

No. 72333-2-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

KELLY A. SPRATT,

Plaintiff/Respondent,

v.

BRADLEY TOFT and JILL TOFT,

Defendants/Appellants

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RESPONSE BRIEF OF RESPONDENT

Janet A Irons, WSBA 12687
LAW OFFICE OF JANET A. IRONS
1400 – 112th Ave SE, Suite 100
Bellevue, Washington 98004
(206) 447-8500
Attorney for Respondent

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I. INTRODUCTION

Kelly Spratt, the plaintiff below and respondent herein, prays that the instant appeal be denied in its entirety and that she be awarded both her legal fees and terms in the amount of \$10,000, as provided for in RCW 4.24.525(6).

II. SOLE ISSUE ON APPEAL

As noted in the appellants brief at page 3, there is only one issue on appeal: has Ms. Spratt established by clear and convincing evidence that she voluntarily left her employment at Quadrant Home Loans. The answer is a resounding: YES.

III. CHRONOLOGY OF EVENTS

The records before the Court are consistent and clear: Ms. Spratt voluntarily resigned her position from Quadrant Home Loans, where Mr. Toft was her supervisor. Not only does Ms. Spratt's employment file from Quadrant Home Loans document that she voluntarily left that employment (CP 383), but Ms. Spratt also testified that she was never the focus of an

improvement program, formal or otherwise, as alleged by Mr. Toft. CP 145 (¶7).¹

Ms. Spratt has provided specific and detailed testimony regarding why she decided to quit her position at Quadrant Home Loans. She testified she made the decision to quit her position at Quadrant Home Loans after a particularly confrontational scene with Mr. Toft in which he erroneously accused her of wrong-doing. CP 145-6 (¶¶ 10-13). Ms. Spratt first announced her decision to quit not to Mr. Toft, but to two of Mr. Toft's supervisors, one of whom was Randy Smith. CP 146 (¶ 12). Mr. Toft was not informed of her decision until the next day, at which time he sent an email to other employees at Quadrant Home Loans acknowledging that Ms. Spratt had voluntarily left her position. CP 147 (¶13) and CP 156. A few months later, Ms. Spratt was solicited to return to work for one of the Quadrant Home Loans joint venture partners, which she did on the condition she would not have to interact with Mr. Toft. CP 147 (¶14).

Randy Smith, the regional vice president of Wells Fargo Bank (one of the members of the Quadrant Home Loan joint venture) and Mr. Toft's supervisor during the scenario in question, corroborates Ms. Spratt's

¹ Inexplicably the appellants ignore this portion of the record. Ms. Spratt unambiguously denies ever having been reprimanded prior to the scenario at issue. CP 145 at ¶7.

testimony. He has provided a declaration underscoring that he would not have rehired Ms. Spratt if Mr. Toft's allegations regarding Ms. Spratt's job performance and accusations about unethical behavior had been true. The problem lay with Mr. Toft – not Ms. Spratt. CP 168 (¶5 and ¶7).

In the fall of 2011 Ms. Spratt learned that Mr. Toft was running for public office. In March of 2012 she attended a public meeting for the purpose of asking about his qualifications, given his prior record of employee conflicts at Quadrant Home Loans. Before the meeting commenced Mr. Toft began to lie about Ms. Spratt, claiming he had fired her, his goal being to exclude her from the meeting even before it started. CP 187-8 (¶8); CP 180 (¶ 6).

After the March 2012 meeting Mr. Toft forwarded an email to Ramsey Boutros, a Republican Party official from whom Mr. Toft had unsuccessfully sought a personal endorsement. Mr. Toft again alleged that he had fired Ms. Spratt, this time noting it was for cause (i.e. terminated due to "her conduct"). CP 185-186. This is significant as firing for cause has clear defamatory import, not attached to being let go for non-personal reasons, such as cutbacks or layoffs.

