

NO. 65399-7-I

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

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LORA BRAWLEY,

Appellant,

v.

LEYLA ROUHFAR and REZA FIROUZBAKHT, husband and wife, and  
the marital community composed thereof,

Respondents.

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BRIEF OF RESPONDENTS  
LEYLA ROUHFAR and REZA FIROUZBAKHT

---

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## I. INTRODUCTION

Soon after Leyla Rouhfar and Reza Firouzbakht (“the Parents”) hired Lora Brawley to look after their three-year-old son, their son developed a stutter. A doctor told them the stutter might be a sign of stress, but the Parents could not figure out the source of the stress. Meanwhile, Brawley showed problematic behavior and hostility to the Parents. In late August 2008, the Parents decided a family member would take over their son’s care.

When the Parents told their son Brawley would no longer care for him, he revealed that Brawley had hit him and pushed him in his stomach. The Parents responded as many parents might do in similar circumstances: They made a report to police and child protective services, they had a pediatrician and psychologist check their son, and they told family members and his school that Brawley could not interact with their son.

The parting with Brawley did not go smoothly. The Parents disagreed with Brawley over whether they owed her wages and the amount. When they could not reach an agreement, Brawley sued the Parents not only for wages but also for slander – seeking \$2 million in damages to her reputation.

This appeal focuses primarily on the trial court’s dismissal of Brawley’s slander claim. The Parents raised a single question in a motion

for partial summary judgment: whether their allegations of child abuse to police, CPS, doctors, family members and their son's school were privileged and immune from liability. The Parents challenged Brawley to produce evidence that the Parents disbelieved their son or that they had serious doubts about the truth of their abuse allegations. Rather than produce evidence rebutting the Parents' declarations, Brawley argued that the abuse allegations were untrue (even though the motion did not query truth or falsity) and that the allegations were a ruse to avoid paying Brawley less than \$2,000 in wages. The trial court ruled that Brawley failed to meet her burden and granted summary judgment for the Parents on Brawley's slander claim.

Now on appeal, Brawley makes many arguments (including several new arguments not raised below) that RCW 4.24.510 does not apply and that the Court made an improper credibility determination. Brawley's arguments are not supported by clear case law or the record.

The Parents ask the Court to affirm the trial court's motion for partial summary judgment, and to award costs and attorneys' fees to the Parents for responding to this appeal. The Court should also affirm the lower court's ruling on Brawley's attorneys' fees motion because the trial court did not abuse its discretion. Finally, the Parents request an order from this Court striking the improper designation of the child's medical

records as part of the appeal record and sanctions against Brawley for improperly designating these records.

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

### **A. Factual Background.**

Reza Firouzbakht and Leyla Rouhfar, D.M.D., hired Brawley to look after their three-year-old son<sup>1</sup> in May 2008. CP 24. Not long after, their son developed a stutter. *Id.* The Parents discussed the stutter with their son's pediatrician in July 2008 and learned that children of his age often stutter when under stress. *Id.* At that time, the Parents did not know of any stress that might have caused the stutter. *Id.*

Several weeks later, as Mr. Firouzbakht buckled his son into his car seat, the son said: "Nanny Lora go home; [\_\_\_\_\_] get a new nanny." CP 37 ¶ 7. Concerned about this statement, Mr. Firouzbakht asked his son to explain what he meant, but his son simply repeated the statement. *Id.*

After approximately three and a half months of employment, the Parents had begun to realize that Brawley was having problems. CP 25, 29, 37. Brawley's attitude was hostile, and she refused to follow requests. CP 25. On August 28, 2008, Mr. Firouzbakht told Brawley that he and Dr. Rouhfar were transferring their son's care to family members and that

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<sup>1</sup> To protect the privacy interests of the child, the Parents will not identify him by name.

they would need her services for only one more week. CP 25, 30, 37 ¶ 9.

The next day, when Brawley reported for work, she was hostile to Dr. Rouhfar and her son. CP 25. After complaining about a lack of sleep the previous night, she refused Dr. Rouhfar's request to take the boy to a dinosaur exhibit. CP 25. When the boy became upset, Brawley sharply told him that she was not feeling well. *Id.* After leaving for work, Dr. Rouhfar called her husband and asked him to return home and relieve Brawley because Dr. Rouhfar was concerned about Brawley's behavior. *Id.* Mr. Firouzbakht sent Brawley home to rest. That was the last day she provided child care. CP 37 ¶ 10.

