22,532.57 in attorneys' fees and \$416.23 in expenses. *Crann v. Carver*, 2006 WL 3064943, \*6. The court noted: "It is clear that establishing the immunity defense was not difficult." *Id.* at 7. It reduced both the requested hourly rate and the number of hours reasonably spent in establishing the defense to \$150 per hour multiplied by 22.65 hours, resulting in "reasonable attorneys' fees incurred in establishing the defense provided by RCW 4.24.510" of \$3,910. *Id.* at 9. The court also reduced the award of expenses to \$72.22. *Id.*

Here, the trial court did not award Alamo the amount requested, but reduced it to \$149.90 in expenses and \$39,000.00 in attorneys' fees. CP 190. The trial court stated that it "finds the fees and costs of \$39,149.90 reasonable both in regard to time spent and the hourly rate requested." CP 189. However, in reducing the award from the amount requested by Alamo, the trial court did not indicate whether it was using the lodestar method, and, if so, what were the reasonable hourly rate(s) and the reasonable number of hours that it used to arrive at a total of \$39,000.00. The reasonable inference to be drawn here is that trial court did not segregate the time spent on issues for which fees are authorized from time spent on other issues; it simply chose a total fee award that seemed to it to be appropriate. Failure to include in the record a proper

segregation of the time spent on issues for which fees are authorized is an abuse of discretion. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. at 692.

Mindful of all of the above, this Court should vacate the award of expenses and fees, and remand the award of expenses and attorneys fees. On remand, the trial court should be directed to require Alamo to segregate the expenses and fees reasonably incurred in establishing the defense under RCW 4.24.510 from expenses and fees incurred on other issues; and if Alamo fails or refuses to segregate, to deny such expenses and fees. If Alamo segregates in a way that the trial court finds partly but not wholly persuasive, the trial court should be permitted, at its option, to independently decide what represents a reasonable amount of expenses and attorneys' fees incurred to establish the defense, provided that it shows, on the record, a rational basis for its decision. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. at 692-93.

#### F. CONCLUSION

Weinstock did not file a SLAPP. Weinstock filed a legitimate lawsuit against Alamo, and two Alamo employees, because, through their knowingly wrongful actions, she was arrested, incarcerated, and charged with a crime she did not commit. The trial court dismissed Weinstock's

civil claims, erroneously believing that Alamo is entitled to absolute immunity for its wrongful actions merely because those actions included filing a police report. It also erred in dismissing claims that fundamentally are not about a communication. And it erred in granting statutory damages, despite Alamo's egregious bad faith, and excessive litigation expenses and attorneys' fees without a proper segregation. Weinstock respectfully asks this Court to reverse the trial court, and remand for trial on Weinstock's claims.

DATED this 23<sup>rd</sup> day of February, 2012.

THE GILLETT LAW FIRM

  
Michael B. Gillett  
Attorney for Appellant

**APPENDIX A**

**CERTIFIED COPY OF ORDER DISMISSING CRIMINAL  
CHARGES**

FILED  
SKAGIT COUNTY CLERK  
SKAGIT COUNTY, WA

2012 JAN -6 PM 4:08

WMI

**SUPERIOR COURT OF WASHINGTON  
COUNTY OF SKAGIT**

STATE OF WASHINGTON v.

SUZANNE LEE WEINSTOCK,  
Defendant.  
WSP #08-016998

NO: 08-1-00933-4

*Amended*  
MOTION, DECLARATION AND ORDER  
OF DISMISSAL AND QUASH ALL  
WARRANTS AND VACATE NO CONTACT  
ORDERS

**CLERK'S ACTION REQUIRED**

3

**I. MOTION**

The Deputy Prosecuting Attorney for Skagit County moves the Court for an order dismissing in the above referenced case, ~~X~~with [ ] without prejudice, based on the following declaration and order quashing all warrants.

**II. DECLARATION**

I, Paul Nielsen, declare as follows:

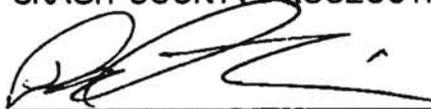
- 2.1 I am Deputy Prosecuting Attorney for Skagit County and make this declaration in that capacity; and
- 2.2 The Defendant was charged with:  
Possession of Stolen Motor Vehicle, Count 1  
Possessing Stolen Property in the Third Degree, Count 2
- 2.3 This case should be dismissed ~~X~~with [ ] without prejudice for the reason(s) that:  
**INTEREST OF JUSTICE**
- 2.4 That all warrants in the above-referenced case be quashed.
- 2.5 That all No Contact Orders filed or ordered pursuant to the above-referenced cause number be vacated.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

OK

DATED: January 6, 2012

SKAGIT COUNTY PROSECUTING ATTORNEY



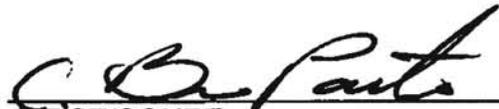
PAUL W. NIELSEN, WSBA #31487  
DEPUTY PROSECUTING ATTORNEY

IT IS HEREBY ORDERED that the above-entitled case be dismissed  with  without prejudice and that all warrants be quashed.

IT IS HEREBY ORDERED that all the No Contact Orders entered in the above-entitled case be dismissed. The Clerk of the Court is hereby directed to forward a copy of this Order to Washington State Patrol, #08-016998.

IT IS FURTHER ORDERED that probable cause existed for the filing of said charge.

DATED: January 6, 2012

  
\_\_\_\_\_  
JUDGE/COURT

**APPENDIX B**  
**CITED STATUTORY PROVISIONS**

### **United States Constitution, Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### **Washington Constitution, Article 1, § 4**

The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

### **Laws of 2002, chp. 232, section 1**

Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

### **Laws of 2010, chp. 118, section 1**

(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

**RCW 19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities**

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. ....