Ms. Spratt attended a second public meeting at the Issaquah Police Department in May 2012, solely for the purpose of defending her reputation since she had become aware that the Tofts were lying about her

employment history. CP 144 (¶4). She took along a copy of Mr. Toft's memo indicating she had voluntarily resigned from Quadrant Home Loans in 2005. CP 189 (¶16). Prior to commencement of the meeting Mr. Toft again had told parties in one-on-one discussions that he had fired Ms. Spratt. CP 181 – 182 (¶ 14-15).

Even though there was no intervening personal contact, in August 2012 Tofts commenced an action in the King County District Court seeking to obtain a Temporary Restraining Order against Ms. Spratt. CP 206-223 (King County District Court, Issaquah Division, No. 123-5596). Tofts submitted copies of materials taken off Ms. Toft's Facebook page, which were accessible only to Ms. TOft, showing a private contact initiated by Ms. Spratt in March 2012. CP 231-2 (¶8). The Tofts provided no evidence of any private contacts whatsoever by Ms. Spratt after that March 2012 email. The TRO was subsequently denied without entry of a written order. CP 192-3 (¶2).

In October 2012 Ms. Spratt – and many others – received a package of materials herein referred to as “the anonymous letter”. Those materials aggressively defamed Ms. Spratt. That letter included materials proven to be uniquely available to Ms. Toft, i.e. a copy of Ms. Toft's Facebook page that was different than the copy included in the prior court proceedings.

CP 229-237. That letter insinuated facts that are untrue, for instance referencing that Ms. Spratt is “the type of person” that may harm people.

IV. PROCEDURAL HISTORY

This matter was commenced by Kelly Spratt in October 2012 to recover damages for a single cause of action: a pattern of defamatory statements made about her by Bradley and Jill Toft. CP 1 - 3. Those statements include, *inter alia*, the repeated false allegations by Mr. Toft that had fired Ms. Spratt from Quadrant Home Loans some years earlier, as well as a wide range of other defamatory allegations concerning Ms. Spratt, including some that were distributed in an “anonymous letter”.

Mr. and Mrs. Toft changed attorney twice over the ensuing months [CP 491-492; 495-497; 502-504], each time requesting a delay to “get up to speed”, besides repeated notices of unavailability from defense counsel. CP 493-494; 505-506. These all resulted in a delay in discovery and orderly progression of the case. Eventually the Defendants responded to Ms. Spratt’s lawsuit by bringing a motion to dismiss under RCW 4.24.525, premised on the theory that all their communications regarding Ms. Spratt fell within “public participation” as their communications involved a matter of “public interest” due to the fact Mr. Toft was at the time a candidate for public office. CP 7-17. That motion was not brought

until six months after Ms. Spratt's defamation suit was filed, rather than immediately as envisioned by the statute. *Cf. CP 7-17 with RCW 4.24.525(5)(a)*. Further, the motion was noted for oral argument nearly three months later. CP 500-501. Pursuant to RCW 4.24.525 a discovery stay was in place during the intervening period.

The trial court ruled against the Tofts' anti-SLAPP motion to dismiss based a finding that the actions at issue were not "public participation" under RCW 4.24.525. CP 398-400. The trial court then awarded Ms. Spratt her fees and costs, plus \$10,000 in statutory terms, due to the frivolous nature of the Tofts' motion. (Because of that ruling, i.e. no public participation elements in the claim, the trial court did not reach the issue of whether Ms. Spratt had established the likelihood of prevailing on her claim of defamation.) The Tofts' then brought a Motion for Reconsideration, CP 417-465, which was also denied. The Tofts subsequently filed their first appeal to this Court. (Toft adv. Spratt, Court of Appeals, Div. 1, 70505-9-1). CP 411-415.

After full briefing and oral argument, this Court reversed the trial court decision and found that the communications at issue did fall within "public participation" as defined in RCW 4.24.525. Included in the decision was a remand to the trial court. The Tofts then filed a motion entitled "Reconsideration and Clarification" requesting rewording of the

opinion, causing a sufficient delay to force the case to be reassigned at the trial court.