On September 2, 2008, after learning that Brawley was not coming back, their son complained to his parents: "Nanny Lora hit me and pushed me on my tummy." CP 25. The Parents subsequently made a report to police, CP 25, and at the suggestion of the police, they took their son to a doctor for a physical evaluation, *id.*, and to a child psychiatrist. Dr. Rouhfar contacted Child Protective Services. CP 12. The Parents also spoke with the director of their son's preschool, and a few close family members who occasionally cared for him, to let them know that Brawley was no longer entrusted with their son's care. CP 25-26.

**B. Procedural Background.**

On October 8, 2008, Brawley sued the Parents for unpaid wages, breach of contract, injunctive relief and slander per se. CP 3-12. Brawley's slander claim did not specify to whom the Parents allegedly made slanderous statements, only that the statements "were published to others." CP 6. For the slander claim, Brawley planned to seek a jury award of \$2 million. CP 272. On November 16, 2009, the Parents filed a motion for partial summary judgment, in which they argued that their statements were privileged and therefore immune from liability. CP 28-36. During oral arguments, the trial court requested supplemental briefing on the single issue of whether "malice" is a question of law for the court to decide or a factual question for a jury to decide. CP 99, 113. The court issued its ruling on January 22, 2010, holding that the Parents' statements to police and CPS were privileged and absolutely immune under RCW 4.24.510 and the statements made to family members, health care providers and school personnel were privileged under a qualified common interest privilege. CP 216. The Court ruled:

Plaintiff Brawley has failed to meet her burden of showing she can prove the four *prima facie* elements of her defamation claim and that Defendants made an unprivileged claim. Specifically, the court grants the motion on the basis that the statements made to the police and Child

Protective Services are privileged and absolutely immune from liability under RCW 4.24.510. The statements made to family members, health care providers, and school personnel are privileged under a qualified common interest privilege. A qualified privilege may be lost if it can be shown that the privilege was abused. It is Plaintiff's burden to demonstrate abuse of that privilege and a showing of actual malice will defeat a conditional or qualified privilege which must be shown by clear and convincing proof of knowledge or reckless disregard as to the falsity of the statement. While the court agrees with Plaintiff that factual disputes regarding such should be reserved for the jury, there is no evidence in the record that would allow the court to conclude that there is a genuine issue of fact on this question. Plaintiff has not provided the court with the necessary evidence to survive partial summary judgment. In accordance with RCW 4.24.510 Defendants are entitled to fees and statutory damages.

CP 216-17. The Court granted the Parents' motion for partial summary judgment on the slander claim. CP 216.

On February 4, 2010, the Parents made an Offer of Judgment on Brawley's claims for unpaid wages, breach of contract and injunctive relief, which Brawley accepted. CP 329-31, 334-35. The offer included "a reasonable sum for attorney's fees incurred in prosecuting Plaintiff's wage claim, pursuant to RCW 49.48.030 and 49.52.070, in an amount to be determined by the Court." CP 330.

On March 23, 2010, Brawley filed a motion for an award of attorneys' fees. CP 314-58. Nowhere in her motion did she provide an accounting of her hours. Instead, she provided the court with a total number of hours that did not explain what work was performed, when it was performed, or the basis for her fee request. CP 358. The request also failed to segregate time associated with her unsuccessful defamation claim. CP 316-17. The Parents pointed out Brawley's failure to provide adequate documentation. CP 361-62. In her reply brief, Brawley refused to produce her billing records on the basis of attorney-client privilege and attorney work product and added that "[i]f the court requests supplemental production of the records, counsel requests the right to redact them heavily to delete these communications." CP 375.

On April 2, 2010, the trial court award Brawley \$5,000 in attorneys' fees. CP 422. The trial court found that because Brawley was not the prevailing party, "she should not be awarded fees for her defamation claim, her breach of contract claim and time spent defending the Parent's[sic] counterclaim" and that there was no justification for the multiplier of 1.5 that Brawley sought. CP. 421. The trial court further found that "Brawley failed to provide evidentiary support for her claim of costs related to the present litigation" and that "25 hours @ 200.00 per

hour is reasonable given that the primary issue litigated was the defamation claim.” CP 422.

This appeal followed.