\* \* \*

**RCW 4.24.500. Good faith communication to government agency –  
Legislative findings - Purpose**

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

**RCW 4.24.510. Communication to government agency or self-regulatory organization – Immunity from civil liability**

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. 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. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

**RCW 4.24.520. Good faith communication to government agency –  
When agency or attorney general may defend against lawsuit – Costs  
and fees**

In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under chapter 234, Laws of 1989, the office of the attorney general may intervene in and defend against the suit. An agency prevailing upon the defense provided for in RCW 4.24.510 shall

be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid.

**RCW 4.24.525. Public participation lawsuits – Special motion to strike claim – Damages, costs, attorneys' fees, other relief – Definitions**

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including 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;

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document

submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

**RCW 42.56.550. Judicial review of agency actions**

\* \* \*

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

\* \* \*

**RCW 70.105.097. Action for damages resulting from violation --  
Attorneys' fees**

A person injured as a result of a violation of this chapter or the rules adopted thereunder may bring an action in superior court for the recovery of the damages. A conviction or imposition of a penalty under this chapter is not a prerequisite to an action under this section.

The court may award reasonable attorneys' fees to a prevailing injured party in an action under this section.

**Calif. Penal Code § 70(c)(2)**

It is the intent of the Legislature by this subdivision to abrogate the holdings in *People v. Corey*, 21 Cal. 3d 738, and *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, by a public entity, while wearing a police uniform as private security guards or patrolmen, and to allow the exercise of peace officer powers concurrently with that employment.

**APPENDIX C**

**CRANN v. CARVER, 2006 WL 3064943 (W. D. Wash. 2006)**

2006 WL 3064943

Only the Westlaw citation is currently available.  
United States District Court, W.D. Washington,  
at Seattle.

John CRANN, et al., Plaintiffs,  
v.  
Officer L. CARVER, et al., Defendants.

No. Co5-1529P. | Oct. 26, 2006.

#### Attorneys and Law Firms

Joseph R. Shaeffer, Timothy K. Ford, MacDonald, Hoague & Bayless, Seattle, WA, for Plaintiffs.

Robert Michael Bartlett, Cook & Bartlett, Seattle, WA, for Defendants.

#### Opinion

#### ORDER ON DEFENDANT PRICE'S MOTION FOR ATTORNEYS' FEES, COSTS, STATUTORY DAMAGES, AND RULE 11 SANCTIONS

MARSHA J. PECHMAN, District Judge.

\*1 This matter comes before the Court on a motion by Defendant John Price titled: "(1) Motion for Award of Attorneys Fees, Costs and Statutory Damages; (2) Renewed Motion for Rule 11 Sanctions; and (3) Request for Entry of Final Judgment with Rule 54(b) Certification." (Dkt. No. 96). Through this motion, Mr. Price is seeking an award of statutory damages under RCW 4.24.510, as well as an award of attorneys' fees and costs under RCW 4.24.510 and 42 U.S.C. § 1988. Mr. Price also seeks Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond.

The Court has reviewed the papers and pleadings submitted by Defendant Price, Plaintiffs John Crann and Laurel Black, and Plaintiffs' former counsel Paul Richmond, as well as the balance of the record in this case. Being fully advised and having heard oral argument on this matter, the Court GRANTS in part and DENIES in part Defendant Price's motion. The Court ORDERS as follows:

(1) The Court GRANTS Defendant Price's request for an award of statutory damages of \$10,000 pursuant to RCW 4.24.510. Plaintiffs' former counsel Paul Richmond will be liable for payment of this award.

(2) The Court GRANTS in part and DENIES in part Mr. Price's request for attorneys' fees and expenses under RCW 4.24.510. The Court awards Mr. Price fees of \$3,910 and expenses of \$72.22 pursuant to RCW 4.24.510. Plaintiffs' former counsel Paul Richmond will be liable for payment of these fees and expenses.

(3) The Court DENIES Mr. Price's request for attorneys' fees under 42 U.S.C. § 1988.

(4) The Court GRANTS in part and DENIES in part Mr. Price's request for Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. The Court grants this request to the extent that Mr. Price seeks a ruling that Mr. Richmond violated Rule 11 by bringing plainly unsustainable state-law claims against Mr. Price. However, the Court denies this request to the extent Mr. Price seeks monetary sanctions against Mr. Richmond under Rule 11. The Court finds that monetary sanctions under Rule 11 are not warranted to deter future conduct, given that the Court is requiring Mr. Richmond to pay approximately \$14,000 in fees, expenses, and damages to Mr. Price under RCW 4.24.510.

(5) The Court DENIES as moot Mr. Price's request for entry of a partial final judgment under Rule 54(b). Because all claims against all Defendants have now been dismissed, the Court will enter a final judgment in this matter pursuant to Rule 58.

The reasons for the Court's order are set forth below.

#### Background

The Court previously described the background of this case in its order on Defendant Price's motion for summary judgment. *See* Dkt. No. 89. To summarize briefly, Plaintiffs John Crann and Laurel Black, through attorney Paul Richmond, filed this lawsuit in September 2005 against Mr. Price, the City of Seattle, the City's Office of Professional Accountability, and several Seattle police officers. Mr. Crann was arrested by the Seattle police on October 5, 2003 after Mr. Price, a private citizen, reported to the police that he suspected Mr. Crann of car prowling. Plaintiffs' suit raised claims for deprivation of constitutional rights under 42 U.S.C. § 1983, along with various state-law claims.

\*2 On June 15, 2006, the Court granted Mr. Price's motion for summary judgment on all claims asserted against him. The Court found: (1) Mr. Price was not subject to suit under § 1983 because he was not a state actor; and (2)

Mr. Price was immune from Plaintiffs' state-law claims under RCW 4.24.510, a Washington statute that immunizes individuals from civil liability based on their communications to a government agency regarding any matter reasonably of concern to the agency. RCW 4.24.510 provides that an individual prevailing on the defense provided by the statute is entitled to recover the reasonable attorneys' fees and expenses incurred in establishing the defense, as well as \$10,000 in statutory damages. However, statutory damages may be denied if the court finds that the defendant's communication to the agency was made in bad faith.

