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Court of Appeals No. 65914-6-I

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

NORMAN WHERRETT & ANABELLA WHERRETT
Appellants/Cross-Respondents

vs.

MARY WHITE & DAVID WHITE, LAVONNE EKREN, MARLISS
CROSSON
Respondents/Cross-Appellants

On Appeal from the King County Superior Court
KCSC Case No. 09-2-46120-1 SEA

APPELLANT'S OPENING BRIEF

BRIAN H. KRIKORIAN, WSBA #27861
Law Offices of Brian H. Krikorian
2110 N. Pacific Street, Suite 100
Seattle, WA 98103
(206) 547-1942
Fax: (425) 732-0115
Attorneys for Appellants

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

II. STATEMENT OF THE CASE.....3

1. Introduction.....3

2. Background Facts3

 (A) Specific Examples of Harassing Conducted Related to
 defendant Ekren
 7

 (B) Specific Examples of Harassing Conducted Related to the
 defendant Crosson.....
 16

 (C) Specific Examples of Harassing Conducted Related to the White
 Defendants21

III. ARGUMENT.....27

1. Standard of Review.....27

**2. The Washington Anti-Slapp Statute Does not Provide
 Defendants With Absolute Immunity To Plaintiffs’ Claims In This
 Case28**

 (A) RCW 4.24.501 Only Protects Communications Regarding
 Matters “Reasonably of Concern” to a Specific Agency, Not All
 Conduct.....28

 (B) The Anti-SLAPP Statute Does not Reach Conduct or
 Communications Unrelated to Governmental Agencies.....33

 (C) The Anti-SLAPP Statute Does Not Prohibit Plaintiff from
 Seeking Equitable Remedies under the Anti-Harassment Statues.....34

(D) Plaintiffs’ Outrage and Negligent Infliction of Emotional Distress Claims Are Not Barred	36
3. The Purpose of the Anti-SLAPP Statute Is To Protect Speech Directed to Influence a Government Action or Outcome, And Should Not Be Construed Broadly to Eliminate All Remedies of a Plaintiff	41
(A) The Court Erred In Granting Summary Judgment Based Upon Immunity Under The Statute Because There Is A Question Of Fact Regarding Whether The State Acted In Good Faith.	41
(B) Interpreting The Statute To Dismiss This Case In its Entirety Will The Wherretts’ Right Of Access To The Courts.	43
IV. CONCLUSION	46

TABLE OF AUTHORITIES

Cases

<i>Browning v. Slenderella Sys.</i> , 54 Wn.2d 440, 341 P.2d 859 (1959).....	36
<i>Burchell v. Thibault</i> , 74 Wash.App 517, 521, 874 P.2d 196 (1994)	35
<i>Castro v. Stanwood School Dist. No. 401</i> , 151 Wash.2d 221, 224, 86 P.3d 1166 (2004)	27
<i>Christen v. Lee</i> , 113 Wash.2d 479, 492, 780 P.2d 1307 (1989)	38
<i>City of Tacoma v. Luvene</i> , 118 Wn.2d 826, 839, 827 P.2d 1374 (1992).....	44
<i>Emmerson v. Weilep</i> , 126 Wash.App. 930, 110 P.3d 214 (2005)	33, 36
<i>Gallimore v. State Farm Fire & Casualty Insurance Company</i> , 102 Cal.App. 4 th 1388, 1398, 126 Cal.Rptr. 2d 560 (2002).....	33
<i>Gontmakher v. City of Bellevue</i> , 120 Wash.App. 365, 366, 85 P.3d 926 (2004)	28, 33
<i>Grimsby v. Samson</i> , 85 Wn.2d 52, 530 P.2d 291 (1975).....	36, 37
<i>Hough v. Stockbridge</i> , 113 Wash.App. 532, 54 P.3d 192 (2002).....	43
<i>Kloepfel v. Bokor</i> , 149 Wash.2d 192, 199, 66 P.3d 630 (2003)	37
<i>Pelton v. Tri-State Mem'l Hosp., Inc.</i> , 66 Wash.App. 350, 354, 831 P.2d 1147 (1992)	28
<i>R.A. V. v. City of St. Paul</i> , 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).....	44