### III. ARGUMENT

#### A. Standard of Review.

Under Washington law, the First Amendment requires prompt dismissal of meritless defamation claims. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005); *Mark v. Seattle Times*, 96 Wn.2d 473, 484, 635 P.2d 1081 (1981) (“In the First Amendment area, summary procedures are even more essential.”) (internal quotation marks and citations omitted). To establish a *prima facie* case that would avoid summary judgment, a plaintiff alleging defamation must offer evidence of “convincing clarity” that would raise a genuine issue of fact as to each element of her claim. *Mark*, 96 Wn.2d at 487. Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of every element essential to that party’s case, and on which that party will bear the burden of proof at trial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The nonmoving party must produce “specific facts sufficiently rebutting the moving party’s contentions and disclosing the existence of a material issue of fact.” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106

Wn.2d 1, 13, 721 P.2d 1 (1986). She cannot rely on speculation, claims that questions of fact remain, or having her affidavits accepted at face value. *Id.* “The nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Id.*

With respect to an attorneys’ fee award, an appeals court reviews a fee award under an abuse of discretion standard. *The Boeing Co. v. Heidy*, 147 Wn.2d 78, 51 P.3d 793 (2002). “A trial court abuses its discretion only when the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.*

**B. The Trial Court Properly Granted Summary Judgment on Brawley’s Defamation Claims.**

Brawley raises a host of arguments – several of them new – to argue that the trial court erred in dismissing her slander claim. All of her arguments are without merit.

**1. The Parents did not waive use of RCW 4.24.510 as a defense.**

Under CR 8(c), a defendant must plead certain affirmative defenses “and any other matter constituting an avoidance or affirmative defense.” Because the purpose of the rule is to avoid unfair surprise, the Washington Supreme Court has endorsed a flexible reading of CR 8(c): “[O]bjection to a failure to comply with the rule is waived where there is

written and oral argument to the court without objection on the legal issues raised in connection with the defense.” *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975). *See also Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766, 733 P.2d 530 (1987) (“Since the negligence claim was argued by both parties and ruled on by the trial court, it should have been treated as if raised in the pleadings.”).

Immunity under RCW 4.24.510 is not an affirmative defense listed in CR 8(c) that must be pleaded. The case law Brawley cites does not support her position that it is an affirmative defense that must to be pleaded or else it is waived. In *Doe v. Gonzaga University*, 99 Wn. App. 338, 315, 992 P.2d 545 (2000), the Court held that the statute could not be raised for the first time *on appeal*. In *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 435-36, 979 P.2d 917 (1999), the court did not consider the specific question of whether the statute is an affirmative defense that must be pleaded or it is waived.

Even assuming, however, RCW 4.24.510 is an affirmative defense, Brawley waived the opportunity to object. In their moving papers, the Parents expressly invoked RCW 4.24.510 and asserted that their statements to police officers and CPS were privileged under that statute. CP 32-33. In her opposition, Brawley could have pointed out that the statute was an affirmative defense that should have been pleaded earlier.

CP 38-54. She did not. Instead, she argued repeatedly that the Parents' statements to police and CPS were false and defamatory and made in bad faith. CP 44 ("The declarations of the parents prove only that they did accuse Lora Brawley of child abuse, to both government agencies and to others."); CP 49-53, 72-73. Brawley claims that she raised the argument during oral argument. Brief of Appellant Lora Brawley ("Appellant Brief") at 14. However, the citation in the record, CP 118, is not a record of the oral arguments.<sup>2</sup>

It was only *after* the hearing, during the actual malice briefing, that Brawley first objected to the Parents' reliance on RCW 4.24.510 as an affirmative defense.<sup>3</sup> CP 118. It was too late. The Court had asked the parties for briefing on only actual malice. CP 99, 113. It did not grant the parties leave to raise new arguments or to present new arguments. Brawley had ample opportunity to assert in her opposition papers and during oral argument that RCW 4.24.510 was an affirmative defense that needed to be pleaded. She failed to do so, and as a result, waived the

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<sup>2</sup> Because Brawley failed to include materials in the record that support her argument, the Court may disregard that argument. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

<sup>3</sup> The trial court considered all of Brawley's supplemental briefing and the materials. CP 216. To the extent that Brawley objected (belatedly) that the Parents waived RCW 4.24.510 as an affirmative defense, the trial court rejected her argument and held in favor of the Parents. There is no evidence that the trial court abused its discretion. *See Phillips v. Richmond*, 59 Wn.2d 571, 574-75, 369 P.2d 299 (1962).

argument that RCW 4.24.510 is an affirmative defense that needed to be pleaded.

