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No. 69224-1-I

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

Northwest Center, *et al.*,

Defendants/Appellants,

v.

Lennie J. Thompson,

Plaintiff/Respondent.

**OPENING BRIEF OF DEFENDANTS/APPELLANTS
NORTHWEST CENTER, et al.**

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I. INTRODUCTION

Defendants/Appellants the Northwest Center, Tom Everill, John Tye, Virginia Burzotta, Jonathon Whipple, and the NWC Board of Directors (collectively, the “Northwest Center”) seek expedited review of a trial court order granting the Northwest Center’s special motion to strike pursuant to Washington’s Act Limiting Strategic Lawsuits Against Public Participation (“anti-SLAPP”), RCW 4.24.525, but reserving for trial the mandatory award of attorney fees, costs, and \$10,000 penalty provided by the statute.

The Northwest Center brought its special motion to strike in response to a defamation claim asserted by Plaintiff/Respondent Lennie Thompson (“Mr. Thompson”),¹ a former employee of the Northwest Center who was terminated and later subject to an anti-harassment order prohibiting him from contacting Jonathon Whipple, a former supervisor. Mr. Thompson’s defamation claim, asserted against both the Northwest Center and King County District Court Judge Peter Nault, unquestionably violated Washington’s anti-SLAPP laws. The trial court granted the Northwest Center’s special motion to strike and dismissed Mr. Thompson’s defamation claim, but erred when it reserved for trial the mandatory award of attorney fees, costs, and statutory penalty. Such a reservation is not contemplated by the plain language of RCW 4.24.525, does not serve a logical purpose, defies the legislature’s intention for the

¹ Mr. Thompson is represented *pro se*, without the assistance of legal counsel.

prompt resolution of anti-SLAPP claims, and causes unfair prejudice to the Northwest Center.

The Northwest Center presents this appeal pursuant to RCW 4.24.525(5)(d), which provides the right of an expedited appeal from a trial court order ruling on a special motion to strike. The Northwest Center respectfully requests the Court reverse the trial court's reservation of the mandatory award and penalty, and direct that the award and penalty be issued contemporaneously with the order granting the Northwest Center's special motion to strike.

II. ASSIGNMENT OF ERROR

Assignment of Error: In granting the Northwest Center's special motion to strike pursuant to Washington's anti-SLAPP statute, RCW 4.24.525, the trial court erred by reserving for trial the mandatory award of attorney fees, costs, and statutory penalty.

Issue No. 1: Under Washington's anti-SLAPP statute, RCW 4.24.525(6)(a), whether the trial court was required to contemporaneously award the Northwest Center the mandatory attorney fees, costs, and statutory penalty when it granted the Northwest Center's special motion to strike.

Issue No. 2: Under Washington's anti-SLAPP statute, RCW 4.24.525(5)(d), whether the Northwest Center has a right of expedited appeal from the trial court's order, which reserved for trial the award of attorney fees, costs, and statutory penalty.

III. STATEMENT OF THE CASE

A. Background Facts.

The Northwest Center is a non-profit charitable organization devoted to promoting the rights and independence of individuals with developmental disabilities. CP 46. Mr. Thompson was employed by the Northwest Center as a job coach from October 2008 until June 2010. *Id.* He was terminated due to poor job performance and for failing to adhere to paperwork standards. *Id.* Jonathon Whipple served as a supervisor at the Northwest Center during Mr. Thompson's employment. *Id.*

Mr. Thompson protested the Northwest Center's decision to terminate his employment and filed a claim with the National Labor Relations Board (the "NLRB"). *See* CP 82. The NLRB dismissed the claim, finding that Mr. Thompson's dispute with the Northwest Center was "largely of a personal nature" and otherwise failed to establish a violation of federal labor law. *Id.*

In addition to filing a claim with the NLRB, Mr. Thompson began harassing and threatening several supervisors and former colleagues at the Northwest Center. CP 46-49. For example, Mr. Thompson stood outside of the Northwest Center's central office and yelled or argued with employees as they entered or exited the building. *Id.* Several employees, including Mr. Whipple, were afraid of Mr. Thompson, who has a felony conviction for armed bank robbery. *Id.* During his employment at the Northwest Center, Mr. Thompson made his criminal history known to

coworkers by distributing copies of a book that recounted his bank robbery experience.