The Court directed Mr. Price to file a motion documenting any attorneys' fees and expenses that he intended to claim under RCW 4.24.510. The Court also indicated that Mr. Price could seek statutory damages under RCW 4.24.510, but noted that Plaintiffs could oppose such an award on bad faith grounds. Finally, the Court reserved ruling on a motion for Rule 11 sanctions filed by Mr. Price, noting that the motion may be moot in light of Mr. Price's ability to seek attorneys' fees and expenses under RCW 4.24.510. Following the Court's ruling, Paul Richmond withdrew as Plaintiffs' attorney.

Mr. Price has now moved for attorneys' fees, expenses, and statutory damages under RCW 4.24.510, as well as attorneys' fees under 42 U.S.C. § 1988. In addition, Mr. Price has renewed his request for the imposition of Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. Plaintiffs have responded to Mr. Price's motion through new counsel. Mr. Richmond has responded to Mr. Price's motion in a separate brief.

## Analysis

### 1. Statutory Damages Under RCW 4.24.510

The Court first considers whether Mr. Price is entitled to an award of statutory damages under RCW 4.24.510. The statute provides that "a person prevailing upon the defense provided for in this section ... shall receive statutory damages of ten thousand dollars," with the proviso that "[s]tatutory damages may be denied if the court finds that the complaint or information was communicated in bad faith."

As Mr. Price notes, RCW 4.24.510 provides that a court "shall" award statutory damages to a party prevailing on the immunity defense, although a court "may" deny statutory damages based on a finding of bad faith. Under Washington law, it is well-established the use of the term "may" in a

statute is regarded as permissive or discretionary, while the use of the term "shall" is regarded as mandatory. *See, e.g., Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518 (1993) ("The word 'shall' in a statute ... imposes a mandatory requirement unless a contrary legislative intent is apparent"); *Streng v. Clarke*, 89 Wn.2d 23, 28 (1977) (noting that words in a statute must be given their ordinary meaning unless a contrary intent appears and that "[t]he ordinary meaning of the word 'may' conveys the idea of choice or discretion"). As a result, an award of statutory damages to a defendant prevailing on the defense provided by RCW 4.24.510 is mandatory unless the Court in its discretion declines to award such damages based on a finding of bad faith by the defendant.

\*3 Mr. Price maintains that under Washington law, bad faith must be established by "clear, cogent, and convincing" evidence. *Radley v. Raymond*, 34 Wn.2d 475, 482 (1949). Mr. Price also argues that this standard requires proof that the fact in question is "highly probable." *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735 (1993). Plaintiffs do not dispute these points. The parties also do not generally dispute that under Washington law, "[t]o prove bad faith, one must show 'actual or constructive fraud' or a 'neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.'" *Ripley v. Grays Harbor County*, 107 Wn.App. 575, 584 (2001) (internal quotation marks and citations omitted).

Plaintiffs offer several arguments in support of their position that Mr. Price's communications to the police were made in bad faith. Plaintiffs suggest that Mr. Price: (1) falsely told the police that several weeks before Mr. Crann's arrest on October 5, 2003, Mr. Price had called the police after confronting a knife-wielding car prowler in the same neighborhood; and (2) lied to the police when he told them that he had witnessed Mr. Crann attempting to open a car door in a suspicious manner on the night of October 5th. Mr. Crann also maintains that he had seen Mr. Price earlier on October 5th and that Mr. Price appeared to be intoxicated. Plaintiffs also argue that Mr. Price told an investigator after the incident that Mr. Crann's arrest had been "hilarious."

Mr. Price has previously offered two declarations attesting that the prior alleged incident occurred near the residence of one of his friends, in the same neighborhood where Mr. Crann was arrested on October 5, 2003. (Dkt. Nos. 57 at ¶ 4; Dkt. No. 70 at ¶ 4). It appears that this friend was Tony Sherbon, who has also offered an affidavit indicating that he

witnessed the prior alleged event. (Dkt. No. 110-1). However, neither Plaintiffs nor Defendant have been able to locate any police records regarding the alleged prior incident. The police report from Mr. Crann's arrest indicated that Mr. Price told the police that this alleged incident had occurred "approximately six weeks ago."<sup>1</sup>

Under Fed.R.Evid. 803(10) and 902, Plaintiffs may attempt to prove that this event never occurred by offering certified evidence that a diligent search failed to disclose any police records or reports from the prior alleged incident. However, it is not entirely clear that Plaintiffs' public disclosure requests were sufficiently broad to encompass any police records of the prior alleged incident, given that the police were allegedly called from one address but the search for the alleged suspect purportedly took place at a motel some blocks away. In any case, even assuming that the materials offered by Plaintiffs satisfy the "diligent search" and certification requirements of Rule 803(10) and Rule 902, such evidence is not conclusive and may be rebutted.

\*4 Here, Mr. Price has offered sworn statements from himself and his friend Tony Sherbon attesting that the prior alleged incident occurred and that the police were called. To be sure, as Plaintiffs note, Mr. Price and Mr. Sherbon's statements are not entirely consistent. For instance, Mr. Price has stated that he called the police to report the prior incident, while Mr. Sherbon states that he made the call. In addition, Mr. Price's declaration indicates that Mr. Sherbon's residence was in the 3900 block of Whitman Avenue North, while Mr. Sherbon indicates that he lived on the 3900 block of Woodland Avenue North.<sup>2</sup> Nonetheless, there is no apparent reason why Mr. Price would have lied to the police on the night of Mr. Crann's arrest when he told them that the prior alleged incident had occurred. There is no evidence that Mr. Price or Mr. Sherbon knew Mr. Crann or had any incentive to invent the alleged prior incident. In addition, there is no apparent reason why Mr. Price would have deliberately called the police on October 5, 2003 to make a false report regarding suspicions that Mr. Crann was car prowling in the neighborhood on that night.

In essence, Plaintiffs suggest that Mr. Price called the police on October 5th and invented the prior alleged incident out of malice or as a prank. In support of such contentions, Plaintiffs have produced a report from an investigator who interviewed Mr. Price about two months after Mr. Crann's arrest. The report states:

JOHN [Price] said that when the police finally showed up on the second occasion, he was on one of the street corners and he flagged down the police and pointed out the guy. JOHN said as soon as he pointed out the guy, the guy immediately turned and started walking the other direction. JOHN said that when the police officer saw this, he told the guy, "Don't go anywhere," several times, but the guy kept moving. When the police got close, the guy tried to run and the police got him on the ground. JOHN termed this sequence of events, "hilarious."