**2. RCW 4.24.510 protects the Parents' statements to police and CPS.**

Brawley also argues for the first time that her lawsuit was not a Strategic Lawsuit Against Public Participation ("SLAPP"). Appellant Brief at 26-29. By failing to raise the issue before the trial court, Brawley is precluded from raising the issue on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). CP 38-54, 113-121.

If Brawley had raised the issue, the Parents would have answered that they meet the plain language of the statute. RCW 4.24.510 provides:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the

court finds that the complaint or information was communicated in bad faith.

Thus, the statute applies when “(1) a person communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization and (2) the complaint is based on any matter reasonably of concern to that agency.” *Bailey v. State*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008) (internal quotation marks omitted). The Parents satisfied the plain language of the statute because they (1) communicated a complaint to their local police and state CPS and (2) a child abuse complaint is reasonably of concern to those agencies.

Brawley argues that her lawsuit “was no SLAPP” and that RCW 4.24.510 does not apply as a matter of law because Brawley did not know about the police or CPS reports until after filing suit. Appellant Brief at 28. She also contends that the Parents “presented no evidence their reports involved a matter of public rather than private interest.” Appellant Brief at 29. Whether Brawley knew about the statements to police or CPS when she filed her lawsuit is irrelevant because Brawley clearly intended to holding the Parents accountable for their statements to police and CPS in her slander claim, contrary to RCW 4.24.510. When the Parents cited to RCW 4.24.520 as part of the basis for their motion for partial summary judgment, CP 32-33, 88, Brawley could have easily defeated that portion

of the Parents' motion by informing the trial court that her slander claim did not encompass any statements to government authorities. She did not. CP 38-54. Instead, she repeatedly argued that those statements were made in bad faith, and that she would hold the Parents liable for defamation for making those statements.<sup>4</sup> CP 44, 51. Because Brawley's slander claim included the Parents' statements to police and CPS, the trial court properly ruled that those statements were absolutely privileged under RCW 4.24.510.

Moreover, Brawley should be judicially estopped from asserting one position before the trial court and later, before this Court, taking an inconsistent position to gain an advantage. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The core factors of judicial estoppel are:

(1) whether "a party's later position" is "clearly inconsistent" with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

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<sup>4</sup> Brawley's slander claim did not specify to whom the Parents allegedly made slanderous statements, only that the statements "were published to others." CP 6. Thus, the claim is broad enough to encompass statements to police and CPS.

*Id.* at 539-40 (citations omitted). Before the trial court, Brawley took the position that her lawsuit sought to hold the Parents accountable for statements they made to government authorities. CP 51. Before this Court, Brawley argues that her lawsuit was *not* based on statements to government authorities. Appellant Brief at 28-29. Brawley is misleading either the trial court or this Court about whether her slander claim includes statements made to police and CPS. Brawley should be judicially estopped from arguing her inconsistent positions.

Similarly, Brawley’s claim that the Parents “presented no evidence their reports involved a matter of public rather than private interest” is without legal support. Child abuse is a matter of significant public interest. *See State v. Motherwell*, 114 Wn.2d 353, 366, 788 P.2d 1066 (1990) (recognizing a compelling state interest in combating child abuse). The unique reporting duty imposed on teachers, health professionals and others is further support that child abuse is a matter of public concern. *See* RCW 26.44.030. Nevertheless, the plain language of the statute does not require that the privileged communication involve a public issue. *Bailey*, 147 Wn. App. at 263.

The trial court properly found that the Parents’ statements to police and CPS were absolutely privileged under RCW 4.24.510. CP 216. The Parents communicated a child abuse complaint to police and CPS, and

such information is unquestionably a matter of concern to those agencies. Their statements to police fit squarely within the plain language of the statute. *See Dang v. Ehredt*, 95 Wn. App. 670, 682, 977 P.2d 29 (1999). Likewise, communications to a state agency concerned with the welfare of children about a matter concerning potential child abuse fall within the statute. Such statements also fit within the spirit of the statute, which protects citizens who provide information to government authorities and are sued as a result. *See Dang*, 95 Wn. App. at 685 (stating that “the clear purpose of the statute is to encourage communication between citizens and law enforcement agencies”).

