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COURT OF APPEALS  
STATE OF WASHINGTON  
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NO. 64324-0  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ROGER L. SKINNER,

Petitioner,

vs.

CITY OF MEDINA, et al.,

Respondents.

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RESPONDENTS' BRIEF

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Shannon M. Ragonesi, WSBA #31951  
Keating, Bucklin & McCormack, Inc., P.S.  
800 Fifth Avenue, Suite 4141  
Seattle, WA 98104  
(206) 623-8861

ORIGINAL

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## I. INTRODUCTION

Appellant Roger Skinner (hereinafter “Skinner”) filed suit against Respondents Briana Beckley, Linda Crum, Jeffrey Chen, Dan Yourkoski and Doug Schulze (hereinafter “the employees”) for reporting him to the City of Medina and the Civil Service Commission for making racist and derogatory comments. This form of lawsuit is well recognized as a Strategic Lawsuit Against Public Participation, or SLAPP, as it is designed to intimidate or dissuade citizens from making complaints or providing information to government entities about matters of concern to the government. Our state and federal governments have enacted legislation in an effort to put a stop to SLAPP litigation.

SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

**. . . 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.** Chapter 232, Laws of 2002 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 2002 c. 232 § 1 (emphasis added); Bailey v. State, 147 Wn. App. 251, 262, 191 P.3d 1285 (2008), *rev. denied*, 166 Wn.2d 1004, 208 P.3d 1123 (2009).

Skinner was a Lieutenant with the Medina Police Department when he made offensive and racist comments to two subordinate records clerks, Linda Crum and Briana Beckley. Skinner told Crum and Beckley, “The Chief said you are just “monkeys at a keyboard” and “any monkey could do your job.” Skinner also told Beckley, “One thing I’ve noticed is that even though there are a lot of Asian people in Seattle, there aren’t a lot of Asians as supervisors at Seattle. I think Asians don’t make good managers because people don’t like them.” Skinner’s Chief of Police and supervisor, Jeff Chen, is Asian.

Crum and Beckley reported Skinner’s offensive comments to their supervisor, Corporal Dan Yourkoski, who reported them to the City Manager, Doug Schulze. Skinner was terminated by the City for misconduct. He appealed his termination to the Medina Civil Service Commission. Crum, Beckley, Yourkoski, Chen and Schulze were all summoned to testify before the Civil Service Commission regarding Skinner’s statements. After hearing the testimony, the Commission upheld Skinner’s termination. Skinner responded by filing a lawsuit against the employees for reporting his misconduct and testifying against

him at the Commission hearing. He also filed suit against the City of Medina (hereinafter “the City”) for alleged negligent hiring and supervision of the employees. He also filed an appeal of the Civil Service Commission decision affirming his termination.

The employees moved for summary judgment dismissal based on the anti-SLAPP immunity statute, RCW 4.24.510. The employees and the City also moved for dismissal based on Skinner’s failure to comply with RCW 4.96.020. The trial court granted dismissal of all claims, awarded the employees statutory damages under RCW 4.24.510, and awarded statutory attorney fees. Skinner now appeals.

## **II. STATEMENT OF THE CASE**

### **A. FACTS**

Although Skinner did some good work as a police officer during his time with the City, he also had a history of being counseled and disciplined for making inappropriate and offensive comments to fellow employees and persons outside of the Department. CP 147-154. Some examples include:

- Discipline for unbecoming conduct for witness intimidation in 1993 during a Civil Service Commission hearing (Skinner admitted making the comments, but denied he was trying to intimidate the witness from testifying) CP 147-151;

- Warning letter in 1995 about an allegation that he had made derogatory comments about a former employee in violation of written orders (Skinner denied making the comments) CP 152;
- Suspension in 2000 for making a graphic sexual remark about a female officer in another department to a Medina officer (Skinner admitted making the comment) CP 153-154; and
- Counseling in 2005 for treating Officer Shannon Gibson, a subordinate female officer, differently than a male officer and causing her to believe she was being treated unfairly. CP 143, ¶ 4, CP 167.

Skinner also received comments in his performance appraisals in 2004 and 2005 indicating he had been counseled regarding the importance of gaining the respect of his subordinates and peers and improving his interpersonal skills. CP 143 ¶ 5, 156-157, and CP 161-162.

Jeffrey Chen was hired by the City of Medina on June 1, 2001 as a Captain of the Medina Police Department. CP 142, ¶ 2. He was promoted to Chief of Police on February 1, 2004. *Id.* Dan Yourkoski was hired by the Medina Police Department in 2000 and promoted to Corporal in 2002. CP 113, ¶ 2. Doug Schulze was hired by the City of Medina as the City Manager in November 1996. CP 76, ¶ 2. He remained the City Manager for Medina until October 2006 when he accepted a position as the City

Manager for the City of Normandy Park. *Id.* Linda Crum was hired by the Medina Police Department as a Police Records Manager in 2001. CP 121, ¶ 2. Briana Beckley was hired by the Medina Police Department as a Police Administrative Specialist in 2002. CP 132, ¶ 2.

On October 1, 2005, Chief Chen was temporarily assigned to the Federal Bureau of Investigation National Academy in Quantico, Virginia for approximately three months of training. CP 143, ¶ 6. Prior to departing, Chief Chen appointed Corporal Yourkoski as the Acting Chief of Police in his absence. CP 143-144, ¶ 6. The Chief explained to the staff that he had appointed Corporal Yourkoski because Skinner was actively looking for a position with another department and he was concerned that if he secured a new job while the Chief was gone, it would effect the operation of the police department. *Id.* Skinner was unhappy he chose Corporal Yourkoski to serve as the Acting Chief. CP 144, ¶ 6. Skinner was dissatisfied with his position with the City and he told the City Manager he was looking for other law enforcement jobs at other cities. CP 77, ¶ 4.

On October 18, 2005, Skinner and Beckley attended training together in Bellevue. CP 132, ¶ 3. During the lunch break, Skinner made comments to Beckley that she found disheartening. CP 132-133, ¶ 3. Skinner told Beckley that when she and Crum were not around, Chief

Chen made disparaging comments about them. CP 133, ¶ 3. In particular, Skinner claimed the Chief had said she and Crum were just “monkeys at a keyboard” and that “any monkey could do [their] job.” *Id.* The overall message Skinner gave her was that the Chief did not feel they were of any value to the agency. *Id.*

Skinner also told Beckley, “One thing I’ve noticed is that even though there are a lot of Asian people in Seattle, there aren’t a lot of Asians as supervisors at Seattle. I think Asians don’t make good managers because people don’t like them.” CP 133, ¶ 4. Beckley was shocked to hear such an offensive comment from her supervisor. *Id.* She tried to ignore his comment and change the subject. *Id.*

For the rest of the day, Beckley replayed the conversation with Skinner in her mind. CP 135. She intended to disregard it, but the idea that the head of the organization believed she was of no value was not only bothersome but hurtful. *Id.* She also felt Skinner’s comment about “Asians” was inappropriate. *Id.*

After returning to work, Beckley spoke with Crum about the conversation with Skinner. CP 133, ¶ 5. Crum admitted to Beckley that Skinner had made a similar remark to her earlier in the week. CP 133, ¶ 5, CP 122, ¶ 4. Skinner had told Crum the Chief said, “any monkey at a

keyboard can do [her] job.” *Id.* Beckley and Crum were both upset and demoralized by what Skinner told them. CP 133, ¶ 5.