(Dkt. No. 103-2 at 3). Characterizing the arrest of another person as "hilarious" certainly may be in poor taste. However, this statement provides a very thin basis for the Court to find that Mr. Price had a motive to communicate false information to the police. Plaintiffs appear to suggest that Mr. Price made false statements to the police in order to amuse himself by causing the arrest of a person that he did not know. The Court finds little reason to reach this conclusion, particularly in light of the standard of proof for bad faith. Although Mr. Crann suggests that Mr. Price had been drinking the night of October 5th, at most this would tend to suggest that Mr. Price's judgment may have been impaired, not that he acted out of an "interested or sinister motive."<sup>3</sup>

In a footnote, Plaintiffs suggest that they should be permitted to take additional discovery to pursue evidence regarding bad faith. The Court disagrees. In its order on Defendant Price's motion for summary judgment, the Court indicated that Plaintiffs could renew their request for a Rule 56(f) continuance on "bad faith" issues if Defendant sought statutory damages under RCW 4.24.510. However, Plaintiffs have not provided a sufficient basis for such a continuance. As the Court noted in its order on Defendant Price's summary judgment motion, a party seeking a continuance under Rule 56(f) must specifically identify relevant information where there is a basis for believing that the information sought actually exists. *See* Dkt. No. 89 at 8. Here, Plaintiffs have not specifically identified what information they would seek through continued discovery. Plaintiffs previously made a vague assertion that additional discovery was needed on "[i]ssues relating to Price's intent and behavior." *Id.* at 9. Plaintiffs have not identified with greater specificity what type of information regarding Mr. Price's "intent and behavior" they wish to seek through continued discovery, nor have they offered a basis for believing that such information exists.<sup>4</sup>

\*5 In sum, the Court finds that Plaintiffs have not demonstrated by clear, cogent, and convincing evidence that Mr. Price engaged in bad faith when he communicated information to the police. Defendant will be awarded statutory damages in the amount of \$10,000 pursuant to RCW 4.24.510.

This award leads to the question of whether liability for statutory damages under RCW 4.24.510 may or should be imposed on Plaintiffs' former counsel Paul Richmond, rather than on Plaintiffs.<sup>5</sup> RCW 4.24.510 does not indicate who shall be required to pay statutory damages, nor does there appear to be any Washington law that squarely addresses whether such damages may be imposed on the non-prevailing party's counsel. In the context of awarding attorneys' fees under RCW 4.84.185, Washington courts have suggested that an award of fees must be assessed against the non-prevailing "party" and not against his or her attorney. *See Watson v. Maier*, 64 Wn.App. 889, 896 (1992). However, such a rule would be consistent with the express language of RCW 4.84.185, which authorizes such awards against "the nonprevailing party." *Id.* By contrast, RCW 4.24.510 includes no similar provision providing that statutory damages or fees must be assessed against the "non-prevailing party."

If the Washington State Legislature intended to provide that an award of statutory damages under RCW 4.24.510 could only be imposed on the non-prevailing "party," the Legislature could have adopted the same type of language included in RCW 4.84.185. Given the Legislature's silence in this regard and the lack of Washington case law on this question, the Court must use its best judgment to predict how the Washington Supreme Court would rule on this issue. *See Burlington Ins. Co. v. Oceanic Design & Constr.*, 383 F.3d 940, 944 (9th Cir.2004). In making this determination, the Court may look to well-reasoned decisions of courts in other jurisdictions that have confronted analogous situations. *Id.*

Other jurisdictions have at times permitted an award of statutory fees to be imposed against the non-prevailing party's attorney, rather than against the party itself. *See, e.g., Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 786 (2d Cir.1988) (authorizing courts to require the non-prevailing party's attorney to pay the prevailing party's fees under Section 35 of the Lanham Act); *But see Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006 (9th Cir.2002) (statutory award of fees to prevailing parties in claims under federal False Claims Act or 42 U.S.C. § 1988 not authorized against attorneys). As the court in *Motown* noted, "it seems proper to permit the district

court to impose the sanction, in whole or in part, against the attorney when it finds that the improper conduct was caused by the attorney rather than the client." *Motown*, 849 F.2d at 786.

The reasoning of the *Motown* court is sensible and persuasive. The Court finds it likely that the Washington Supreme Court would apply similar reasoning in this context and would provide that trial courts have discretion to determine whether to impose statutory damages under RCW 4.24.510 against the non-prevailing party, the non-prevailing party's attorney, or both, depending on the equities of the case.

\*6 In this case, the improper assertion of untenable state-law claims against Mr. Price was entirely due to the failure of Plaintiffs' former counsel Paul Richmond to provide competent representation to his clients. Plaintiffs Crann and Black plainly had no idea that RCW 4.24.510 provided Mr. Price with absolute immunity against civil liability for communicating information to the police, much less that Mr. Price could claim \$10,000 in statutory damages if he prevailed on the defense provided by RCW 4.24.510. As a member of the Washington State Bar Association and the bar of this Court, Mr. Richmond had a duty to provide competent representation to his clients, including "the legal knowledge, skill, thoroughness, and preparation reasonable necessary for the representation." *See Wash. R. of Prof. Conduct 1.1.* Mr. Richmond did not uphold this duty when he failed to recognize that Plaintiffs' state-law claims against Mr. Price were barred under Washington law. Under these circumstances, where it is clear that the "improper conduct was caused by the attorney rather than the client," the Court finds that Mr. Richmond alone should be liable for the damages that have resulted from his failure to represent his clients in a competent manner. Therefore, the Court holds that Plaintiffs' former counsel Paul Richmond shall be solely liable for payment of statutory damages of \$10,000 to Defendant John Price pursuant to RCW 4.24.510.