**3. The trial court properly dismissed the remainder of Brawley’s defamation claim based on the common interest privilege.**

Brawley’s brief recognizes that a common interest privilege exists where “the publication is for the protection of the interest of the publisher, the recipient or a third person, persons sharing a common interest, family relationships, public interest.” *Owens v. Scott Publ’g. Co.*, 46 Wn.2d 666, 674, 284 P.2d 296 (1955). *See also Hitter v. Bellevue School Dist.*, 66 Wn. App. 391, 401, 832 P.2d 130 (1992) (recognizing privilege for communications between a principal and a parent); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 643, 20 P.3d 946 (2001) (recognizing privilege where statements were made to protect the safety of a client,

court personnel and the public); Restatement (Second) of Torts §§ 593-98 (1977).

The trial court properly ruled that the Parents' statements to family members, health care providers and school personnel were protected by a qualified privilege under the common interest privilege. CP 216. The Parents needed to communicate the child abuse allegations to the child's preschool director and family members to protect their son, and share the information with his pediatrician and child psychiatrist for treatment. The communications clearly fall within the common interest privilege.

Relying on *Moe v. Wise*, 97 Wn. App. 950, 989 P.2d 1148 (1999), Brawley argues (for the first time) that these statements are not within the ambit of the common interest privilege because the privilege "generally applies to organizations, partnerships and associations" and that because the Parents did not have such a relationship with the recipients of the communications, the common interest privilege did not apply. Appellant Brief at 30. Because Brawley failed to raise this argument to the trial court, she is precluded from raising the issue here. *Smith*, 100 Wn.2d at 37. In any event, this misreads *Moe*, which held that the privilege is "**generally** available for persons involved in the same organizations, partnerships, associations, or enterprises..." *Moe*, 97 Wn. App. at 989. *Moe* did not hold that a person must have such a relationship for the

privilege to apply. And, in fact, Washington courts have recognized a common interest privilege in cases not involving an organization, partnership, association or enterprise. *See Hitter*, 66 Wn. App. 391, 401, 832 P.2d 130 (1992) (recognizing a common interest in communications between a principal and a parent); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 643, 20 P.3d 946 (2001) (recognizing privilege where statements were made to protect the safety of a client, court personnel, and the public).

**4. Brawley failed to meet the clear and convincing standard to show abuse of the privilege.**

Because the common interest privilege applied, Brawley had to show by “clear and convincing evidence” that the Parents’ statements were made with knowledge of, or reckless disregard for, the falsity of the statement to avoid summary judgment. *Gilman v. MacDonald*, 74 Wn. App. 733, 738, 875 P.2d 697 (1994); *Hitter*, 66 Wn. App. 401; *Moe*, 97 Wn. App. at 963. This standard applies whether or not the plaintiff is a public or private individual.<sup>5</sup> *See, e.g., Moe*, 97 Wn. App. at 963; *Bender*

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<sup>5</sup> The Parents were prepared to argue at trial that Brawley is a public figure because she claims national recognition as an expert on child care issues. CP 482. For instance, she claims she was a guest on *Rolanda*, *Sally Jessie Raphael*, *The Geraldo Show*, *Dateline* and CNN. She also claims to be a resource for printed publications and a speaker at local, national and international conferences. CP 482. However, whether or not Brawley is a public or private figure is irrelevant to the privilege issue raised in the Parents’ motion for partial summary judgment. Consequently, there was no need to provide evidence on this issue in their summary judgment briefing. The trial court did not determine that Brawley was a public figure and there is no suggestion that such a

*v. City of Seattle*, 99 Wn.2d 582, 601-02, 664 P.2d 492 (1983) (applying standard where plaintiff was a private figure); *Hitter*, 66 Wn. App. at 401 (same). Brawley had to show the Parents “in fact entertained serious doubts as to the truth of the statement; it is not shown by a mere failure to reasonably investigate.” *Parry v. George H. Brown & Assocs., Inc.*, 46 Wn. App. 193, 197, 730 P.2d 95 (1986); *see also Herron v. KING Broadcasting Co.*, 112 Wn. 2d 762, 775, 776 P.2d 98 (1989); *St. Amant v. Thompson*, 390 U.S. 727, 371, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Proving reckless disregard for the falsity of a statement required a showing that the Parents entertained serious doubts regarding the truth of their statements. *Herron*, 112 Wn.2d at 775. The Washington Supreme Court has rejected cases permitting defamation privileges to be defeated on a lesser showing. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 177 n.2, 727 P.2d 982 (1986) (“Henceforth, this court will follow the rule . . . [that] proof of knowledge or reckless disregard as to the falsity of a statement is required to establish abuse of a qualified privilege.”).