When the case was eventually returned to the trial court, the Tofts brought a “renewed” Motion to Dismiss based on the premise that Ms. Spratt could not establish defamation by clear and convincing evidence, as required by RCW 4.24.525. CP 513-702. The trial court ruled against the Tofts again on these new grounds, denying the Tofts’ motion but not imposing legal fees or terms. CP 782-785. The Tofts then filed for reconsideration as to only one piece of evidence, i.e. the “anonymous letter”. CP 788-799. Simultaneous with the filing of the Motion for Limited Reconsideration the Tofts’ also filed this second appeal, CP 800-806, resulting in another automatic discovery stay under RCW 4.24.525. (The trial court eventually denied the Tofts’ Motion for Limited Reconsideration. CP 827-828.)

V. LEGAL ARGUMENT

It is axiomatic that summary judgment motions are reviewed by this Court de novo. *See Anderson v. State Farm Mut. Ins.* 191 W.App. 323, 2 P.3d 1029 (2000): “the usual de novo standard on review of summary judgment” at 329. Thus, all inferences must still be made in the light most favorable to the non-moving party (Ms. Spratt). CR 56.

In order to defeat a summary judgment motion brought against a defamation claim, the defending party must establish the following:

To establish a prima facie defamation claim, the plaintiff must show (1) that the defendant's statement was false, (2) that the statement was unprivileged, (3) that the defendant was at fault, and (4) that the statement proximately caused damages. *Caruso v. Local Union No. 690*, 107 Wash.2d 524, 529, 730 P.2d 1299 (1987); *Mark v. Seattle Times*, 96 Wash.2d 473, 486, 635 P.2d 1081 (1981).

Alpine Industries Computers, Inc. v. Cowles Pub. Co., 114 Wn.App. 371, 378, 57 P.3d 1178 (Wash.App. Div. 3 2002). In the context of a “special motion” under RCW 4.24.525(4), these same four elements must be proven by “clear and convincing evidence”. Ms. Spratt has carried this burden, even given the heightened level of proof required.

A. The Statements are False.

Mr. Toft asserted orally and in writing that he fired Ms. Spratt. Those were false statements as proven by the following clear and convincing evidence:

- *Declaration of Randy Smith (CP166-168)*: Randy Smith’s declaration confirms that Ms. Spratt voluntarily resigned and was subsequently re-hired to work on another Wells Fargo project, something that would not have happened if she’d been fired from Quadrant Home Loans or resigned in lieu of being fired. CP 168. Mr. Smith also addressed Mr. Toft’s unacceptable management

style (including being manipulative) and the many management meetings held to address it, CP 168, – and that Mr. Toft was eventually involuntarily terminated because he “failed to perform job duties”. See also CP 198 (Mr. Toft’s formal termination notice).

- *Declaration of Kelly Spratt (CP 143-165)*: Kelly Spratt’s declaration confirms that she voluntarily resigned from Quadrant Home Loans due to Mr. Toft’s abusive conduct, first going to Mr. Toft’s supervisors who apologized for Mr. Toft’s behavior, and then going to Mr. Toft the next day. CP 146 -147. She was subsequently rehired by one of the joint venture partners in that company due to her excellent reputation – and she agreed on the condition she would never have to interact with Mr. Toft. CP 147.
- The personal file from Quadrant Home Loans, maintained by Doherty Employer Services, shows that Ms. Spratt voluntarily terminated her employment after being verbally attacked by Mr. Toft. CP 383.

There is thus clear and convincing evidence that Mr. Toft was abusive toward his subordinates, that he wrongly accused Ms. Spratt of unethical behavior and as a result she voluntarily terminated her employment – and was subsequently rehired even while Mr. Toft was being fired. Mr. Toft’s statements that he “fired” Ms. Spratt for “her conduct” are thus completely false.