## 2. Attorneys' Fees and Expenses Under RCW 4.24.510

RCW 4.24.510 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...." Plaintiffs do not dispute that an award of fees and expenses is mandatory under this section. However, they argue that the amount of fees claimed by Mr. Price is unreasonable. The Court agrees.

In his opening brief, Mr. Price requested \$22,532.57 in attorneys' fees and \$416.23 in out-of-pocket expenses under

RCW 4.24.510, as well \$200 in statutory costs under RCW 4.84.020(6) and RCW 4.84.080. (Dkt. No. 96 at 7). Mr. Price's counsel made no attempt to segregate the fees and expenses that were incurred in this matter in establishing the defense provided by RCW 4.24.510 from fees and expenses incurred on other matters. Instead, Defendant's counsel asserts that "[s]egregation is not easy in this case due to the fact that seven separate causes of action were asserted against Price, only one of which was a federal claim." (Dkt. No. 96 at 4-5). Mr. Price proposes that the Court should simply allow him to recover 6/7ths of all the fees and expenses that his attorneys incurred in representing him in this matter as an award under RCW 4.24.510.

To calculate the reasonable attorneys' fees incurred in establishing the defense provided by RCW 4.24.510, the Court must first calculate the "lodestar" figure—"the number of hours reasonably expended (discounting hours spent on unsuccessful claims, duplicated effort, and otherwise unproductive time) multiplied by the attorney's reasonable hourly rate." *Banuelos v. TSA Washington, Inc.*, 134 Wn.App. 607, 141 P.3d 652, 657 (2006). Here, the Court concludes that Mr. Price's fee request of \$22,532.57 does not reflect the hours reasonably expended on establishing the defense provided by RCW 4.24.510, nor it is based on a reasonable hourly rate for the work performed.

#### A. Hours Reasonably Expended

\*7 RCW 4.24.510 states that a party prevailing on the defense provided by the statute shall be entitled to "reasonable attorneys' fees incurred in establishing the defense." The meaning of this provision is plain: Defendant Price is only entitled to reasonable fees that were incurred "in establishing the defense" provided by RCW 4.24.510. The statute does not allow fees for other matters outside this narrow category.

Defendant's counsel suggests that it is not easy to segregate the fees incurred in establishing the defense from the other fees incurred in this matter. The Court disagrees. As a preliminary matter, it appears that Defendant's counsel was aware of the immunity defense provided by RCW 4.24.510 very early in this case. *See, e.g.*, Dkt. No. 96-2 at 2 (Defendant's counsel finalized memo on "affirmative defense of immunity from civil liability, as well as award of attorney's fees and expenses incurred" on November 22, 2005, only eight days after first billing entry in the matter). As a result, Defendant's counsel should have made efforts to ensure that fees and expenses incurred in establishing the defense were clearly documented and segregated from fees and expenses

incurred on other matters. *See Loeffelholz v. C.L.E.A.N.*, 119 Wn.App. 665, 690 (2004).

In any case, as Plaintiffs note, the billing records of Defendant's counsel provide fairly detailed descriptions of the work performed, making it relatively simple to segregate the fees incurred in establishing the defense provided by RCW 4.24.510 from other fees incurred in this matter. Plaintiffs' counsel has suggested that the only fees that should be allowed under RCW 4.24.510 are for the 26.75 hours listed in Exhibit 11 to the Declaration of Plaintiffs' counsel ("Exhibit 11"). *See* Dkt. No. 99-6 at 6-7. The Court agrees with Plaintiffs' analysis. The billing entries set forth in Exhibit 11 essentially reflect time that Defendant's counsel spent researching immunity issues and drafting Defendant's successful motion for summary judgment, which resulted in dismissal of Plaintiffs' state law claims due to the immunity provided by RCW 4.24.510. These are the type of fees that were reasonably necessary to establish the defense provided by RCW 4.24.510.

It is clear that establishing the immunity defense was not difficult. As Plaintiffs' counsel suggests, Defendant Price could have established this defense and obtained dismissal of all six state-law claims by filing a short motion to dismiss under Rule 12(b)(6) at the outset of this case. In terms of legal analysis, Defendant only needed to provide the same four-paragraph legal argument that he offered when he ultimately moved for summary judgment on the state-law claims under RCW 4.24.510. *See* Dkt. No. 57 at 7-8. Instead of taking this straightforward step at the outset of this case, Defendant's counsel opted instead for a more circuitous route. For example, Defendant's counsel asserted an improper "counterclaim" for "immunity defense" and unnecessarily incurred fees by filing a motion to hold Plaintiffs in default for failing to answer this purported "counterclaim"—all inappropriate and unnecessary actions that the Court rejected. *See* Dkt. No. 56.

\*8 In his reply brief, Defendant appears to suggest that he was unable to file a 12(b)(6) motion to establish the immunity defense provided by RCW 4.24.510. Defendant bases this argument on the fact that when he filed a motion for default judgment on his inappropriate "immunity defense counterclaim," Plaintiffs sought to introduce a declaration from Elizabeth Frost. Defendant seems to suggest that if he had filed a motion to dismiss under 12(b)(6), Plaintiffs would have offered the same declaration and the Court would have been required to convert the motion into a motion for summary judgment under Rule 56.

Defendant's reasoning is not persuasive. If Defendant had moved to dismiss Plaintiffs' state-law claims under 12(b)(6) based on the immunity defense and Plaintiffs sought to offer materials outside the pleadings (e.g., Ms. Frost's declaration), the Court would not have been automatically required to convert the motion into a summary judgment motion. Instead, the Court could have simply excluded the declaration as extraneous. *See* Fed.R.Civ.P. 12(b)(6) (providing that court may exclude materials outside the pleadings in ruling on motion to dismiss); *Keams v. Tempe Tech. Inst., Inc.*, 110 F.3d 44, 46 (9th Cir.1997) ( Rule 12(b)(6) motion not converted to summary judgment motion where court stated that it did not rely on exhibits outside the pleadings in reaching its legal conclusion). In this case, Ms. Frost's declaration would have been extraneous to the question of whether Defendant was entitled as a matter of law to civil immunity from Plaintiffs' state-law claims pursuant to the defense provided by RCW 4.24.510.<sup>6</sup>

Therefore, the Court finds that Defendant's counsel reasonably expended 26.75 hours in establishing the defense provided by RCW 4.24.510, as described in the billing entries set forth in Exhibit 11 to the declaration of Plaintiffs' counsel. This total reflect 22 .65 hours of work performed by attorney Robert Bartlett and 4.1 hours of work performed by attorney Diana Hill. The Court will not allow any fees incurred by Defendant's counsel after June 15, 2006, the date that the Court granted summary judgment in favor of Defendant Price. At that time, the defense provided by RCW 4.24.510 was established. Any further fees incurred after that date (e.g., for briefing to establish the amount of fees incurred, entitlement to statutory damages, etc.) are not provided by the statute.