<i>Reid v. Dalton</i> , 124 Wash. App. 113, 126, 100 P.3d 349 (2004)	42
<i>Richmond v. Thompson</i> , 130 Wash.2d 368, 922 P.2d 1343 (1996).....	43, 44
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d at 35 (2002)	37
<i>Segaline v. State Department of Labor and Industries</i> , 144. Wash.App. 312, 182 P.3d 480 (2008), review granted, 165 Wn. 1044, 205 P.3d. 132 (2009)	29, 33, 38
<i>Segaline v. State of Washington Department of Labor and Industries</i> , 169 Wash.2d 467, 238 P.3d 1107 (2010)	29, 41
<i>State v. Halstien</i> , 122 Wn.2d 109, 122, 857 P.2d 270 (1993)	44, 45
<i>Snyder v. Med. Serv. Corp.</i> , 145 Wash.2d 233, 243-46, 35 P.3d 1158 (2001) 37, 38	

Treatises:

16 Wash. Prac., Tort Law And Practice § 13.21 (3d ed.)	37
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Statutes:

RCW 4.24.510	28
RCW 4.24.500	29
RCW 10.14.010	34
RCW 10.14.020	34, 35

I. ASSIGNMENT OF ERROR

Plaintiffs/Appellants/Cross-Respondents Norman and Anabella Wherrett (collectively “the Wherretts”) appeal from an order granting summary judgment in favor of defendants LaVonne Ekren, Marlis Crosson, and David and Mary White, and against the Wherretts, for the following reasons:

First—the lower court erred in ruling that, as a matter of law, no triable issues of fact existed as to whether the Wherretts claims were barred, and that all of the defendants, in good faith, communicated with governmental entities regarding the Wherretts, and therefore had “absolute immunity” pursuant to the provisions of the Washington Anti-SLAPP statute (RCW 4.24.510).

Second—to the extent the Anti-SLAPP statute was applicable to certain conduct of the defendants, the lower court erroneously found no material issues of fact existed as to whether the conduct of the defendants unrelated to conduct covered by §4.24.510 permitted the Wherretts to maintain an action for damages.

Finally—to the extent the Anti-SLAPP statute comes into play in this case, the Wherretts submit that the statute as currently drafted, and applied, unconstitutionally denies the Wherretts a remedy to access the justice system for conduct of the defendants that were not intended to be in

good faith, or to legitimately report matters to governmental agencies.

The Wherretts respectfully submit that this case does not hinge strictly on communications made with governmental entities. In fact, those communications were only a means to an end. In many cases, those communications do not meet the statutory requirements of RCW 4.24.510 or a requirement of “good faith.” To the contrary, some of the defendants admitted in deposition testimony that their primary goal was to find ways to harass and annoy the Wherretts to achieve their ulterior goal: To have the Wherretts remove cars that were *legally* located on their real property.¹

The fact that the defendants used means that included, at times, frivolous communications to local authorities about the Wherretts should not have provided them with absolute immunity from civil liability for actions not protected by the Anti-SLAPP statutes. Many of the acts of the defendants had nothing to do with communications to governmental agencies at all, but were acts of provocation and harassment directed strictly at the Wherretts. Accordingly, the blanket application of the Anti-SLAPP statute by the lower court was in error.

¹ Deposition of Marlis Crosson (“Crosson Deposition”), 64:17 to 65:18; Deposition of LaVonne Ekren (“Ekren Deposition”) 50:5-54:12; Declaration of Norman Wherrett, ¶¶34-5; Exhibits 31 and 32 [Clerk’s Papers (“CP”) 932-998; 774-775; 920-929].

II. STATEMENT OF THE CASE

1. INTRODUCTION

This appeal emanates from an order by Judge Michael Hayden, of the King County Superior Court, granting summary judgment in favor of defendants LaVonne Ekren, Marliss Crosson, David and Mary White and against the Wherretts.

The Wherretts sued defendants for claims of Civil Harassment, Malicious Harassment, Outrage, and Negligent Infliction of Emotional Distress. The Wherretts agreed to dismiss their claim of Malicious Harassment. As such, the Wherretts are only appealing the dismissal of the Civil Harassment, Outrage and Negligent Infliction claims. On June 11, 2010, Judge Hayden granted the defendants Ekren, Crosson and the Whites' motions for summary judgment, finding that defendants were immune pursuant to the provisions of the Washington Anti-SLAPP statute (RCW 4.24.510). The defendants have cross-appealed the Court's denial of statutory damages.