In addition, the Declaration of Jolie Imperatori (CP 179-186) demonstrates that Mr. Toft was aware of the falsity of his story regarding Ms. Spratt as his story varied regarding Ms. Spratt's departure from Quadrant Home Loans depending on the composition of his audience. For instance, at the meeting in May 2012 Mr. Toft told isolated individuals before the meeting that he had fired Ms. Spratt, however once the meeting began and Ms. Spratt was present to defend herself, Mr. Toft at first refused to answer and then said Ms. Spratt had quit in lieu of being fired. CP 183. In actuality, both of Mr. Toft's statements were false – the clear and convincing evidence shows Ms. Spratt quit solely because of Mr. Toft's abusive behavior, a conclusion that is supported by the written record and the materials cited above.

The appellants now argue that claims Ms. Spratt was fired are not in and of themselves defamatory – however they ignore that the assertions by the appellants were not simple, unmodified statements. For instance, Mr. Toft indicated Ms. Spratt was fired for “the very behavior she exhibited tonight,” in other words for cause. CP at 186. That was an obvious indication that Ms. Spratt was fired for misconduct, not for any possible financial problems the employer was having as now argued by the appellants. *Appellants' Brief at page 15 et seq.*

Clear and convincing evidence has been provided that Mr. Toft's statement went beyond simply saying Ms. Spratt was fired, which is not true, with him adding that it was done for cause. The obvious intended goal of the lies by Mr. and Ms. Toft was to cast Ms. Spratt in a poor light and thus degrade the impact of Ms. Spratt's objections to Mr. Toft's candidacy. This is the very essence of defamation.

B. No privilege applies.

1. Ms. Spratt is not a limited public figure.

The Tofts' efforts to cast Ms. Spratt as a limited public figure, *Tofts' Opening Brief at pages 33 – 39*, is misplaced. None of the cases proffered by Tofts indicate a member of the public becomes a limited public figure by a few isolated acts, such as walking into a public meeting...and is at that instant that Mr. Toft began his campaign to defame Ms. Spratt. Ms. Spratt had written one letter to a local Republican official informing him of her concerns, CP 148, and then in March 2012 appeared as member of the public at an open forum to ask a few, pointed questions of the candidate. She held no press conferences, issued no public statements, did not appear on TV or radio, and did not voluntarily "thrust" herself into "the vortex" of his political campaign. CP 143. She made no advance announcements of her intentions to attend the public

meeting and went solely as a voter, asking questions during a portion of the meeting intended for the very purpose.

The record before this Court demonstrates Ms. Spratt eventually attended a total of only two public meetings – the first to outlined above and the second to defend herself against Tofts defamatory attacks. CP 144, ¶4. She not campaign for either of Mr. Toft’s opponent or contribute to their campaigns. CP 143-144.

In spite of this limited activity, Tofts rely on *Tilton v. Cowles Publ’g Co.*, 76 Wn. 2d 707, 459 P.2d 8 (1969), to support their position that Ms. Spratt’s made herself a “limited pubic figure”. However in *Tilton*, the plaintiffs were leaders of an organization that sought to change the Spokane city charter. In contrast, Ms. Spratt was not the leader of any organization or even a paying member of one. CP 144. She was and is a private citizen that wrote a letter to a private party, then made an isolated appearance in a campaign because she had unique information she thought warranted a question to the candidate. She attended only one another meeting – and then solely to defend herself. Mr. Toft’s defamation caused her to stop even that limited participation in the election cycle, so that she attended no further meetings, sent no letters beyond the first (reference above) and in June 2012 even restricted her presence in social media. CP 152. Given Ms. Spratt’s nearly hermit-like existence during the campaign,

the Tofts' reliance on *Tilton* to cast Ms. Spratt as a limited public figure is obviously off the mark.

The Tofts' reliance on cases from other jurisdictions on the topic of defamation² is also misplaced. Washington has a fully developed basis of law in this area (refer to *Tilton* discussion above), and Tofts' reliance on *Cabrera v. Alam*, 197 Cal App 4th 1077, 129 Cal. Reprt. 3rd 74 (2011) and *Grass v. News Grp. Pubs., Inc.* 570 F. Supp 178 *S.D. N.Y. 193) are misplaced. Further, even if those cases are considered, they do not support Toft's position, as discussed below.