The day after the conversation, Beckley was still troubled by it. CP 133, ¶ 6, CP 136. She felt the comments, whether true or not, created discontent and an uncomfortable work environment for her. CP 135-136. She discussed the comments with Corporal Yourkoski, who was the Acting Chief. CP 136. She asked him if he believed the disparaging remarks were made by Chief Chen. *Id.* Yourkoski said he did not believe the comments to be true. CP 136, CP 114. He also said he was obligated to notify Chief Chen about the complaint. CP 136. Beckley prepared a written memorandum detailing what had happened. CP 135-136.

At the time Skinner made the “monkey” comment to Crum, she just internalized it even though she felt it was demoralizing, because it was not confirmed that it was true. CP 122, ¶ 4. She also does not like confrontations. *Id.* However, when Beckley approached her and told her what Skinner had said, she felt disturbed and hurt by the comment, which devalued their positions with the Department. *Id.* She reported the comments to Corporal Yourkoski and prepared a written memorandum. CP 122, ¶5, CP 125. In her memo, she also reported that Skinner had made comments on other occasions about there being a possibility that either her or Beckley’s job could be eliminated and disturbing her into

believing her job might be at risk. CP 125. She felt such comments, whether true or not, created an unhealthy work environment. *Id.*

Corporal Yourkoski reported the complaints of Beckley and Crum to Chief Chen who was at the FBI Academy during this time. CP 114. Corporal Yourkoski informed the City Manager of the allegations and the City Manager initiated an investigation into the alleged misconduct. CP 77, ¶ 3. He interviewed Beckley, Crum and Corporal Yourkoski. *Id.* He also contacted Chief Chen and requested that he provide information about the incident. *Id.*

Chief Chen was extremely disturbed when he heard about the comments made by Skinner to Beckley and Crum. CP 144-145, ¶ 7-9. He sent an email to the City Manager to complain about Skinner's conduct. CP 145, ¶ 9, CP 166. He found the comment about Asians to be highly offensive from a racial perspective, and stated the alleged comments made by him to the support staff about monkeys was an outright lie by Skinner. *Id.* The Chief believed Skinner's actions were meant to be subversive and to discredit and malign him as a person and a police chief. *Id.* He believed Skinner's actions and comments violated City and state policy and professional ethics. *Id.*

In the meantime, Skinner somehow learned about the investigation. On October 31, 2005, he called Crum at home on her day off and

questioned her about the investigation and her interview with the City Manager. CP 123, ¶ 6, CP 126. Crum was surprised to receive a call from him on her day off and was uncomfortable that not only did he know she and others had been interviewed, but that he knew what it was about. *Id.* He told her a “little bird” told him about the interviews. *Id.* He asked her if it was about what he said to Briana during the training. *Id.*

Crum tried to get off the phone with him but he continued to question her. *Id.* Crum was upset about the phone call and prepared a written confidential memorandum to Corporal Yourkoski to bring this to his attention. *Id.*

On November 3, 2005, the City Manager provided Skinner with written notice of the internal investigation and potential discipline. CP 77 ¶ 4, 80-81. He scheduled an interview with Skinner for November 9, 2005. *Id.* During the meeting, Skinner admitted making the monkey comments to both Beckley and Crum, but claimed he was just repeating comments he heard Chief Chen make. *Id.* The City Manager read to Skinner the allegation that Skinner had said, “One thing I’ve noticed is that even though there are a lot of Asian people in Seattle, there aren’t a lot of Asians as supervisors at Seattle. I think Asians don’t make good managers because people don’t like them.” *Id.* Skinner admitted making

this comment, and did not suggest that the comment had been incorrectly reported by Ms. Beckley. *Id.*

On January 13, 2006, the City Manager directed Chief Chen to provide Skinner with written notice of his intention to discharge him based on the seriousness of his actions, the overall negative impact on the organization that he caused, and the prognosis for future similar problems. CP 77 ¶ 5, CP 82-84. He informed Skinner that the grounds for the proposed discharge were based on the fabricated comments meant to discredit the Chief of Police, and the inappropriate racial comment about Asians. *Id.* Later that day, Skinner's legal counsel sent a letter to the Medina City Attorney, Wayne Tanaka, indicating she represented Skinner and listing the allegations against Skinner. CP 78, ¶ 6, CP 85. Skinner told her he was being disciplined for "saying that Asians are intelligent people, so that it is surprising that there are not more Asians in management." *Id.* However, this was not the allegation read to Skinner by the City Manager.

The letter from Skinner's attorney raised a new concern about his honesty as he appeared to have provided false information to his legal counsel. CP 78, ¶ 7. Therefore, the City Manager sent Skinner a memorandum dated January 23, 2006 indicating he was extremely concerned about the information in the letter from his attorney. CP 78, ¶

7, CP 86. He stated it appeared to be a misrepresentation of the actual allegations and complaints against him. *Id.* The City Manager informed him that he intended to add this new information to his consideration of disciplinary action. *Id.*

In response to this memorandum, Skinner provided a memo in which he denied that he had ever admitted to the City Manager that he made the derogatory remark about Asians. CP 78, ¶ 8, CP 87. He now claimed the statement he made to the City Manager during their interview was, “I’ve met a lot of Asians throughout my police career, particularly from the larger cities such as Seattle, and that they’ve all been intelligent people. I was curious why I didn’t see more in the high ranking positions.” *Id.* The City Manager asked Beckley if it was possible this was the statement made by Skinner, but she indicated this was not the statement Skinner had made to her. CP 78, ¶ 8, Beckley Decl, ¶ 7.

On February 1, 2006, Chief Chen held a hearing with Skinner to allow him an opportunity to present his version of events and any mitigating information. CP 168-169. Skinner was accompanied by a new attorney at the hearing. *Id.* The only statement he made during the hearing was, “I guess the only comments I have is that I deny making any racial slur about Asians and ah regarding the other comment made regarding the monkey comment, I was repeating something I heard and

don't feel I should be punished for saying something that someone else said. That is all I have to say." *Id.*

After considering all the information provided, the City Manager decided to terminate Skinner. CP 79, ¶ 9, 88-89. He appealed his termination to the Medina Civil Service Commission. CP 79, ¶ 10. The Commission held a public hearing on the matter on August 4, 2006. Briana Beckley, Linda Crum, Corporal Yourkoski, Doug Schulze and Chief Chen all testified under oath as witnesses at the hearing. CP 79, ¶ 10, CP 90. On September 1, 2006, the Commission issued its finding, conclusions and order and upheld Skinner's termination. CP 90-102.

The Commission found Skinner's recitation of the monkey comment was sufficient in and of itself to justify serious disciplinary action. CP 97-98, ¶ 5.13.2. The Commission found that other than to embarrass or undermine the Chief, or to regain lost credibility within the Department, there appeared to be no reason for his monkey comment or Asians comment to Beckley. CP 97, ¶ 5.13.1. The Commission noted that Skinner was specifically responsible for improving employee morale in his job description. CP 99, ¶ 5.16.2. His conduct in undermining employee morale was directly contrary to the specific standards of the Department as well as common expectations in a quasi-military organization. CP 99, ¶ 5.16.2.