Brawley failed to come forward with evidence that would create a triable issue of fact. She presented no evidence that the Parents disbelieved their son or that they entertained serious doubts about the truth

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determination affected the trial court’s ruling. CP 215-17. To the extent that Brawley argues she is not a public figure, this argument does not change the outcome. Appellant Brief at 25-26.

of their statements. On appeal, Brawley cites to evidence and argument that she produced to the trial court on January 10, 2010 – after the parties had fully briefed the summary judgment motion, after oral arguments, and after the Parents submitted their supplemental brief on actual malice. The evidence was part of briefing to address the sole legal issue of actual malice. Brawley justified the submission of late evidence on the claim that the transcript had not arrived on time, CP 117, even though the deposition was taken *more than a year earlier*, on November 11, 2009, CP 155, and presumably could have been presented to the trial court during the summary judgment briefing.<sup>6</sup> Brawley also stated that “[b]y their own admissions, the Rouhfars’ allegations were not an accurate reporting of their son’s alleged statements.” Appellant Brief at 31. The record citations, CP 15 and 119, do not provide any support for this claim.<sup>7</sup> Even assuming the Parents *coached* their son, this does not raise a question of fact as to whether the Parents *disbelieved* their son.

Before the trial court, Brawley argued that summary judgment was inappropriate because a creditability determination was needed to resolve a conflict between the Parents’ declarations and Brawley’s “flat-out

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<sup>6</sup> The trial court did consider the late-filed evidence. CP 216. Even if this Court does consider the untimely evidence, the deposition testimony does not show that the Parents disbelieved their son or had serious doubts about the truth of their statements.

<sup>7</sup> Again, the Court may disregard this argument. RAP 10.3(a)(5).

denial.”<sup>8</sup> CP 43. Brawley stated in a declaration that “I do not believe that Leyla truly believed that I had verbally (or physically) abused Avesta, or she would not have insisted that I owed them hours to care for him in future.” [sic] CP 69. She contended that bad faith existed because the Parents allegedly did not raise concerns about her services until after she complained about two pay checks that the bank refused. CP 51. This “evidence” does not satisfy Brawley’s burden because “[a] party’s self-serving statements or conclusions and opinions are insufficient to defeat a summary judgment motion.” *See Segaline v. Dep’t of Labor and Indus.*, 144 Wn. App. 312, 325, 182 P.3d 480 (2008), *rev’d on other grounds*, *Segaline v. Dep’t of Labor & Indus.*, \_\_\_ Wn. 2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010); *Mansfield v. Holcomb*, 5 Wn. App. 881, 885, 491 P.2d 672 (1971) (“Plaintiff’s affidavit consists mainly of an attack on the sufficiency of various affidavits of the defendants. It states no facts admissible in evidence on the issue of actual malice, but goes only so far as to deny, without stating supporting facts, various averments in the defendants’ affidavits which state they made the charges without actual malice.”); *Adams v. King County*, 164 Wn.2d 640, 647 (2008) (“Such facts must move beyond mere speculative and argumentative assertions.”).

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<sup>8</sup> Proof of falsity alone cannot overcome a privilege. *Mark*, 96 Wn.2d at 492; *Parry*, 46 Wn. App. at 198.

Moreover, Brawley's declaration was not based on personal knowledge.

See CR 56(e); *Mansfield*, 5 Wn. App. 881, 885.

Brawley's evidence of her dispute with the Parents over wages owed are not facts that show *with convincing clarity* the Parents' state of mind and whether they disbelieved the abuse allegations. At best, this is evidence of spite or ill will<sup>9</sup> which is insufficient for showing actual malice and is of little probative value. See *Henry v. Collins*, 380 U.S. 356, 357, 85 S. Ct. 992, 13 L. Ed. 2d 892 (1965) ("The jury might well have understood these instructions to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood."); see also *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). Brawley had to show that the Parents subjectively doubted the truth of what they said. *Moe*, 97 Wn. App. at 965; *Herron*, 112 Wn.2d at 787. She did not. "Unsupported allegations of malice, where a plaintiff alleges mere falsity and possible corrupt motives, and no other bad faith activity on the part of the defendant, would make determination of the existence of a qualified privilege by the court of little or no importance and force every defamation case to trial." *Kauzlarich*, 105 Wn. App. at 647. Brawley's opinion and speculation did not provide clear and convincing evidence that the Parents' statements were made with

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<sup>9</sup> The Parents do not concede that they acted in spite or with ill will and the trial court made no such finding.

knowledge of, or reckless disregard for, the falsity of their information. *Gilman*, 74 Wn. App. at 738. The trial court did not err and it did not make an improper credibility determination, Appellant Brief at 32, because Brawley presented no conflicting evidence.