In *Cabrera* the plaintiff gave a campaign speech at a public meeting for a candidate in an upcoming homeowners association election, and having previously served on the board herself she was already a public figure in that forum. She sued after being accused of misusing the association's funds while in office. The California court found that under those circumstances, the plaintiff was a limited public figure and the privilege applied, with the heavier burden for a defamation claim. 197 Cal. App 4th at 1085.

Similarly, in *Grass* the owner of a Rite Aid started a letter writing campaign regarding one candidate in the midst of an election cycle that "a reasonable person would view... as having thrust his own reputation into

² *Tofts' Opening Brief page 33 -39*

the public eye”. That action involved spending money and time in an effort to impact the election through contact with a wide section of the electorate. 570 F. Supp. 182. Tofts cite to no case, in any jurisdiction, where an individual with very limited and isolated activities such as Ms. Spratt’s one private letter and two attendances as a member of the audience at public forums was found to be a “limited public figure”.

In both *Cabrera* and *Grass* the person found to be a limited public figure undertook a well-orchestrated plan to influence the general electorate on an issue, including making public statements that were intended to be widely disseminated. Letters were sent to a wide range of people in *Grass*, for instance, that actual rose to the level of “a campaign” in the words of the Court. In addition, in *Cabrera* the party in question relied on the fact she was already a limited public figure (having served on the Board at issue) to create a platform for her remarks. Neither of this situations is even vaguely relevant to Ms. Spratt.

Tofts attempt to circumvent this hole in their argument by characterizing Ms. Spratt’s comments on her private social media sites as the equivalent to a letter writing campaign to strangers. But Ms. Spratt’s sites were available only to those that intentionally access them, and by June 2012 that dissemination had been limited even further so only those she approved could see them. CP 152. That is a far cry from leading a

public organization or commencing a letter writing campaign to strangers. Notably Tofts site no case law for the quantum leap that social media comments on a private page create “limited public figure” status, and there is good reason for that - none exists. Indeed, if such were the law the vast majority of adults in the United States would be limited public figures as most people have either a Facebook page or a Twitter account on which they post random thoughts. Comments directed solely to friends and family on social media – on private pages with no “followers” - have never been held to create a “limited public figure” by any court in any jurisdiction.

2. Public Concern privilege is not applicable.

There was no qualified privilege for issues of public concern applicable to Mr. Toft’s statements to Mr. Boutros prior to the March 2012 public meeting, Mr. Toft’s subsequent email to Mr. Boutros, Mr. Toft’s private comments to individuals before the May 2012 PCO meeting began, or in the “anonymous letter” sent by Ms. Toft. Specifically, there was no privilege arising out of “matter of public concern”, as no such privilege exists:

The trial court erroneously relied on the language in *Alpine* as a basis for a qualified privilege for communications on matters of public concern. No such privilege exists.

Momah v. Bharti, 144 Wn. App. 731, 745, 182 P.3d 455 (Div. 1, 2008).

Neither is Tofts' argument well taken that comments to Mr. Boutros (orally and in writing) and to attendees at the May 2012 were privileged due to "common interest"³ as Mr. Boutros and Mr. Toft had no common purpose whatsoever. Indeed, Mr. Boutros refused to have a common purpose with Mr. Toft, i.e. Mr. Boutros refused to endorse Mr. Toft in the 2012 election. CP 185-186.

Common interest privilege occurs only when the declarant and the recipient have a common interest in the subject matter of the communication. *Moe v. Wise*, 97 Wn. App. 950, 957-58, 989 P2.d 1148 (1999). Tofts attempt to expand this privilege to cover the comments made to Mr. Boutros (which were at first aimed at excluding Ms. Spratt from the March 2012 meeting and then at obtaining Mr. Boutros' endorsement), then to individuals attending a public meeting in May 2012 where a number of candidates appeared to give their pitches.