Regarding the comment about Asians, the Commission noted there appeared to be no purpose for the comment other to undermine the Chief's standing as supervisor of the Department. CP 98, ¶ 5.14. The Commission further stated that Skinner's suggestion that the Asians comment or the monkey comment were innocent small talk among Department personnel was not persuasive. CP 98, ¶ 5.14. Rather, Skinner sought to discredit the Chief with subordinate personnel. CP 98, ¶ 5.14. The Commission found that whether racist or not, it constituted disrespectful, discourteous and insubordinate conduct. CP 98, ¶ 5.14.

On January 21, 2009, Skinner filed a verified claim for damages with the City. CP 109, ¶ 4, CP 111. He then filed his complaint on January 29, 2009, only eight days after his verified claim. CP 1-10.

Skinner's counsel provided a letter to the City on February 5, 2009 regarding the claim. CP 112. He admitted the mandatory sixty day waiting period had not expired when he filed the Complaint. *Id.* He stated he intended to "re-serve" the City after 60 days expired from the January 21 date. *Id.* He stated Skinner would not require an answer to the lawsuit until he re-served the City. Skinner did not re-serve the City. CP 109, ¶ 6.

The employees and the City filed and served their answer to Skinner's complaint on February 25, 2009. They asserted the defenses of

RCW 4.24.510 immunity and failure to comply with RCW 4.96. They later filed an amended answer on May 1, 2009. CP 11-18.

In response to discovery requests, Skinner stated his claims against the employees were based on their complaints against him which resulted in his termination, and their testimony against him at the Civil Service Commission hearing. CP 104-105, CP 117-118, CP 128-129, CP 138-139, and CP 171-172. When asked what claims he believes were made against him by the employees, Skinner merely stated “Claims such as those proffered by [employee] in her testimony at the Civil Service Commission hearing regarding the termination of Plaintiff’s employment,” or a similarly worded response for each of the employees. *Id.*

## **B. PROCEDURAL HISTORY**

The employees moved for dismissal of the claims against them based on Washington’s anti-SLAPP statute, RCW 4.24.510. CP 19-42. The City and the employees also moved for dismissal based on Skinner’s failure to comply with the claim filing statute – RCW 4.96.020. *Id.* The trial court granted summary judgment and dismissed all claims pursuant to RCW 4.24.510 and RCW 4.96.020. CP 73-75. The employees subsequently moved for statutory damages pursuant to RCW 4.24.510. CP 174-177. Skinner did not submit any declaration or evidence of bad faith to oppose the motion. CP 182-183. He opposed it on procedural

grounds. The trial court granted the motion and awarded statutory damages in accordance with RCW 4.24.510. CP 198-199.

The employees also moved for attorney fees under RCW 4.24.510. CP 250-254. They supported the motion with a declaration of their legal counsel and extensive, segregated billing statements detailing work performed in support of their defense under RCW 4.24.510. CP 222-249. All legal work unrelated to this claim was redacted and segregated from the billing statements. *Id.* The trial court granted the motion for attorney fees, and made a finding that, “the ct reviewed all of the billing statements submitted & finds that the amounts requested are reasonable & that the claims have been segregated. The rate is consistent with that of comparable attorneys in the Puget Sound area.” CP 336-337.

### **III. LEGAL ARGUMENT**

#### **A. STANDARD OF REVIEW**

Where the constitutionality of a statute is challenged, that statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. Tunstall v. Bergeson, 141 Wn.2d 201, 220, 5 P.2d 691 (2000). “This demanding standard of review is justified because, as a co-equal branch of government that is sworn to uphold the constitution, we assume the

Legislature considered the constitutionality of its enactments and afford great deference to its judgment.” *Id.*

One of three tests may be used to determine whether the right to equal protection has been violated. First, strict scrutiny applies when a classification affects a suspect class or a fundamental right. State v. Clinkenbeard, 130 Wn. App. 552, 566, 123 P.3d 872 (2005), citing Westerman v. Cary, 125 Wn.2d 277, 294, 892 P.2d 1067 (1994). Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary for a compelling state interest. *Id.* Second, the intermediate scrutiny test may apply in certain limited circumstances where the classification affects an important right and applies to a semi-suspect class not accountable for its status. *Id.* Third, the rational basis test applies when the challenged classification involves neither a fundamental right nor a suspect classification. Clinkenbeard, citing O'Hartigan v. Dep't of Pers., 118 Wn.2d 111, 122, 821 P.2d 44 (1991). Under the rational basis test, the law is subject to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. Clinkenbeard, citing Westerman, 125 Wn.2d at 294-95.

Motions for summary judgment are reviewed de novo. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Although the court must consider all facts submitted and draw all reasonable inferences from

the facts in the light most favorable to the nonmoving party, the inferences *must be reasonable*. If such inferences are not reasonable, summary judgment is proper. See, Scott v. Blanchet High School, 50 Wn. App. 37, 42-47, 747 P.2d 1124 (1987) (plaintiff relied on vague evidence and inferences that required leaps in logic based on unsupported assumptions).

**B. THE COURT CAN AFFIRM THE DISMISSAL OF SKINNER'S CLAIMS AGAINST THE EMPLOYEES ON NON-CONSTITUTIONAL GROUNDS.**

In this case, Skinner brought claims against the employees for negligence. CP 7-8. He did not allege claims for defamation, malicious prosecution or tortious interference with a business interest.

It is well established in Washington that all employees – public or private – are entitled to a common law qualified privilege for making an otherwise defamatory statement when the declarant and recipient have a common interest in the subject matter of the statement. Moe v. Wise, 97 Wn. App. 950, 957-8, 989 P.2d 1148 (1999), citing Ward v. Painters' Local Union No. 300, 41 Wn.2d 859, 865-66, 272 P.2d 253 (1953); Lawson v. Boeing Company, 58 Wn. App. 261, 266-67, 792 P.3d 545 (1990). The privilege arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest. This certainly extends to complaints of unlawful co-worker discrimination and misconduct such as in the present case.

A plaintiff must prove knowledge of falsity, or reckless disregard as to falsity, of the statements in order to establish an abuse of the privilege. Lawson, 58 Wn. App at 267, citing Gunteroth v. Rodaway, 107 Wn.2d 170, 176 n.2, 727 P.2d 982 (1986). In Segaline v. Labor & Indus., 144 Wn. App. 312, 182 P.3d 480 (2008), *rev. granted* 165 Wn.2d 1044 (2009), the plaintiff alleged RCW 4.24.510 was unconstitutional unless it contained an implicit requirement of good faith. Segaline, 144 Wn. App. at 324. The court stated it does not reach a constitutional issue if it can decide the case on non-constitutional grounds. Segaline, 144 Wn. App. at 524, citing Isla Verde Int’l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752-53, 49 P.3d 867 (2002). Because there was no evidence in the record that L&I’s communication to the police was not in good faith, the defendant was entitled to qualified immunity under the statute for reporting the plaintiff’s misconduct.<sup>1</sup> Segaline, at 325.