After the NLRB dismissed his claim, Mr. Thompson continued harassing employees of the Northwest Center, including Mr. Whipple. Id. His interaction with Mr. Whipple became more worrisome when he made an unannounced and unwelcome visit to Mr. Whipple's personal residence. CP 46-47. During this encounter, Mr. Thompson delivered a threat of divine retribution for the alleged conspiracy surrounding his termination. Mr. Whipple, who had been at home with his fiancé and two young children, became so concerned that he armed himself with a shotgun and demanded Mr. Thompson leave the premises. Id. Mr. Thompson drove off in his vehicle. Id. He later sent a letter to Mr. Whipple purportedly containing an apology, but actually containing threatening statements such as "you know you did a lot of damage," and "if you call [the NLRB] and then basically admit that you've done wrong you will be protected from prosecution and from being fired." Id.

Following the encounter at Mr. Whipple's residence, the Northwest Center mailed two letters to Mr. Thompson, requesting that he cease all contact with the Northwest Center and its employees. CP 36-39. Mr. Whipple then filed a petition in King County District Court for an anti-harassment order against Mr. Thompson. Following an extended court hearing, during which Mr. Thompson was permitted to speak at length, Judge Peter Nault entered an anti-harassment order against

Mr. Thompson. CP 65-80. Mr. Thompson sought reversal of the order six months later, but his request was denied by Judge Nault. CP 47-49.

Mr. Thompson filed his lawsuit in King County Superior Court on May 1, 2012. CP 1-39. The Northwest Center, Tom Everill, Virginia Burzotta, Jonathon Whipple, and the Northwest Center Board of Directors were named as defendants. CP 2. In addition, Judge Nault was named as a defendant. *Id.* Mr. Thompson asserted claims of breach of contract, unlawful termination, discrimination, and defamation. CP 7-10.

Mr. Thompson asserted his defamation claim against all defendants, including Judge Nault, based on the statements submitted in connection with the anti-harassment proceedings. CP 8-9.

B. The Anti-SLAPP Proceedings and Special Motion to Strike at the Trial Court Level.

The Northwest Center filed its special motion to strike pursuant to the anti-SLAPP laws with King County Superior Court on June 28, 2012. CP 44-83. The motion was brought in response to the defamation claim asserted in Mr. Thompson's complaint, which violated both of Washington's anti-SLAPP statutes, RCW 4.24.510 and RCW 4.24.525. In the motion, the Northwest Center requested the trial court strike and dismiss Mr. Thompson's defamation claim and award it the attorney fees, costs, and \$10,000 penalty mandated by RCW 4.24.525.

Oral argument was heard on the Northwest Center's special motion to strike in King County Superior Court on August 3, 2012. During oral argument, Mr. Thompson clarified that his defamation claim was based on

both statements submitted in connection with the anti-harassment hearing and on Mr. Whipple's communications with law enforcement. RP 9:6-13. Mr. Thompson also stated that his defamation claim was based on his belief that the anti-harassment order was "fraudulent and bogus." RP 11:8-11. Agreeing that Mr. Thompson's defamation claim violated RCW 4.24.525, the trial court granted the Northwest Center's motion with prejudice and ruled as follows:

So what I have done is I have indicated in [the order] that all defamation claims against all defendants are dismissed with prejudice. I'm going to reserve for trial any request for the legal fees and costs or the statutory penalty and that all claims against Judge Nault are dismissed with prejudice.

RP 29:6-13; see CP 99-100. The trial court's order states that the mandatory award of attorney fees, costs, and statutory penalty are "reserved for trial." CP 100.

C. Procedural History of the Appeal.

On August 31, 2012, the Northwest Center filed its notice of expedited appeal, requesting review of the trial court's order on its special motion to strike. On October 4, 2012, the parties received a letter from the Court notifying the Northwest Center that the order appealed from was not reviewable as a matter of right pursuant to RAP 2.2(a). An appeal hearing was scheduled for October 26, 2012. In response, the Northwest Center sent a letter to the Court, requesting the appeal be permitted to proceed, and citing RCW 4.24.525(5)(d), which provides:

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.