When discussing the comments made to Mr. Boutros before the March 2013 meeting, Tofts claims that Mr. Boutros came to that meeting to consider endorsing Mr. Toft's candidacy which they then argue means Mr. Toft and Mr. Boutros had a common purpose in all comments on all topics – including discussions regarding someone Mr. Boutros had never met before. In doing so, Tofts fail to acknowledge that the vetting process

³ *Tofts' Opening Brief page 39.*

had occurred in a different meeting with different attendees, well before Ms. Spratt even arrived. Compare CP 188, ¶¶ 6 - 7 with CP 188-189, ¶¶ 8 -10. Further, the comments made regarding Ms. Spratt were made not to encourage Mr. Boutros to endorse and support Mr. Toft, but to solicit assistance in excluding Ms. Spratt from a public meeting. CP 189, ¶ 9.

Notably, Mr. Boutros has affirmed that he was present at the meeting March 2012 as a private citizen, not an officer of the Republican Party, and he that had no “common interest” with Mr. Toft at the time – and neither did the Republican Party. CP 189, ¶ 10. Further, Mr. Boutros had no “common interest or purpose” with Mr. Toft when he received the defamatory email about Ms. Spratt shortly thereafter. In both instances Mr. Toft was seeking an endorsement from Mr. Boutros as private citizen, not an endorsement from the Republican Party (an endorsement that Mr. Boutros did not control).

Neither is there a reasonable argument that defamatory statements made to attendees at the May 2012 meeting involved “common interest and purpose.” The attendees at the May 2012 meeting were there to obtain information about candidates – true and accurate information. Instead, Mr. Toft provided them with false and defamatory information indicating that he had fired Ms. Spratt...information he provided for the purpose of deflecting their attention from the true issue of public concern:

his own qualifications for public office. The statements by Mr. Toft were solely to benefit himself and to deceive the isolated attendees to whom he was speaking. It stretches credulity beyond all reason for Tofts to argue that every member of the Republican Party shared his common purpose of getting him elected - even if based on false information and defamation of private citizens. Certainly that was not the case. Mr. Toft's defamatory statements at the May 2012 meeting were thus not part of a "common purpose and interest" and therefore were not subject to a privilege.

The "common interest" privilege is equally inapplicable to the "anonymous letter" sent in October 2012. The appellants have not attempted to show any common interest in having such vile and horrendous allegations disseminated to a wide segment of the community - much of which had no bearing on anything but smearing Ms. Spratt's reputation.

C. Tofts are at fault

The evidence is clear, convincing and undisputed that Mr. Toft repeatedly, in varying contexts, both orally and in writing, asserted as a fact that he fired Ms. Spratt. CP 187-191; CP 179-184; CP 143-165. As set forth above, the evidence is overwhelming and uncontroverted that Mr. Spratt actually voluntarily resigned with her excellent reputation in tact.

Mr. Toft's comments indicating Ms. Spratt was fired were undeniably false and clearly defamation and Mr. Toft has never denied making them.

Similarly, evidence from a social media expert has been provided that the "anonymous letter" contains an attachment that is accessible only to Ms. Toft. That letter contains language and characterizations that are clearly intended to harm the reputation of Ms. Spratt. As noted in Dunlap v. Wayne, 105 Wn.2d 529,538, 716 P.2d 842 (1986), adopting Restatement (Second) of Torts §566 (1977), defamatory communication may consist of a statement in the form of an opinion if it implies the allegation of undisclosed defamatory facts as the basis of the opinion.