See also, Right-Price Recreation, LLC v. Connells Prairie Community Council, 146 Wn.2d 370, 46 P.3d 789 (2002), *cert. denied*, 540 U.S. 1149. In Right-Price, the court declined to decide the defendants’ constitutional claim that the good faith requirement of former

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<sup>1</sup> The court did not decide the issue of whether the current version of RCW 4.24.510 contains an implied good faith requirement. Review has been granted at 165 Wn.2d 1044 (2009) on the issue of whether a governmental agency is entitled to immunity as a “person” under the statute, but not on the issue of whether there is an implied good faith requirement in the statute.

RCW 4.24.510 violated the First Amendment, because it could decide the case based on statutory grounds. Right-Price, 146 Wn.2d at 382-83. Because the plaintiff failed to establish clear and convincing evidence that the defendants' statements were made with actual malice, the court ruled there was no evidence of defamation or bad faith, and statutory immunity applied.

In the present case, the only claims brought by Skinner against the employees were negligence claims. CP 7-8. Skinner failed to produce clear and convincing evidence of recklessness or falsity on the part of any of the employees who reported his comments.<sup>2</sup> Skinner admitted he made the "monkey" comments to Crum and Beckley. CP 88. He admitted making a comment about "Asian supervisors" but denied it was meant as a racial slur. *Id.* There is no admissible evidence in the record that would justify a trial on the issue of bad faith or malice. The employees are entitled to good faith immunity under RCW 4.24.510, which is the equivalent of the common law qualified privilege available to private employees. Therefore, the employees are entitled to both common law *and* statutory immunity from Skinner's negligence claims.

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<sup>2</sup> The trial court considered the issue of bad faith when hearing the employees' motion for statutory damages as required by RCW 4.24.510, and ruled the employees were entitled to statutory damages. CP 198-199. Skinner has not assigned error to this ruling.

**C. SKINNER HAS FAILED TO SHOW PUBLIC AND PRIVATE EMPLOYEES ARE SIMILARLY SITUATED WITH RESPECT TO THE PURPOSE OF THE LAW.**

The equal protection clause of the state constitution requires that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. State v. Clinkenbeard, 130 Wn. App. 552, 565, 123 P.3d 872 (2005), citing State v. Harner, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). Skinner admits RCW 4.24.510 is valid on its face as it provides immunity to all citizens who make complaints to governmental agencies, regardless of employment status. However, he alleges that in the context of an employment claim, it violates the state privileges and immunities clause as it provides immunity to public employees who make complaints of co-worker misconduct to their public employers, whereas a private employee would not enjoy the same immunity for making the same complaint to a private employer.

As discussed in depth in Section D below, the *purpose* of RCW 4.24.510 is to protect individuals who make good-faith reports to government agencies **because this information is vital to effective law enforcement and the efficient operation of government.** RCW 4.24.500. Private employees who report coworker misconduct to their employers are not similarly situated with respect to the *purpose* of the law because they are not reporting information to assist in law enforcement or

in the efficient operation of the government. As such, there is no violation of equal protection in the application of the statute.<sup>3</sup>

**D. STRICT SCRUTINY IS NOT THE APPLICABLE STANDARD BECAUSE ACCESS TO THE COURTS, IN AND OF ITSELF, IS NOT A FUNDAMENTAL RIGHT UNDER THE CONSTITUTION.**

In this case, Skinner argues the strict scrutiny test applies to his equal protection challenge to RCW 4.24.510 because he alleges access to the courts is a fundamental right. However, it is well established that access to the courts, in and of itself, is not recognized as a fundamental right guaranteed by the Washington constitution or the United States Constitution. Ford Motor Co. v. Barrett, 115 Wn.2d 556, 562, 800 P.2d 367 (1990), citing Housing Auth. v. Saylor, 87 Wn.2d 732, 739-40, 557 P.2d 321 (1976), Boddie v. Connecticut, 401 U.S. 371 (1971), United States v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973).

- 1. The courts must look to the underlying action to determine whether the issue being litigated implicates a fundamental right.**

In Housing Auth. v. Saylor, the court adopted the ruling in Ortwein v. Schwab, 410 U.S. 656 (1973) holding the equal protection clause does not require a waiver of court fees for indigents if the interest

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<sup>3</sup> In addition, as noted previously, private employees *do* enjoy a qualified privilege for making complaints about coworker misconduct.

involved in the indigent's claim is not a fundamental one and there is another procedure available. Saylors, 87 Wn.2d at 739. The court noted the question of what interests other than marital status involve fundamental rights requiring free access to the judicial process is a question which remains for future determination. But in any event, the interest involved in Saylors lay in the area of economics and social welfare, and did not involve a fundamental right or require access to the courts under the equal protection clause. *Id.*

In Ford v. Barrett, the appellant claimed the “lemon law” allowing costs and continuing damages to a consumer who prevails on appeal was a violation of the equal protection and privileges and immunities clauses of the Washington State and federal Constitutions. The appellant asserted strict scrutiny was the appropriate level of judicial review because the case involved a fundamental right of access to the courts for an appeal. However, the court cited its previous ruling in Housing Auth. v. Saylors which held that access to the courts is **not** a fundamental right guaranteed by the Washington Constitution. The Ford court reaffirmed this ruling and held, “**access to the courts is not recognized, of itself, as a fundamental right.**” Ford v. Barrett, 115 Wn.2d at 562 (emphasis added).

In Ford, the court recognized and followed the underlying “fundamental interest” test set forth in Boddie v. Connecticut, 401 U.S.

371 (1971). In Boddie, the U.S. Supreme Court held that access to a state court for a divorce was a fundamental right because resort to the court was the only possible way a litigant could ever obtain a divorce. However, the Court stressed this holding was limited.

In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, **we wish to re-emphasize that we go no further than necessary to dispose of the case before us**, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. **We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual**, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental right human relationship. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Boddie, 401 U.S. at 382-83 (emphasis added). The Court further held:

The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain.

Boddie, 401 U.S. 375-76.

United States v. Kras, *supra* followed this decision by holding that access to the courts for a bankruptcy action is not a fundamental right.

“Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated.” Kras, 409 U.S. at 446. The Court stated debtors have the option to negotiate directly with their creditors and reach resolution, thus the courts are not the sole means available for obtaining relief.

In Ortwein v. Schwab, *supra*, the appellants claimed a court filing fee for an action to increase in welfare payments violated the Equal Protection Clause by unconstitutionally discriminating against the poor. However, the Court stated the litigation was in the area of economics and social welfare and did not involve a suspect class such as race. The Court held the appellants’ interest in increased welfare payments had far less constitutional significance than the Boddie appellants, and access to the court for this action was not a fundamental right. Ortwein, 410 U.S. 660.

See also, Miranda v. Sims, 98 Wn. App. 898, 907, 991 P.2d 681 (2000) (“Because the right of access to the courts has not, by itself, been recognized as a fundamental right, we reject the family’s argument that their claim should be evaluated under strict scrutiny.”); Dependency of Grove, 127 Wn.2d 221, 237-38, 897 P.2d 1252 (1995) (In civil cases, the

constitutional right to legal representation is presumed to be limited to those cases in which the litigant's physical liberty is threatened, or where a fundamental liberty interest, similar to the parent-child relationship, is at risk. Where, as here, the interest at stake is only a financial one, the right which is threatened is not considered "fundamental" in a constitutional sense.); Marriage of Giordano, 57 Wn. App. 75, 787 P.2d 51 (1990) (when access to the courts is not essential to advance a fundamental right, such as the freedom of association or disassociation involved in Boddie, access may be regulated if the regulation rationally serves a legitimate end); City of Seattle v. Megrey, 93 Wn. App. 391, 968 P.2d 900 (1998) (same).