#### **B. Reasonable Hourly Rate**

The Court must next determine a reasonable hourly rate for the work performed by Defendant's counsel. "In determining the attorney's reasonable hourly rate, the trial court may consider the skill level the litigation requires, the time limitations the litigation imposes, the size of the potential recovery, the attorney's reputation, and the undesirability of the case." *Banuelos*, 141 P.3d at 657; *see also* Wash. R. Prof. Conduct 1.5 (listing factors to consider in determining reasonableness of attorneys' fees).

\*9 Defendant requests a rate of \$245 per hour for Mr. Bartlett's work and \$125 per hour for Ms. Hill's work.<sup>7</sup> In response, Plaintiffs argue that the Court should not allow the

\$245 per hour rate for Mr. Bartlett's work in light of the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. As Plaintiffs note, Defendant's arguments regarding the applicability of the immunity defense provided by RCW 4.24.510 were not complex. Plaintiffs suggest that a reasonable hourly rate for Mr. Bartlett's work in establishing the defense provided by RCW 4.24.510 would be \$150 an hour. Plaintiffs observe that \$150 an hour is the same rate previously claimed in this litigation for the work of Tobin Dale, an experienced attorney who appeared in this matter for the City of Seattle and the police officers. *See* Dkt. No. 18 at 2.

The Court agrees with Plaintiffs. Although Mr. Bartlett is an experienced attorney and the Court does not doubt that he may warrant a higher hourly rate in a different matter, the level of skill required to establish the defense provided by RCW 4.24.510 simply was not great. In order to prevail on this defense, Defendant Price could have merely filed a motion to dismiss that cited the language of RCW 4.24.510, perhaps with a citation to this Court's previously published ruling in which the Court noted that the Legislature had eliminated the "good faith" requirement from RCW 4.24.510 in 2002. *See Harris v. City of Seattle*, 302 F.Supp.2d 1200, 1202 n. 1 (W.D.Wash.2004). Given the lack of complexity of this legal question and the relatively low level of skill required to establish civil immunity in this case, the Court finds that an hourly rate of \$245 an hour would not be reasonable. In addition, this case did not appear to impose significant time limitations, did not involve a particularly large potential recovery, and did not appear to present an "undesirable" case for Defendant's counsel to take-particularly in light of obvious defenses available to Mr. Price. As a result, the Court finds that a rate of \$150 an hour would be appropriate for Mr. Bartlett's work in establishing the defense provided by RCW 4.24.510.

#### **C. Total Fee Award**

Consistent with the discussion above, the Court finds that Defendant Price's reasonable attorneys' fees incurred in establishing the defense provided by RCW 4.24.510 is \$3,910. This figure reflects 22.65 hours for the work of Mr. Bartlett at a rate of \$150 per hour and 4.1 hours for the work of Ms. Hill at \$125 per hour.

#### **D. Expenses**

RCW 4.24.510 also provides that Mr. Price is entitled to recover expenses incurred in establishing his defense under this statute. Mr. Price claims \$416.23 in out-of-pocket

expenses under RCW 4.24.510. As Plaintiffs note, the billing records provided by Defendant's counsel generally do not identify which costs apply to which task, making it difficult for the Court to determine a fair award of costs. Under these circumstances, the Court agrees with Plaintiffs' suggestion that it would be reasonable "to compensate costs based on the percentage of the attorney's fees awarded as compared with fees sought." (Pls.' Opp. at 12). The Court is awarding Defendant Price \$3,910 in attorneys' fees pursuant to RCW 4.24.510, which represents 17.35% of his original request for \$22,532.57 in fees under the statute. Therefore, the Court will award Defendant Price 17.35% of the out-of-pocket costs of \$416.23 that he originally sought under RCW 4.24.510, for a total of \$72.22.

\*10 The Court denies Defendant's request for a "statutory attorney fee award of \$200 as costs" pursuant to RCW 4.84.010(6) or RCW 4.84.080. (Dkt. No. 96 at 7). This Court has previously declined to award such costs in another case involving the immunity defense provided by RCW 4.24.510. See *Harris v. City of Seattle*, C02-2225P, Dkt. No. 141 at 4 (request for such costs by Defendant Washington Firm) and Dkt. No. 200 at 2 (denying request on grounds that "State statutory attorney's fees are not taxable"). The Court also declines to award Defendant interest on his attorneys' fees. As Plaintiffs note, none of the statutes or rules relied upon by Defendant provide for such an award of interest.

#### ***E. Liability for Attorneys' Fees and Expenses Under RCW 4.24.510***

RCW 4.24.510 does not indicate who shall bear liability for attorneys' fees and expenses awarded under the statute. For the same reasons that the Court discussed earlier in determining that Mr. Richmond should be liable for statutory damages under RCW 4.24.510, the Court finds that liability for the Mr. Price's fees and expenses under RCW 4.24.510 should be imposed solely on Plaintiffs' former counsel Paul Richmond. Therefore, Mr. Richmond shall be solely liable to Defendant Price for \$3,910 in attorneys' fees and \$72.22 in costs under RCW 4.24.510.