The trial court's grant of summary judgment dismissing Brawley's slander claim was proper as a matter of law and in light of the clear Washington case law requiring prompt dismissal of meritless defamation claims under the First Amendment. *Mohr*, 153 Wn.2d at 821. As a result, the trial court's award of attorneys' fees, costs and statutory damages was appropriate and should be affirmed.

**5. The Parents request an award of attorneys' fees and expenses.**

Pursuant to RAP 18.1, the Parents request an award of reasonable attorneys fees and expenses in connection with defending the portion of the appeal relating to RCW 4.24.510. *See Bailey*, 147 Wn. App. at 264.

**C. The Trial Court Did Not Abuse Its Discretion in Its Award of Attorneys' fees to Brawley.**

Brawley argues that the trial court erred in its calculation of attorneys' fees. The trial court granted in part Brawley's motion, and made the following findings and conclusions of law:

NOW, THEREFORE, the Court hereby makes the following FINDINGS OF FACT:

1. Plaintiff has failed to provide evidentiary support for her fee request;
2. The established rate for billing clients will likely be a reasonable rate. Because Ms. Young states that she regularly bills at a rate of \$200, the reasonable hourly rate for calculating the Lodestar is \$200;
3. Plaintiff Brawley has failed to support for her claim of 107.25 hours by providing a total number of hours that she and others spent on the case, but failing to give an explanation for how those hours were spent. This is insufficient to support the number of hours claimed;
4. Because Brawley was not the prevailing party, she should not be awarded fees for her defamation claim, her breach of contract claim and time spent defending the Parent's counterclaim. These claims are sufficiently distinct from her wage claim that time spent on these matters must be segregated from any attorneys fees award;
5. Brawley is entitled to only reasonable fees related to her wage claims pursuant to RCW 49.48.030 and 49.52.070;
6. The amount at issue is a relevant consideration in determining the reasonableness of the fee award. The wage dispute involved less than \$2,000 in back-owed pay. In light of this, Brawley's claim for 107.25 hours for a total of \$25,500 in fees is unreasonable;
7. Brawley has asked for a multiplier of 1.5. An adjustment based on these factors may be made in rare instances. The Court finds there is no justification for such a

multiplier because the issues relating to wage dispute were fairly straightforward and her hourly rate adequately compensates for any risk factor to Ms. Young for working with a client who may be unable to pay all of her attorneys fees; and

8. Brawley has failed to provide evidentiary support for her claim of costs related to the present judgment.

\* 25 hours @ 200.00 per hour is reasonable given that the primary issue litigated was the defamation claim.

CP 421-22.

Brawley challenges finding No. 6 that the amount at issue is a relevant factor in determining a fee award. Appellant Brief at 36-37. Significantly, Brawley does not challenge the trial court's other findings, and so they are verities on appeal. *City of Spokane v. State Dep't of Revenue*, 145 Wn.2d 445, 451 (2002). The trial court did not abuse its discretion in the fee award.

The lodestar method is the preferred method for calculating fee awards under Washington law. *See Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). The lodestar is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. *Id.* at 434. The burden of proving that fees are reasonable falls on the party seeking the fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 152, 859 P.2d 1210 (1993). After the lodestar is calculated, the trial court

may make an adjustment taking into consideration the contingent nature of success and the quality of work performed. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983).

Before a trial court can determine the number of hours reasonably spent, an attorney must provide “reasonable documentation”:

This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work ( i.e., senior partner, associate, etc.). The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

*Id.* at 597. *See also Mahler*, 135 Wn.2d at 434 (“Counsel must provide ***contemporaneous records*** documenting the hours worked.”) (emphasis added). Brawley failed to support her claim of 107.25 hours. CP 358. She merely provided a total number of hours that she and others spent on the case, but gave no contemporaneous records documenting how those hours were spent, even though she had ample opportunity to do so. *Id.*

Moreover, Brawley was entitled to only reasonable fees related to her wage claims pursuant to RCW 49.48.030 and 49.52.070. The amount at issue is a relevant consideration in determining the reasonableness of the fee award. *See Mahler*, 135 Wn. 2d at 433. *See also* RPC 1.5(a)(4).