**2. The cases relied upon by Skinner did not overturn Saylors or Ford.**

Skinner cites Putman v. Wenatchee Med. Ctr., 166 Wn.2d 974, \_\_ P.3d \_\_ (2009) to support his argument that access to the courts is a fundamental right under the Washington and federal Constitutions. However, Putman did not reach this holding.

Putman cites John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991) for the statement, "The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." Putman, 166 Wn.2d at 979. However, neither of these cases held that access to the courts, in and of

itself, is a fundamental right. Nor did either of these cases overturn the prior rulings in Ford or Saylors. Rather, the John Doe court made the above statement in reference to the fundamental right under Const. art. 1, § 10 to open access to judicial proceedings. John Doe, 117 Wn.2d at 781.

The art. 1 § 10 right of open access of the public to observe and attend judicial proceedings is a right separate and distinct from the right of access to courts for potential litigants. This right is triggered after litigants are already in court. Under this provision of the state constitution, the public and the media have open access to attend all judicial proceedings unless they are sealed pursuant to strict criteria that have been laid out by the courts. See, e.g., Indigo Real Estate Servs. v. Rousey, 151 Wn. App. 941, 951, \_\_ P.3d \_\_ (2009), citing State v. Waldron, 148 Wn. App. 952, 957, 962, 202 P.3d 325 (2009) (any request to redact court records implicates the public's right of access to court records under article I, section 10 of the Washington State's Constitution); Dreiling v. Jain, 151 Wn.2d 900, 904, 93 P.3d 861 (2004) (As the public's right of access serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process, this right may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified.)

In both Putman and John Doe, the court was analyzing the issue of the right to conduct discovery. In John Doe, the court acknowledged the ruling in Saylor that access to the courts was not a fundamental right. John Doe, at 781. It further stated that the right of access is necessarily accompanied by those rights accorded litigants by statute, court rule or the inherent powers of the court, and stated, “The merits of a particular action may depend upon statute. E.g., RCW 4.24.” John Doe, at 782. Finally, the court stated, “...**access must be exercised within the broader framework of the law as expressed in statutes, cases, and court rules.**” John Doe, at 782 (emphasis added). At no time did the court hold access to the courts, without regard to the underlying interest at issue, was a fundamental right guaranteed by the state Constitution. In this case, access to the courts is subject to RCW 4.24.510.

Skinner makes no attempt to reconcile the holdings of Ford and Saylor with the holdings in Putman and John Doe. He offers no explanation for why the court did not even mention, let alone analyze, Ford and Saylor in Putman when it was allegedly overruling those long-standing and oft cited decisions. The lack of discussion of these cases in either Putman or John Doe illustrates the fact that the court did not intend to overrule its prior decisions. As such, Skinner has failed to establish that

access to the courts, in and of itself, without a review of the underlying interest at issue, is a fundamental right.

**3. There is no fundamental right to sue a co-worker for negligent infliction of emotional distress under Washington law.**

Skinner claims on page 8 of his brief that the right to be compensated for personal injuries “has been held to be a substantial and fundamental right under the Constitution of the State,” and cites Hunter v. North Mason School Dist., 85 Wn.2d 810, 814, 539 P.2d 845 (1975) for this proposition. However, the dicta Skinner refers to actually stated:

The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person’s physical well-being and ability to continue to live a decent life.

The court did not hold it was a constitutional, fundamental right to have access to the courts to sue for personal injuries. It merely stated indemnification may be fundamental to a person’s well being. As noted in Boddie and Kras and Ortwein, *supra*, there are alternative means to obtain compensation for injuries. In Skinner’s case, these options included moving for a protection order (See, Emmerson v. Weilep, 126 Wn. App. 930, 110 P.3d 214 (2005) ((RCW 4.24.510 does not provide immunity from actions that do not seek money damages such as civil actions for protection orders))), negotiation, filing a claim, mediation, arbitration, Civil

Service Commission review, and pursuit of legal action against the employer. In fact, Skinner has utilized several of these options.

In DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 141-142, 960 P.2d 919 (1998), the plaintiff argued her article I, § 12 claim should be assessed under a heightened scrutiny standard because the court in Hunter v. North Mason High Sch., held the right to be indemnified for personal injuries is a substantial individual property right. The court did not agree.

However, despite plaintiff's contention, it is not settled law that intermediate scrutiny applies in this case...Moreover, in Hunter, it is unclear what level of scrutiny the court applied, as noted later in Daggs v. City of Seattle, 110 Wn.2d 49, 56, 750 P.2d 626 (1988). Hunter involved a claims-filing statute, and, as also indicated in Daggs, more recent decisions suggest a minimum scrutiny analysis applies in assessing such statutes. *Id.*

Further, Skinner has failed to establish that Washington law even recognizes or provides a cause of action against coworkers for negligent infliction of emotional distress. Skinner cites to Rothwell v. Nine Mile Falls School District and Woody v. Stapp to support his belief that coworkers can be held liable to each other for negligent infliction of emotional distress.<sup>4</sup> However, neither of these cases reached such a holding.

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<sup>4</sup> 206 P.3d 347 (Div. III, 2009), 189 P.3d 807 (Div. III, 2008).

In Rothwell, the court decided the issue of whether the plaintiff's claims of negligent infliction of emotional distress against the school district were barred by the Washington Industrial Insurance Act, Title 51 RCW. The court ruled the claims were not barred by Title 51 and remanded the case back for further proceedings. The court did not consider, nor did it decide, the issue of whether an employee can bring a cause of action for negligent infliction of emotional distress against a coworker.

In Woody, which has similar facts to the present case, the plaintiff sued his coworkers for making complaints of sexual harassment against him that resulted in his termination. Woody sued them for defamation, civil conspiracy and tortious interference. The court applied the qualified privilege for intra corporate communications and ruled there was no evidence the coworkers made false statements against him. Woody did not bring a claim for negligent infliction of emotional distress against his coworkers, nor did the court rule that any such potential cause of action exists against his coworkers.

As noted in Section B above, employees are entitled to a qualified privilege for reporting coworker misconduct. Thus, there is no set of facts under which an employee could maintain an action for negligent infliction of emotional distress against a coworker for reporting alleged misconduct.

The only potential claims available would be intentional actions such as defamation or tortious interference. However, Skinner did not plead any of these causes of action in this case.