#### ***3. Attorneys' Fees Under 42 U.S.C. § 1988***

Mr. Price also seeks an award of attorneys' fees under 42 U.S.C. § 1988 as the prevailing party on Plaintiffs' claims under 42 U.S.C. § 1983. In his opening brief, Mr. Price appears to assert that a prevailing defendant in a § 1983 case is automatically entitled to an award of attorneys' fees under § 1988. See Opening Brief at 8 (asserting that "[a] prevailing

party in a § 1983 action is entitled to his reasonable attorneys fees and costs under 42 USC § 1988(b)").

As Plaintiffs note, Defendant's assertion is not accurate. Although a prevailing plaintiff in a § 1983 case is normally entitled to an award of attorneys' fees, a prevailing defendant typically is not. Under Ninth Circuit law, "[a] prevailing defendant is entitled to attorney fees under 42 U.S.C. § 1988 only when the plaintiff's claims are 'groundless, without foundation, frivolous, or unreasonable.'" *Karem v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir.2003); see also *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir.1990) ("[a]ttorneys' fees in civil rights cases should only be awarded to a defendant in exceptional circumstances."). "In determining whether this standard has been met, a district court must assess the claim at the time the complaint was filed, and must avoid *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir.2006).

Here, the Court does not conclude that Plaintiffs' § 1983 claims against Mr. Price were groundless, without foundation, frivolous, or unreasonable at the time the complaint was filed. Although the Court ultimately dismissed the § 1983 claims against Mr. Price because there was no evidence that he was a "state actor," the question of whether a person may be regarded as a "state actor" under § 1983 is a difficult and often fact-intensive question. The inquiry does not begin and end with the fact that Mr. Price was a private citizen. As the Ninth Circuit has noted, "[a] private party can still become a state actor if it acts in concert with state officials, or if the state has lent 'significant encouragement' to its action, or if it is exercising powers traditionally the exclusive prerogative of the state." *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1377 (9th Cir.1987). The Ninth Circuit has noted that "we still find the concept of 'state action' somewhat nebulous." *Id.* (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974) ("While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.")).

\*11 Prior to filing a complaint and obtaining discovery, Plaintiffs had little if any ability to determine whether Mr. Price acted in concert with the police in a manner sufficient to establish liability as a state actor. Based on the conduct alleged in his complaint, Plaintiffs had at least some

basis believe that discovery would show that Mr. Price had acted in concert with the police. In particular, the fact that Plaintiffs' pre-suit investigation failed to locate any records of Mr. Price's alleged interaction with the police several weeks before Mr. Crann's arrest would serve to heighten suspicions on this question. Although Plaintiffs' former counsel apparently failed to pursue this issue by propounding discovery on Mr. Price after filing the complaint, the question is not whether Plaintiffs ultimately established their claim—instead, it is whether there was a non-frivolous basis to maintain the claim at the time the complaint was filed. Accordingly, Defendant Price's request for attorneys' fees under § 1988 will be denied.

#### 4. Rule 11 Sanctions

Finally, Defendant Price has renewed his previous request for the imposition of Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. Mr. Richmond has opposed this request, arguing that the claims asserted in Plaintiffs' complaint were based on a non-frivolous argument for the modification or reversal of existing law or the establishment of new law.

For the same reasons discussed immediately above, the Court finds that Mr. Richmond did not violate Rule 11 by filing a complaint with Section 1983 claims against Mr. Price. Although these claims were unsuccessful and tenuous at best, they were not patently frivolous. However, the Court finds that Mr. Richmond did violate Rule 11 by asserting state-law claims against Mr. Price for which RCW 4.24.510 plainly and unambiguously provided Mr. Price with immunity from civil liability.

By signing Plaintiffs' complaint, Mr. Richmond certified that the claims asserted in the complaint were “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” Fed.R.Civ.P. 11(b)(2). When Mr. Price filed for summary judgment against Plaintiffs based on the immunity provided by RCW 4.24.510, the opposition brief filed by Mr. Richmond did not offer any non-frivolous arguments as to why the statute would not provide immunity to Mr. Price. Indeed, Mr. Richmond offered only a two-paragraph response to Mr. Price's arguments regarding immunity under RCW 4.24.510. *See* Dkt. No. 73 at 10-11. Mr. Richmond's arguments appeared to confuse the immunity provided to Mr. Price by RCW 4.24.510 with the provisions of the statute that permit a Court to waive an award of \$10,000 in statutory

damages to a defendant if a communication is made in bad faith. *Id.*

In response to Defendant Price's Rule 11 motion, Mr. Richmond has now raised several new arguments as to why RCW 4.24.510 should not be interpreted to provide absolute immunity from civil liability to a person who communicates information to the police. Notably, Mr. Richmond has presented these new arguments in his response to the renewed Rule 11 motion, rather than presenting them in opposition to Defendant's summary judgment motion when such arguments might have benefitted his former clients. This suggests that Mr. Richmond's new arguments were belatedly developed for the purpose of avoiding the imposition of sanctions.

\*12 In any case, the Court is not persuaded by the belated arguments offered by Mr. Richmond. The language of RCW 4.24.510, as amended in 2002, is clear: “A person who communicates a complaint or information to any branch or agency of federal, state, or local government ... 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.” There is no exception to this immunity for “bad faith” communications. This point is underscored by the fact that prior to amendment in 2002, RCW 4.24.510 had explicitly provided that immunity from civil liability would only apply to “a person who in good faith communicates a complaint or information” to a government agency. *See* 1999 Wash. Sess. Laws Ch. 54, § 1. As one commentator explained shortly after the 2002 amendment, “the amended section 4.24.510 provides much greater protection.... Even communications made in bad faith will be immune, although the [defendant] will then lose his or her right to statutory damages.” Michael Eric Johnston, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of “Strategic Lawsuits Against Public Participation”*, 38 *Gonz. L.Rev.* 263, 286 (2003).