In *Scott Fetzer Co.*, the Washington Supreme Court held that the plaintiff's request for \$180,914 in attorneys' fees was unreasonable where the amount at issue totaled \$19,000. The court reversed two prior awards by the trial court in the amount of \$116,788 and \$74,746.38, and ruled that \$22,454.28 was the proper award, after taking into consideration the amount of time needed to research and brief the jurisdictional issues. The Court noted: "What is particularly obvious in this case is the gross disparity between the amount requested, and even the amount actually awarded by the trial court, when compared to the amount in controversy." *Id.* at 150.

The trial court applied the same reasoning to Brawley's fee request. The only claim Brawley prevailed on was the wage dispute – less than \$2,000 in back-owed pay. CP 421. And yet, Brawley claimed 107.25 hours for a total of \$25,500 in fees. CP 314, 358. The trial court recognized that the focus of the litigation was not the wage claim but on the slander claim. CP 422. On the latter claim, the Parents prevailed by defeating Brawley's \$2 million defamation claim. CP 215-17, 421.

Moreover, the lack of proportion in the fee request was not the only finding the trial court made. The trial court gave numerous additional reasons for giving Brawley an award that was lower than what she sought. Those reasons included Brawley's failure to segregate time

spent on non-wage claims, her failure to justify a multiplier and her failure to provide an adequate accounting. Significantly, the trial court, which presided over the summary judgment briefing and the many discovery disputes, concluded that “the primary issue litigated was the defamation claim.” CP 467. The trial court did not abuse its discretion. Finally, because Brawley has not prevailed on this issue, or any other issue on appeal, she is not entitled to any attorneys’ fees for this portion of her appeal.

**D. The Parents Ask That the Court Strike the Child’s Medical Records From the Appeal Record.**

The Parents request an order from this Court striking CP 441-56. These documents consist of the child’s medical records, which were improperly put into an open trial court file by Brawley’s counsel, despite the fact that the trial court ordered that the records not be published and the parties entered into a protective order stating that the medical records would not be published. CP 287-89, 401-05, 408-09. After Brawley put the record into the public court file, the trial court imposed sanctions of \$1,000 on Brawley’s counsel, Saphronia Young. CP 409. The Court also denied her motion for reconsideration.<sup>10</sup>

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<sup>10</sup> Brawley’s motion for reconsideration, the Parents’ opposition and the trial court’s denial of the motion is in Respondent’s Supplemental Designations.

Once again, the child's medical records have been needlessly put into another court record – this time in the clerks papers related to the present appeal. Brawley designated these highly confidential medical records even though Brawley has not appealed the trial court's order of sanctions or cited these records as part of her appeal. *See* RAP 9.6(a) (“Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court.”). The Parents request attorneys' fees or other sanctions as the Court sees fit related to Brawley's improper designation of the child's medical records.

#### **IV. CONCLUSION**

The Parents challenged Brawley to come forward with evidence that the Parents did not believe Brawley abused their son (or that they entertained serious doubts) when they contacted government authorities, their son's doctors, family members and the director of the child's school. Brawley came forward with no relevant evidence, and so there was no need for the trial court to make a credibility determination. The trial court ruled properly that Brawley failed to meet her burden and granted summary judgment in the Parents' favor on Brawley's defamation claim.

Brawley's arguments otherwise are without merit. She allowed the absolute immunity defense under RCW 4.24.510 to be tried, and therefore Brawley has waived any objection that the Parents did not affirmatively

plead the statute as a defense. Other arguments – that Brawley’s lawsuit was not a SLAPP and that the common interest privilege does not apply – were not raised below and therefore cannot be raised before this Court.

The Parents ask the Court to affirm the trial court’s motion for partial summary, and to award expenses and attorneys’ fees to the Parents for responding to the part of the appeal related to RCW 4.24.510. The Court should also affirm the lower court’s ruling on Brawley’s attorneys’ fees motion because the trial court’s findings show no abuse of discretion. Finally, the Parents request an order striking the improper designation of the child’s medical records from the appeal record and attorneys’ fees or sanctions against Brawley for designating these records.

RESPECTFULLY SUBMITTED this 17th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Declared under penalty of perjury under the laws of the State of Washington, dated at Seattle, Washington, this 17th day of September, 2010.

  
\_\_\_\_\_  
Sarah K. Duran

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