**E. BECAUSE RCW 4.24.510 DOES NOT VIOLATE A FUNDAMENTAL RIGHT, IT DOES NOT VIOLATE THE STATE PRIVILEGES AND IMMUNITIES CLAUSE.**

In considering a privileges and immunities claim, the court must initially address whether the alleged privilege or immunity is one that is protected by article I, section 12 of the Washington constitution. Madison v. State, 161 Wn.2d 85, 95, 163 P.3d 757 (2007). A privilege is not necessarily created every time a statute allows a particular group to do or obtain something. Am. Legion Post v. Dep't of Health, 164 Wn.2d 560, 607, 192 P.3d 306 (2008), citing Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004) (Grant County II). Instead, the term “‘privileges and immunities’ pertains alone to those **fundamental rights** which belong to the citizens of the state by reason of such citizenship.” *Id.*, quoting State v. Vance, 29 Wash. 435, 458, 70 P. 34 (1902) (emphasis added); Madison, 161 Wn.2d at 95.

Because access to the courts for a claim of negligent infliction of emotional distress against a coworker is not a fundamental right, the state privileges and immunities clause is not implicated in this case. Skinner’s

argument that RCW 4.24.510 violates article I, section 12 of the state constitution should be rejected.

**F. RCW 4.24.510 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT PASSES THE STRICT SCRUTINY TEST.**

Even if the court were to decide that access to the courts in this case is a fundamental right, RCW 4.24.510 does not violate equal protection because it passes the strict scrutiny test. Under strict scrutiny, a law may be upheld if it is shown to be necessary for a compelling state interest. Clinkenbeard, 130 Wn. App. at 566. RCW 4.24.510 is necessary to accomplish the compelling state interest of encouraging citizens to provide information concerning potential wrongdoing to governmental agencies, and protecting those citizens from retaliation.

The legislative purpose behind RCW 4.24.510 is stated in RCW 4.24.500 (emphasis added).

**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.**

Governmental employees are often the most likely to discover and report potential misconduct or unlawful activity of their coworkers, supervisors and managers. This results in a compelling need to encourage them to report this observed misconduct without fear that they will be forced to defend themselves in expensive litigation. The compelling interest in having government misconduct and corruption discovered and stopped greatly outweighs a coworkers desire to sue the reporter of misconduct for money damages; particularly when the coworker retains other avenues of relief.<sup>5</sup>

The mere fact that an employee works for a governmental agency and not a private employer does not mean she should be stripped of the protection of RCW 4.24.510 when making a complaint of coworker misconduct. Likewise, it was not the intent of the legislature to provide immunity for governmental employees who report coworker misconduct to an outside government agency, but deny immunity for reporting that same misconduct within their own governmental agency.

The statutory immunity enables defendants to raise this defense early in litigation before they expend a large amount of time and resources in defending against damages claims. The damages provision serves the important purpose of dissuading SLAPP litigants from filing suit in the

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<sup>5</sup> As noted previously, the statute does not provide immunity against other types of actions such as protection orders or injunctions.

first place, and defraying the costs of litigation to defendants in situations where suits are filed.

In sum, the legislature has recognized the vital importance of encouraging citizens to provide information about potential wrongdoing to governmental agencies to assist in law enforcement (tips on crime) and ensure efficient operation of government (identifying and correcting misconduct and unlawful behavior). These citizens, whether they are employees within the agency or private citizens, must be protected from retaliatory lawsuits. Skinner openly admits that he filed suit against the employees in this case because they complained about his misconduct and testified against him at the Civil Service Commission hearing. This is the type of retaliatory litigation that RCW 4.24.510 was designed to end.

**G. RCW 4.24.510 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.**

Skinner does not analyze the constitutionality of RCW 4.24.510 under the rational basis standard, nor does he dispute that the statute meets this standard. He has failed to meet his burden of proof to show the statute is unconstitutional under a rational basis review. As such, the court should find the statute does not violate equal protection.

**H. RCW 4.24.510 APPLIES TO GOVERNMENTAL AS WELL AS NON-GOVERNMENTAL INDIVIDUALS.**

Skinner argues the statute only provides immunity to non-governmental individuals, and cites Right-Price, *supra* for this proposition. However, in Gonmakher v. City of Bellevue, 120 Wn. App. 365, 370-374, 85 P.3d 926 (2004), the court correctly stated that the court in Right-Price merely discussed the general characteristics of SLAPP suits, and did not directly address whether the legislature intended to restrict the scope of RCW 4.24.510 to non-governmental individuals. The court further stated it looks to the statute as written for its analysis. A review of the statute indicates there is no exclusion for governmental individuals or employees in the statute. RCW 4.24.510. As such, this argument has no merit.

**I. RCW 4.96.020 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.**

Pursuant to RCW 4.96.020(1) a claimant must file a claim against each employee, as well as the entity, before instituting legal action against those employees. Skinner was aware of this requirement as he filed a claim against Chief Chen; but he failed to file a claim against Crum, Beckley, Yourkoski or Schulze. He alleges the requirement to file a claim against individual government employees is unconstitutional as it provides them with a 60 day “advance notice” of a lawsuit that other citizens do not

receive. His claim is subject to a rational basis review as it does not address a fundamental right or a suspect class. The rational basis test has been utilized by prior courts when reviewing the constitutionality of the claim filing statute. See, e.g. Medina v. Pub. Util. Dist. No. 1 of Benton County, 147 Wn.2d 303, 313, 53 P.3d 993 (2002).

Under the rational basis test, the challenged law is subject to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate government objective. Westerman, 125 Wn.2d at 294-95. The constitutionality of RCW 4.96.020 has been tested on numerous occasions over time in the context of the equal protection clause, and the courts have repeatedly ruled the statute does not violate equal protection of the law.

Equal protection guarantees a party will have the same amount of time to bring a tort action against the government as he or she would have to bring an action against a private tortfeasor. Pirtle v. District 81, 83 Wn. App. 304, 308-09, 921 P.2d 1084 (1996), citing Daggs v. City of Seattle, 110 Wn.2d 49, 53, 750 P.2d 626 (1988). The statute imposes no time requirements beyond those already required by applicable statutes of limitations. Pirtle, citing RCW 4.92.110; 4.96.020; Coulter v. State, 93 Wn.2d 205, 207, 608 P.2d 261 (1980). Although a 60-day waiting period is imposed from the time of the notice of claim to the commencement of

the action, the statute of limitations is tolled during that period. RCW 4.92.110; 4.96.020(4). The waiting period is reasonably related to the governmental objective of negotiation and settlement, Daggs, 110 Wn.2d at 56-57, and certainly creates no impediment for governmental tort victims. Pirtle, at 308-09. See also, Medina v. Pub. Util. Dist. No. 1 of Benton County, 147 Wn.2d at 313.

The same analysis applies to the requirement to file a claim against government employees as to the agency itself. The statute of limitations is tolled for 60 days after the claim for damages is filed. Thus, it imposes no additional time requirements on claimants. Skinner argues the requirement to file a claim provides governmental employees with an unfair 60 day “advance notice” of a lawsuit. However, he produces no case law or legal authority which would indicate that “advance notice” of a lawsuit is wholly unrelated to the purpose of early investigation, negotiation and settlement with government employees. The courts have repeatedly upheld the legitimacy of this purpose of the statute. Skinner has failed to meet his burden to prove this statutory requirement is unconstitutional. Therefore, the trial court dismissal of Skinner’s claims based on his failure to file a claim against Crum, Beckley, Yourkoski and Schulze should be affirmed.