As a result, the Court finds that Mr. Richmond violated Rule 11 by asserting claims against Mr. Price that were clearly barred by RCW 4.24.510. The Court finds that Mr. Richmond has not demonstrated that his assertion of these claims on behalf of Plaintiffs was warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Although Mr. Richmond's conduct violated Rule 11, an award of monetary sanctions or attorneys' fees against Mr. Richmond is not automatic. “A sanction imposed for violation

of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” Fed.R.Civ.P. 11(c)(2). The Ninth Circuit has emphasized that “Rule 11 ‘provides for sanctions, not fee shifting. It is aimed at deterring, and, if necessary punishing improper conduct rather than merely compensating the prevailing party.’ “ *United States ex rel. Leno v. Summit Constr. Co.*, 892 F.2d 788, 791 n. 4 (9th Cir.1989) (internal citation omitted). It should also be noted that the Advisory Committee notes to the 1993 amendments to Rule 11 indicate that a variety of factors may be proper considerations in determining what sanctions, if any, should be imposed for a Rule 11 violation, including the financial resources of the person to be sanctioned. *See also Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir.1994) (“a court can properly consider plaintiff’s ability to pay monetary sanctions as one factor in assessing sanctions”).

Mr. Richmond has represented that he earns less than \$10,000 per year from his legal practice, which obviously suggests that he has limited financial resources. (Dkt. No. 105 at 12). In addition, the Court has already held Mr. Richmond solely liable for the payment of approximately \$14,000 to Defendant Price for statutory damages and attorneys’ fees and expenses under RCW 4.24.510. As a result, the Court finds that monetary sanctions under Rule 11 are not warranted to deter further improper conduct by Mr. Richmond. Requiring Mr. Richmond to pay statutory damages, fees, and expense to Mr. Price should be sufficient to accomplish that goal.

#### **5. Request for Entry of Partial Final Judgment Under Rule 54(b)**

\*13 Finally, Defendant Price’s motion requests entry of a partial final judgment under Rule 54(b). This request is now moot because all claims against the other named Defendants have been dismissed. See Dkt. No. 113. The Court will direct the Clerk to enter a final judgment in this matter pursuant to Rule 58.

#### Footnotes

- 1 Plaintiffs assert that Mr. Price has been inconsistent as to whether the alleged prior incident took place two weeks or six to eight weeks before Mr. Crann’s arrest. Plaintiffs argue that Mr. Price had previously stated that the prior incident took place “two weeks” before Mr. Crann’s arrest, pointing to a memo written by an investigator working for Mr. Crann following an interview with Mr. Price in December 2003. Putting aside concerns about this memo’s accuracy (for example, the memo refers to Mr. Price as Mr. “Pierce”), it should be noted that the same memo indicates that Mr. Price told the investigator that the prior incident had occurred “a few weeks before the incident that involved the arrest.” (Dkt. No. 103-2 at 1).
- 2 The Court takes judicial notice of City of Seattle records indicating that in the 3900 block, Whitman Avenue North and Woodland Park Avenue North run parallel to each other and are one block apart.
- 3 There is no indication in the police report that Mr. Price appeared intoxicated on October 5th.

#### **Conclusion**

For the reasons stated above, the Court GRANTS in part and DENIES in part Defendant Price’s motion. Specifically, the Court:

(1) GRANTS Defendant Price’s request for an award of statutory damages of \$10,000 pursuant to RCW 4.24.510. Plaintiffs’ former counsel Paul Richmond will be liable for payment of this award.

(2) GRANTS in part and DENIES in part Mr. Price’s request for attorneys’ fees and expenses under RCW 4.24.510. The Court awards Mr. Price fees of \$3,910 and expenses of \$72.22 pursuant to RCW 4.24.510. Plaintiffs’ former counsel Paul Richmond will be liable for payment of these fees and expenses.

(3) DENIES Mr. Price’s request for attorneys’ fees under 42 U.S.C. § 1988.

(4) GRANTS in part and DENIES in part Mr. Price’s request for Rule 11 sanctions against Plaintiffs’ former counsel Paul Richmond. Although Mr. Price is correct that Mr. Richmond violated Rule 11 by bringing plainly unsustainable state-law claims against Mr. Price based on his communications with the police, the Court declines to impose monetary sanctions under Rule 11 against Mr. Richmond. Monetary sanctions under Rule 11 are not warranted to deter future conduct, given that the Court is requiring Mr. Richmond to pay fees, expenses, and damages to Mr. Price under RCW 4.24.510.

(5) DENIES as moot Mr. Price’s request for entry of a partial final judgment under Rule 54(b) and DIRECTS the clerk to enter a final judgment under Rule 58.

The clerk is directed to provide copies of this order to all counsel of record and to Plaintiffs’ former counsel Paul Richmond.

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- 4 As the Court noted in its prior order, a Rule 56(f) continuance may also be denied due to lack of diligence in pursuing discovery throughout the course of the litigation, and Plaintiffs failed to demonstrate that they diligently pursued discovery in this matter. (Dkt. No. 89 at 9-10).
- 5 In an unauthorized "supplemental declaration and memorandum" filed after this motion was fully briefed, Plaintiffs also argued that imposing statutory damages against them under RCW 4.24.510 would be unconstitutional. As the Court stated at oral argument, these new constitutional arguments will not be considered: (1) because they were not raised in a timely manner; and (2) Plaintiffs have not complied with the requirements of Fed.R.Civ.P. 24(c).
- 6 At most, the declaration might have had some relevance in determining whether Plaintiffs could avoid the \$10,000 in statutory damages provided by RCW 4.24.510 on "bad faith" grounds, not on the availability of the immunity defense to Mr. Price.
- 7 Although two other attorneys performed work for Mr. Price, Mr. Bartlett and Ms. Hill are the only attorneys who performed the work listed in Exhibit 11.

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Declaration of Service

I, MICHAEL B. GILLETT, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am the attorney-of-record for Appellant Suzanne L. Weinstock in the above-entitled matter. I am over 18 years of age, knowledgeable of the matters stated herein, and competent to testify as to the same. On this day, I caused to be served on the persons indicated below the Brief of Appellants, via messenger service with instructions to serve not later than February 24, 2012:

***Attorney for Respondent:***

Shellie McGaughey, WSBA # 16809  
McGaughey Bridges Dunlap PLLC  
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SIGNED this 23<sup>rd</sup> day of February, 2012, at Seattle, Washington.



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