In a letter dated October 25, 2012, the Court struck the appeal hearing, but noted as follows:

While this language appears to broadly provide for an appeal, there may be some limits to its application, for example, where, as here, the trial court has merely reserved ruling on the issue of the statutory penalty.

This matter will go forward as an appeal. The parties shall address in their briefs whether the challenged order is appealable.

In addition, Mr. Thompson filed his response brief ahead of schedule, on September 28, 2012. The filing of his response brief triggered the time requirement of RAP 10.2(d), which states that “[a] reply brief of an appellant or petitioner should be filed with the appellate court within 30 days after service of the brief of respondent unless the court orders otherwise.” Given that this timeline would have required the Northwest Center to file its reply brief *before* its opening brief was due, no reply brief was filed.² Instead, the Northwest Center will contact the Court and request an alternative deadline for filing a reply brief, if one is necessary.

² The Northwest Center's opening brief was due on or before November 16, 2012. Its reply brief would have been due earlier, on October 29, 2012.

IV. ARGUMENT

A. Washington's Anti-SLAPP Laws.

Washington's original anti-SLAPP statute, RCW 4.24.510, provides immunity to any party who communicates information to a branch of local government, including the judicial branch. Harris v. City of Seattle, 302 F.Supp.2d 1200, 1202 (W.D. Wash. 2004). In 2012, Washington's legislature enacted a second anti-SLAPP statute, RCW 4.24.525, that broadened the scope of protected communication and created a procedural device to curtail any litigation found to be targeted at persons lawfully communicating on matters of public or governmental concern. Castello v. City of Seattle, 2010 WL 4857022, *3 (W.D. Wash. 2010).³ The new anti-SLAPP statute allows a defendant to bring a "special motion to strike any claim that is based on an action involving public participation and petition." RCW 4.24.525(4)(a). "There is nothing in the language of RCW 4.24.525 to indicate that it supersedes RCW 4.24.510. The two provisions are complimentary." Castello, 2010 WL 4857022 at *4 n. 2. The protections afforded by the anti-SLAPP statutes have been extended to oral and written statements made during judicial proceedings and during communications with law enforcement. RCW 4.24.525(2) (judicial proceedings); Cornu-Labat v. Merred, 2012 WL 1032866, *4 (E.D. Wash. 2012) (applying anti-SLAPP protection to statements made to law enforcement).

³ The unpublished federal authority relied upon by the Northwest Center in this brief may be cited based on FRAP 32.1 (a), which permits citation to unpublished federal opinions issued on or after January 1, 2007. See GR 14.1(b).

RCW 4.24.525 provides for a mandatory award of attorney fees and costs, plus a statutory penalty of \$10,000, to each defendant who prevails on an anti-SLAPP motion to strike. RCW 4.24.525(6)(a). “The award is mandatory; the only remaining question for the Court [once an anti-SLAPP motion is granted] is the amount of the award.” Castello v. City of Seattle, 2011 WL 219671, *1 (W.D. Wash. 2011).

It is undisputed that the defamation claim asserted against the Northwest Center and Judge Nault violated Washington’s anti-SLAPP statutes. During oral argument, Mr. Thompson stated that his defamation claim was based on both the anti-harassment hearing in King County District Court and on Mr. Whipple’s statements to law enforcement. Both types of communication are protected by the anti-SLAPP statutes and are properly stricken by special motion. The trial court agreed, granting the Northwest Center’s motion and dismissing Mr. Thompson’s defamation claim with prejudice. CP 99-100. The only questions on appeal are (1) whether the trial court erred when it reserved for trial the award of fees, costs, and statutory penalty; and (2) whether RCW 4.24.525(5)(d) provides for an expedited appeal as a matter of right. Both questions are answered in the affirmative.

B. The Trial Court Erred when it Reserved for Trial the Mandatory Award of Attorney Fees, Costs, and Statutory Penalty Provided by RCW 4.24.525.