D. Ms. Spratt established damages.

It remains to be seen if at trial Ms. Spratt will be awarded both general and special damages as a result of the Tofts' defamation, however she has already signed a sworn statement that she does indeed have special damages in the form of uninsured counseling bills, necessitated by the Tofts' attacks. There is no allegation that that statement is fraudulent, nor did Tofts' question the amount of the damages – which is unnecessary to prove at this juncture. Ms. Spratt has also referenced the personal trauma she has experience from this situation, CP 154, including no longer attending social events for fear of encountering Mr. and Ms. Toft, missing

her children's events for the same reason, and fearing for the safety of herself and her family due to Mr. Toft's past physical threats (i.e. the baseball bat incident referenced her declaration). There is thus detailed evidence that Ms. Spratt has suffered emotional trauma and the question at trial will be the appropriate compensation.

E. The anonymous letter is not a separate claim.

The Tofts have mischaracterized Ms. Spratt's complaint in this matter, attempting to segregate each occurrence of defamation into a separate cause of action, thus making the "anonymous letter" into a separate claim - and then to argue that claim can be dismissed individually. That is a distortion of the pleadings and should be not tolerated. The Amended Complaint references only one cause of action: defamation. CP 1-3.

RCW 4.24.525(10)(a) defines "claim" as follows:

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

RCW 4.24.525(1)(a). This comports with Black's Law Dictionary which defines "claim" as a cause of action. *Black's Law Dictionary* (West Publishing Co., 1979), page 224,

The Amended Complaint filed in this action clearly and unambiguously references only one claim. It is the only pleading that has

been filed by Ms. Spratt alleging a claim against the Tofts and it states only that single cause of action: a pattern of defamation. Notably there is no specific reference to the “anonymous letter” in the Amended Complaint, let alone a separate assertion of damages or separate prayer for relief based on that letter. Thus, under RCW 4.24.525(1)(a) and well settled law, the “anonymous letter” is not a claim to be dealt with separately.

Tofts’ attempt to treat one piece of evidence as a separate claim results in a bizarre manipulation of RCW 4.24.525. As referenced above, RCW 4.24.525 provides for motions to dismiss on any “claim”, also allowing an expedite appeal whenever a motion to dismiss brought under that statute is denied. RCW 4.24.525(5)(d). Also, as noted above, the statute mandates an award of \$10,000 plus legal fees to the defendant if the motion to dismiss a claim is successful. RCW 4.24.525(6). Expanding those statutory provisions to allow for motions to dismiss and then expedited appeals for a single piece of evidence would have a ridiculous outcome and obviously unexpected outcome.

For example, if a defendant is allowed to treat each piece of evidence as a separate basis for an RCW 4.24.525 motion to dismiss, a defendant will have the option of bringing a series of separate motions to dismiss under RCW 4.24.525 – one for each piece of evidence (in this instance

each occurrence of alleged defamation). In each instance the defendant would then have the possibility of being awarded \$10,000 plus fees if he or she prevailed. Further, if the original motion on each piece of evidence was denied, the defendant could then file an expedited appeal, resulting in a stay of discovery. That process could then be initiated over and over and over again, each time with a separate piece of evidence – even though a mound of other evidence might be in existence that provided clear and convincing evidence that defamation had most definitely occurred.

Such an outcome would burden the courts and have the potential for virtually unlimited \$10,000 awards to the defendant. That is a bizarre outcome that the legislature certainly did not envision when it defined “claim”. There is in fact no basis in the statute for the Tofts to bring an expedited appeal on just one piece of evidence when it is not a separate claim or cause of action. There is copious evidence of defamation, including both oral and written statements, and the instant appeal should be immediately dismissed without further briefing on the merits.

F. Ms. Spratt should be awarded her legal fees plus \$10,000 for having to respond to this appeal, pursuant to RCW 4.24.525(6)(b).

This appeal was brought on the untenable proposition that allegations of being fired for cause is the same as having quit due to continued abuse by a supervisor. Such is obviously not the case. In

addition, the Tofts' second appeal ignores the uncontroverted testimony from an expert that Ms. Toft and only Ms. Toft had access to the materials attached to the highly defamatory "anonymous letter." When those two elements are considered – as they should have been by the Tofts – it is clear that the instance appeal is frivolous.