**J. SKINNER FAILED TO PROPERLY FILE HIS CLAIM AGAINST THE CITY AND CHEN, THUS HE FAILED TO COMPLY WITH RCW 4.96.020.**

Former RCW 4.96.020(4) provided that no lawsuit can be commenced against the governmental entity or employee until 60 days have elapsed since the claim was filed.<sup>6</sup> In this case, it is undisputed that Skinner commenced his lawsuit on January 29, 2009, only 8 days after filing his verified claim against the City and Chen on January 21, 2009.

Strict compliance with the procedural filing requirements of former RCW 4.96.020 was mandatory, even if the requirements seem harsh and technical. Burnett v. Tacoma City Light, 124 Wn. App. 550, 104 P.3d 677 (2004); Johnston v. Seattle, 95 Wn. App. 770, 976 P.2d 1269 (1999); Sievers v. City of Mountlake Terrace, 97 Wn. App. 181, 983 P.2d 1127 (1999) (Sievers waited only 59 days after filing her claim before filing suit and the court held she failed to strictly comply with the procedural requirements of RCW 4.96).

Skinner waited until the last minute to file his lawsuit, and he failed to comply with the requirement to file claims against some of the individual defendants, so the statute of limitations against them was not tolled. Because of his own actions, he argues he could not comply with the statutory requirement to wait 60 days after filing his claim before

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<sup>6</sup> Although portions of the statute were changed for claims filed after July 2009, this provision remained the same.

commencing his suit against the City. Had Skinner complied with RCW 4.96.020 in the first place and filed a claim against all of the individual employees instead of just Chief Chen as required, the statute of limitations would have been tolled for 60 days for all defendants. His missteps do not excuse his failure to comply with the statutory requirement to wait 60 days after filing his claim before commencing his lawsuit.

Skinner blames the City for his claim deficiencies because it filed its answer to his complaint instead of waiting 60 days so he could “re-serve” the City with the lawsuit. However, even if the City had waited for Skinner to re-serve the suit after 60 days (which he didn’t do), this would not have corrected his claim filing deficiency. The litigation was commenced on January 29, 2009 when he filed his complaint in court, not upon service (or re-service) of the complaint. *See*, CR 3(a).

Skinner has not cited any cases to support his theory that RCW 4.96.020 could be satisfied by commencing a lawsuit, but waiting 60 days before taking any further action. The cases cited above all hold that claimants must strictly comply with the requirement in RCW 4.96.020 that no action may be commenced until 60 days have elapsed. Skinner has not even argued that he substantially complied with the statute as he commenced the suit only 8 days after he filed his verified claim, and he never re-served the suit as he intended. As such, the dismissal of

Skinner's claims against the City and Chen for failure to comply with this requirement should be affirmed.

**K. THE AWARD OF ATTORNEY FEES WAS SUPPORTED BY EVIDENCE AND WAS REASONABLE.**

Skinner alleges the employees were awarded substantial fees unrelated to their statutory defense under RCW 4.24.510. However, the employees properly segregated their attorney fee request, and produced substantial evidence that the fees awarded were incurred for this defense. CP 222-249, and 285-329.

As evidenced by the billings submitted to the trial court, multiple entries for legal work unrelated to the employees' anti-SLAPP defense and counterclaim were segregated and redacted, and fees were not requested for this work. CP 222-249. Fees were only requested for legal work related to prevailing on the anti-SLAPP defense, such as review of records, client communication, counsel communication, discovery, legal research and analysis applicable to the anti-SLAPP statute and immunity, and preparation of pleadings.<sup>7</sup> *Id.* The employees did not request fees for legal work related to their RCW 4.96 defense or other unrelated matters. Entries for unrelated legal work – which equaled \$11,871.40 – were

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<sup>7</sup> Skinner's argument that only fees for the actual motion to dismiss are justified is not supported by any evidence in the record, such as an expert opinion from a licensed and practicing attorney, and is wholly without merit. To suggest that fees for time spent researching relevant case law, conducting discovery, or communicating with a client are not reasonable or necessary is absurd.

segregated and redacted from the billings. CP 223, ¶ 4. Thus, the record reflects a proper segregation of fees expended for the RCW 4.24.510 defense, for the RCW 4.96.020 defenses, and other legal matters.

Skinner points out a difference in the statement of total fees incurred (\$38,895.70) versus the amount of fees listed in the actual billings attached to the declaration (\$37,680.70). This is due to the fact that the employees were not requesting reimbursement for fees incurred after December 21, 2009. CP 290. The final page of billings was not attached as it would have all been redacted – but the amount of total fees incurred (\$38,895.70) was accurately stated in the declaration. *Id.* In truth, the employees could have also requested an award of attorney fees for the time spent in preparing their motion for attorney fees and expenses, but chose not to do so. The attorney fees requested were reasonable and were necessary to prevail in the anti-SLAPP defense.

Skinner outrageously alleges counsel’s review of the transcript of the civil service commission hearing “has no relevance to the RCW 4.24.510 counterclaim by defendants.” Appellant’s Brief, p.19. The employees served discovery requests on Skinner early in the litigation asking for the basis of his claims against them. He responded, “All acts and omissions of Defendant that resulted in the termination of his employment **including statements such as those proffered in the Civil**

**Service Commission hearing...**” CP 104-105, 117-118, 128-129, 138-139 and 171-172. When asked to supplement these discovery responses with a description of the actual alleged statements, Skinner’s counsel responded, **“The fact that you have not read that transcript does not mean our response was insufficient.”** CP 302-303. He refused to provide any further specification, which *required* counsel to read the entire transcript.

Skinner alleges there are charges for calls to lawyers “who are not part of this litigation (Greg Rubstello, Michael Tomkins).” Appellant’s Brief, p.18. However, Michael Tomkins filed an appearance in this case so he was clearly part of the litigation. CP 305-306. Further, Skinner’s own counsel corresponded with Greg Rubstello during this litigation as Mr. Rubstello represented the City during the Civil Service Commission hearing. CP 307-308.

Skinner incorrectly alleges other communications were not reasonably related to the defense. Jason Barney and Ann Bennett are representatives of the Washington Cities Insurance Authority, the City’s self insurance risk pool, and serve as the City’s claims adjustors for this litigation. CP 287. Donna Hanson is the City Manager for the City of Medina. *Id.* She is the speaking agent for the City, as well as the custodian of records and information for the City. *Id.*

The employees' motion for disclosure of physical address of Skinner's counsel was reasonable and necessary. CP 287-288. Skinner's counsel refused to provide a physical address for same day service of pleadings, thus the employees encountered service difficulties throughout the litigation. *Id.* When filing a six day motion in King County, it is impossible to timely serve a reply by U.S. Mail as a party must add three days for mailing, and the opposing party's opposition is not due until noon two court days before the hearing date. KCLR 7 (b)(D). Thus, without a physical address for service by legal messenger, the employees could not comply with the local rules for service.

After the employees filed their motion, Skinner filed an opposition refusing to provide a physical address, or to accept service by facsimile or electronic mail. *Id.* In light of his opposition, which was now in the court record, the employees decided to strike their motion as Skinner would not be able to justify any future objection regarding timely service if the employees were unable to effect timely service due to his refusal to provide a physical address. *Id.* The purpose of the motion was satisfied and there was no further need for a ruling.