The trial court erred when it reserved for trial the mandatory award of attorney fees, costs, and statutory penalty. The error frustrated the

purpose and intent of Washington’s anti-SLAPP laws. An order granting a special motion to strike is not complete, and the full statutory relief not provided, until the mandatory award and statutory penalty are issued. Washington’s legislature enacted RCW 4.24.525 with a desire to dismiss “groundless” and “unconstitutional” claims before “defendants are put to great expense, harassment, and interruption of their productive activities.” RCW 4.24.525, Findings of Purpose, § 1(b). Courts have recognized that RCW 4.24.525 was enacted “to *swiftly* curtail any litigation found to be targeted at persons lawfully communicating on matters of public or governmental concern.” Castello, 2010 WL 4857022 at *3 (emphasis added). “The statute provides for the *rapid resolution* of a special motion, filed by the defendant, to strike the SLAPP.” Davis v. Avvo, Inc., 2012 1067640, *1 (W.D. Wash. 2012) (emphasis added). “The Washington Legislature enacted the anti-SLAPP statute to provide litigants with an efficient, uniform, and comprehensive method for *speedy adjudication*.” Jones v. City of Yakima Police Department, 2012 WL 1899228, *2 (E.D. Wash. 2012) (emphasis added).

The legislature’s intention for the prompt and full resolution of anti-SLAPP claims is evidenced by the language of RCW 4.24.525 itself. The statute requires a trial court to hold a hearing on a special motion to strike within 30 days after it is served, unless docket conditions dictate otherwise, and the trial court “is directed to hold a hearing with all due speed and such hearings should receive priority.” RCW 4.24.525(5)(a). Likewise, the trial court is directed to “render its decision as soon as

possible,” but not later than seven days after the hearing on a special motion to strike. RCW 4.24.525(5)(b). All discovery is stayed upon the filing of a special motion to strike, and the stay “shall remain in effect until the entry of the order ruling on the motion.” RCW 4.24.525(5)(c). The legislature intended for anti-SLAPP claims to be quickly adjudicated, with all of the statutory protections promptly provided, without any language suggesting that the legislature intended for relief under RCW 4.24.525 to be provided in a piecemeal fashion over an extended period (*i.e.* first striking a claim, and then awarding attorney fees, costs, and penalty during trial, which could occur months or even years later).

No express provision in RCW 4.24.525 provides a trial court the discretion to reserve for trial the mandatory award of attorney fees, costs, and the statutory penalty. Likewise, no court in Washington has approved, much less contemplated, such a procedural move. California’s anti-SLAPP statute mirrors RCW 4.24.525, therefore Washington courts look to California precedent as persuasive authority. Castello, 2010 WL 4857022 at *4. The Northwest Center has not found any California decision approving, much less discussing, the ability of a trial court to reserve for trial an award or penalty after granting a special motion to strike.

Several arguments support the Northwest Center’s position that the trial court should have contemporaneously issued an award of attorney fees, costs, and the statutory penalty when it granted the Northwest Center’s anti-SLAPP motion to strike:

First, no practical or logical reasons justify reservation of the award and penalty. To the contrary, once an anti-SLAPP motion is granted, “the only remaining question for the Court is the amount of the award.” Castello, 2011 WL 219671 at *1. An award of attorney fees and costs under RCW 4.24.525(6)(a) relates solely to those fees and costs incurred in bringing the motion. The Northwest Center is not claiming a right to all fees and costs generated in the lawsuit, negating an argument that it must wait until trial to determine the total amount recoverable. Likewise, litigating Mr. Thompson’s remaining claims will not affect the right of the Northwest Center to recover the award and penalty under RCW 4.24.525. No other arguments support a delay, and requiring the Northwest Center to proceed to trial before being granted complete relief under RCW 4.24.525 is unjustified.

Second, reserving for trial an award of attorney fees, costs, and the statutory penalty frustrates the intent and purpose of RCW 4.24.525, which provides for the swift, rapid, and speedy adjudication of anti-SLAPP motions to strike, before “defendants are put to great expense, harassment, and interruption of their productive activities.” RCW 4.24.525, Findings of Purpose, § 1(b). The protections of the anti-SLAPP statute “shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abuse use of the courts.” RCW 4.24.525, Application—Construction, 2010 ch. 188. An order granting a special motion to strike is not complete without the *mandatory* award of attorney fees, costs, and statutory penalty.