The sum of the evidence before the Court is clear and convincing that Mr. and Ms. Toft repeatedly defamed Ms. Spratt – which makes the instant appeal dead on arrival. Given that, it is clear the appeal was brought to delay the trial in this matter for an indefinite period, even halting discovery yet again. RCW 4.24.525(5)(c). Under these circumstances, the overwhelming evidence is that Tofts brought this second appeal for the sole purpose of delay.

This is not the first time that the Tofts have manipulated the rules of the Court for delay, e.g. the Appellants Motion for Reconsideration and Clarification, brought at the end of the first appeal in this matter. There is no basis in the Rules of Appellate procedure for a motion requesting rewording of an opinion, such as the Tofts sought at that time. The methodical and repeated attempts to delay this case are well demonstrated by the procedural history of this case as outlined §IV above.

An award of terms and sanctions is provided for in such situations in RCW 4.24.525. Specifically, RCW 4.24.525(6)(b) provides as follows:

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 the 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 the responding party prevailed;
- (ii) An award of ten thousand dollars, not including the costs of litigation and attorneys' fees; and
- (iii) Such additional relief, including sanctions on 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 situation.

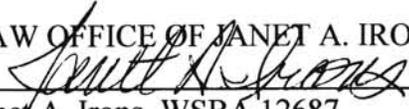
Certainly that is the case in this instance, i.e. frivolous motions to cause unnecessary delay. The Tofts have repeatedly brought unwarranted and "creative" motions, such as asking the appellate court to reword a decision, seeking reconsideration of the second denial of a motion to dismiss but limiting it to only one piece of evidence when there is only one claim at issue, and then bringing a second expedited appeal when that unique and unjustified motion failed. Each time there has been a delay in the case so that now – more than two years after it was original filed – there is still no trial date and discovery has been stayed virtually continually since March, 2013 due to the Tofts motions to dismiss, motions for reconsideration at every stage, and repeated "expedited" appeals.

This Court should not tolerate such machinations and repeated delays. The legislature, in a moment of premonition, provided this Court with the very tool to ensure this type of behavior is halted and sanctioned: RCW 4.24.525(6)(b). Ms. Spratt prays that the Court uses that tool to halt this mutilation of the statute by the Tofts and to allow her to recover the fees and costs the Tofts' behavior has burdened her with in this appeal.

VI. CONCLUSION

Ms. Spratt asks that the Tofts' appeal be dismissed in its entirety. Alternatively, if this second appeal is allowed to go forward, Ms. Spratt asks that the discovery stay be lifted and the trial court instructed to set a trial date, so the case may move forward while this matter is considered on appeal. Lastly, Ms. Spratt seeks an award of legal fees and costs, plus sanctions, under RCW 4.24.525(6)(b) due to the Tofts intentional and repeated delays of this case.

DATED: December 15, 2014

LAW OFFICE OF JANET A. IRONS

Janet A. Irons, WSBA 12687
Attorneys for Respondent Kelly A. Spratt
1400 – 112th Ave SE, Suite 100
Bellevue, Washington 98004
Telephone: 206-447-8500
Fax: 425-688-1797

Irons_law@hotmail.com

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

KELLY A. SPRATT, a married woman,)
) No. 72333-2-I
)
) Plaintiff-Respondent,)
)
) CERTIFICATE OF
) SERVICE
)
)
) vs.)
)
) BRADLEY TOFT and JILL TOFT,)
) husband and wife and the marital)
) community composed thereof,)
)
) Defendants-Appellants.)
)
)

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[Handwritten signature]

I certify that on the 19th day of Dec., 2014 I caused a true copy of

RESPONSE BRIEF OF RESPONDENT

(with corrected margins) to be served on the following in the manner indicated:

Counsel for Mr. and Mrs. Toft
David Gross
Helsell Fetterman
1001 Fourth Ave Plaza, Suite 4200
Seattle, Washington 98154

() U.S. Mail
(x) Hand Delivery
() _____

By: David A. Gross