**L. SKINNER MAKES ASSERTIONS UNSUPPORTED BY THE RECORD.**

Recitation of facts not supported by the record violates RAP 10.3(a)(4). Barnes v. Washington Natural Gas Co., 22 Wn. App. 576, 577 fn. 1, 591 P.2d 461 (1979). Failure to cite to the record for a statement of fact is a failure to comply with the Rules of Appellate Procedure and justifies the court ignoring any such statement of fact. See In re Marriage of Simpson, 57 Wn. App. 677, 681-82, 790 P.2d 177 (1990).

Conclusory statements of fact in a declaration will not suffice to defeat a summary judgment motion. Grimwood v. University of Puget Sound, 110 Wn.2d 355, 360, 753 P.2d 517 (1988), citing American Linen Supply Co. v. Nursing Home Bldg. Corp., 15 Wn. App. 757, 767, 551 P.2d 1038 (1976). A fact is “what took place, an act, an incident, a reality as distinguished from supposition or opinion.” Grimwood, at 359, citing 35 C.J.S. *Fact* 489 (1960). In Grimwood, the court concluded the plaintiff’s affidavit in opposition presented only his conclusions and opinions as to the significance of the facts set forth in defendant’s affidavit. *Id.*, at 360. In finding plaintiff’s affidavit insufficient, the court held that statements claiming he was not uncooperative, and that his job performance was not substandard, were inadmissible conclusions, not facts. It is the perception of the decision maker, not the plaintiff, which is

relevant. Grimwood, at 360, quoting Smith v. Flax, 618 F.2d 1062, 1067 (4<sup>th</sup> Cir. 1980); Chen v. State, 86 Wn. App. 183, 191, 937 P.2d 612 (1997) (an employee’s assertion of his own good performance to contradict the employer’s assertion of poor performance does not raise genuine issues of material fact.)

All documents attached to affidavits must follow the rules relating to authentication of documents. Personal Restraint of Connick, 144 Wn.2d 442, 455, 28 F.3d 729 (2001). In Connick, the court noted that plaintiff’s counsel attached multiple documents as exhibits to his declaration that did not meet the authentication test under ER 901 and 902, chapter 5.44 RCW, or CR 44. “This represents a ‘loose practice’ which we do not condone – especially by members of the bar.” Connick, at 455. “It is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will in future cases accept no less.” *Id.*, at 458.

RAP 10.3(a)(5) requires a fair statement of the facts. In his Opening Brief, Skinner asserted multiple “facts” that lack any citation to the record as required by RAP 10.3(a)(5) or actual admissible evidence as required by Grimwood and Connick. He also refers to unauthenticated and incomplete documents he attached to his declaration. Because Skinner relies on these unsupported facts to support his appeal, the City

and the employees are obligated to ensure that the record upon which this court will base its decision is accurate. Therefore, the City and employees have compiled an appendix which demonstrates the inadmissible evidence and unsupported assertions and conclusions of fact made by Skinner. The court should consider only those facts adequately cited to and supported by the admissible record in ruling on this appeal.

#### IV. CONCLUSION

The trial court properly dismissed Skinner's retaliatory lawsuit against the employees pursuant to RCW 4.24.510. The court also properly dismissed Skinner's claims against the City and the employees pursuant to RCW 4.96.020. These statutes are constitutional and applicable to this case. For the reasons detailed in this brief, the employees and the City respectfully request the court to affirm the trial court's summary judgment dismissal of all of Skinner's claims. The employees also request the court to affirm the award of attorney fees as reasonable and properly segregated.

DATED this 30th day of June, 2010.

KEATING, BUCKLIN & McCORMACK,  
INC., P.S.



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Shannon M. Ragonesi, WSBA #31951  
Attorneys for Respondents

**CERTIFICATE OF SERVICE**

Under penalty of perjury under the laws of the State of Washington, I declare that on June 30, 2010 a true copy of this document was served via:

Legal Messenger  U.S. Mail  Facsimile and  Email - upon the following:

William J. Murphy

*Katie L. Johnson*

By: Katie L. Johnson

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# APPENDIX

FACTUAL ASSERTION	CITATION OFFERED	TRUTH
<p>Despite Skinner's exemplary performance over a period of fifteen years, he was abruptly terminated by City of Medina Police Chief Jeffrey Chen on February 15, 2006. -Appellant's Brief, p.2.</p>	<p>CP 43-44</p>	<p>CP 43-44 contain assertions made by legal counsel in a pleading that are not supported by any citations to declarations or documentary evidence.</p> <p>Skinner had a history of disciplinary actions due to his derogatory, graphic and intimidating comments and actions toward coworkers and persons from outside agencies. CP 147-154.</p> <p>Skinner was terminated by Doug Schulze, the City Manager, not Chief Chen. CP 79, ¶ 9, 88-89.</p> <p>Skinner was not terminated abruptly, but rather, was given notice and an opportunity to present his side before the termination decision was made. CP 77 ¶ 5, CP 82-84, CP 78, CP 86, CP 168-169.</p>
<p>Skinner believes the termination was based, in part, in retaliation for Skinner's disclosure of improper remarks made by the Chief of Police and Skinner's knowledge of Chief Chen's history of dishonesty. -Appellant's Brief, p.2.</p> <p>Chen has a prior history of dishonesty as evidenced by documents obtained from the Seattle Police Department. -Appellant's Brief, p.2.</p>	<p>CP 43-44, 51</p>	<p>CP 43-44 contain assertions made by legal counsel in a pleading that are not supported by any citations to declarations or documentary evidence.</p> <p>CP 51 contains conclusory assertions made by Skinner based on double and triple layers of inadmissible hearsay. He did not submit any declarations, deposition testimony or authenticated or complete documentary evidence to support his assertions of dishonesty against Chief Chen. The allegations made by Skinner involved alleged actions by Chen at another department before he came to work at Medina, and years before the incident at issue in this lawsuit. Skinner has absolutely no personal knowledge regarding these matters, nor did he depose Chief Chen or any other potential witness to attempt to discover any actual or admissible facts surrounding his allegations of dishonesty in a past job for Seattle.</p>

		There is no evidence that Skinner obtained copies of the documents attached to his declaration prior to his termination, or that Chief Chen even knew Skinner had these documents.
Skinner contends he was mis-quoted and that any statements made by him were misconstrued. -Appellant's Brief, p.3.	CP 51	There is nothing in CP 51 that refers to or supports this conclusory assertion.
He also believes that the individuals making these statements were improperly motivated by the Chief of Police who approved performance awards to those individuals after they provided statements supporting the termination of Skinner's employment. -Appellant's Brief, p.3.	CP 51-53, 59	Skinner's assertions are inadmissible as he has no declarations, deposition testimony or factual evidence to support his conclusions. He claims Crum and Beckley were cooperating with Chen so they would get their names on the employee of the year plaque, but he has no personal knowledge of the reasons for the Employee of the Year awards in 2005, 2006 or 2007. His assumptions and beliefs are not admissible evidence.
The trial court awarded attorneys fees despite the fact that the defendants had not properly segregated their attorney fees as required by law and the fees requested were not reasonable. -Appellant's Brief, p.4.	No evidence cited.	The attorney fees were segregated and reasonable. CP 222-249. Skinner's conclusory assertions are not supported by any declarations or factual evidence.