Although the trial court may have dismissed Mr. Thompson's defamation claim when it granted the Northwest Center's special motion to strike, the remedies provided by RCW 4.24.525 are not fully satisfied, and the full statutory protections not afforded, until the trial court issues the mandatory award of attorney fees, costs, and statutory penalty. Permitting the trial court to grant a special motion to strike but reserve for trial the remedies provided by RCW 4.24.525 frustrates legislative intent and deprives the Northwest Center of a critical element of statutory protection.

Third, the Northwest Center will suffer unfair prejudice if the trial court is permitted to reserve for trial the mandatory award of attorney fees, costs, and statutory penalty. In addition to its other arguments, practically speaking, the Northwest Center is presently unable to execute a judgment against Mr. Thompson or use the judgment to facilitate settlement discussions. Instead, it is required to take Mr. Thompson's remaining claims to trial, where, win or lose, its right to the mandatory award of fees, costs, and statutory penalty remains unfettered.

C. RCW 4.24.525 Provides for an Expedited Appeal as a Matter of Right.

By letter dated October 25, 2012, the Court requested the parties "address in their briefs whether the challenged order is appealable."

"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." RCW 4.24.525(d). "When statutory language is unambiguous, the court gives effect to the plain meaning of

the statute. Where a statute is clear on its face, it is not subject to judicial interpretation.” Keithly v. Sanders, ___ Wn. App. ___, 285 P.3d 225, 227 (Div. 1 Sept. 17, 2012).

This Court has recognized the right of an expedited appeal under RCW 4.24.525, and has accepted review of a trial court order on a special motion to strike. American Traffic Solutions v. City of Bellingham, 163 Wn. App. 427, 260 P.3d 245 (Div. 1 2011). In American Traffic Solutions, a traffic signal company, ATS, brought suit against the City of Bellingham, Whatcom County, and several initiative sponsors, claiming that a ballot initiative prohibiting the use of automated traffic safety enforcement cameras exceeded the scope of local initiative power. Id. at 430. In response, the initiative sponsors filed a special motion to strike pursuant to RCW 4.24.525. Id. at 431. The trial court granted the motion, striking the claim, awarding attorney fees and costs, and imposing the statutory penalty of \$10,000. Id. The Court accepted expedited review: “ATS filed a notice of appeal on the same day [of the trial court order], and we granted expedited review.” Id.⁴

The Northwest Center seeks review as a matter of right of the trial court’s order granting its special motion to strike, but reserving for trial the mandatory award of attorney fees, costs, and statutory penalty.

⁴ In American Traffic Solutions, a critical election deadline necessitated emergency review on an expedited basis. Regardless, a docket entry suggests that the parties and the Court agreed that expedited review was appropriate at least with respect to RCW 4.24.525. See Docket Entry August 18, 2011, Case No. 67553-2-1.

Consistent with legislative intent, the language of RCW 4.24.525(d) plainly provides for a right of expedited appeal and should be enforced as written. The Northwest Center's requests the Court permit its appeal to proceed as a matter of right.

V. CONCLUSION

Based on the foregoing authority, the Northwest Center respectfully requests the Court reverse the trial court's order, which reserved for trial the mandatory award of attorney fees, costs, and statutory penalty under RCW 4.24.525, and require the award and penalty be issued contemporaneously with the order granting the Northwest Center's special motion to strike.

DATED this 16th day of November, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury according to the laws of the State of Washington that on this date the foregoing document was filed with the Court of Appeals of the State of Washington, and caused to be served in the manner noted below a copy of same on the following individuals:

Mr. Lennie J. Thompson
1704 174th Avenue KP S
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lennie51351@yahoo.com

Via e-mail and U.S. Mail.

DATED this 16th day of November, 2012.

/s/ Catlyn Wiegand
Catlyn Wiegand, Legal Assistant