2. BACKGROUND FACTS

Plaintiffs Norman Wherrett ("Norm") and Anabella Wherrett ("Ann") have lived in the neighborhood known as Education Hill in Redmond, Washington for approximately 6 years. The Wherretts own a home on 104th Court, which is a cul-de-sac. Plaintiffs live on the north

side of the street. Prior to late 2007 and/or the spring of 2008, the Wherretts had very little problems or conflicts with their neighbors. In fact defendants Ekren, Crosson and White could not point to any real conflict with the Wherretts prior to 2007 or 2008.² The Wherretts had never experienced any issues of significance with regard to their neighbors or with the Redmond Police Department (“RPD”) or the City of Redmond prior to 2007 or 2008.³

Beginning in late 2007, and continuing through this date, the Wherretts began experiencing routine and ceaseless visits and calls by officers of the RPD and representatives of the City of Redmond. The Wherretts also began experience harassment from their neighbors in the form of surveillance and provocations. After nearly 2 years of this conduct, Norm became extremely frustrated and felt harassed and defensive.⁴ In the summer of 2008, Norm suspected his neighbor, David White, may be damaging some of the vehicles on his property, and after consulting with authorities, sought an anti-harassment order against defendant David White. This was denied by Judge Linda Jacke, and Norm accepted David White’s assurance he did not damage the cars. At the

² Crosson Deposition, 10:20 to 13:21; Ekren Deposition, 12:23 to 14:2; Exhibit 1 [CP 793-795; 900-967]

³ Declaration of Norman Wherrett, ¶41; Declaration of Anabella Wherrett, ¶18 [CP 775; 784]

⁴ Declaration of Norman Wherrett, ¶¶34-40; Declaration of Anabella Wherrett, ¶¶15-17 [CP 774-775; 783-4]

urging of his neighbors and Judge Linda Jacke, defendant White immediately sought and received an anti-harassment order against Norm in September 2008. In the Summer of 2009, defendants Ekren, Kathy Admire (“Admire”) and Crosson also sought anti-harassment orders against Norm. Defendants White, Crosson and Ekren then began finding ways to provoke Norm into violating those orders (see below) or calling the police for “alleged” violations that did not occur. These visits and calls involved issues that ranged from the quasi-legitimate (such as whether the Wherretts were adding a 2nd driveway to their property) to the absurd and frivolous (such as defendant Crosson complaining that Mr. Wherrett said “Good Morning” to defendant Crosson’s daughter, defendant Ekren claiming, without any basis, that Mr. Wherrett had a criminal background, and should not be considered as an emergency response volunteer, or the White defendants falsely and frivolously alleging that Mr. Wherrett had placed a “dead body” in a bag in front of his house).

The supposed genus of this harassment and the calls, letters and emails to the RPD and City of Redmond began when the Wherretts *legally* parked numerous vehicles on their property. Norm also purchased some school busses and *legally* parked them on the street.⁵ Some of the

5 Norman Wherrett Declaration ¶34 [CP 773]

defendants began objecting to both the school busses being parked on the street, as well as the fact the Wherretts had many vehicles legally parked on their property. As a result of the initial calls and emails to the City of Redmond, the City amended their ordinances to prohibit the parking of vehicles over 31 feet for more than six hours on the City streets.⁶ Norm complied with the newly changed ordinance, and removed any vehicles not in compliance from the streets. However, the City of Redmond did not, **and has not**, changed the ordinances regarding the number and size of vehicles that can be legally parked on someone's property.⁷ Ekren admitted in her deposition and in an email to defendant Crosson that their collective actions were motivated to "stymie" the Wherretts and send the Wherretts the "message" that the cars "just don't belong" in their neighborhood, even if the Wherretts are not violating any Redmond ordinances, laws, or CC&Rs.⁸

Over the last 2 ½ years, these actions have caused severe emotional distress for the Wherretts. Mr. Wherrett is in his 60s and his wife is from the Philippines, and is not accustomed to the social customs of our country. The Wherretts' daughter was approximately 4 years old when

6 *Id.*

7 See Exhibit 32. As indicated in Carl McCarthy's June 30, 2009, email to the Redmond Mayor and City Council, the City needs "to look at Code changes that balance the needs of this cul de sac with the needs of the City at large. ***We do not want to craft language that may help here while penalizing a greater number of citizens adversely elsewhere.***" (Emphasis added). [CP 929]

8 See Exhibit 3; Ekren Deposition, 52:5 to 53:12 [CP 793-803; 951-980]

this began, and has begun exhibiting abnormal and inappropriate behavior towards others and the Wherretts. Even defendant Kathy Admire testified she noticed aggressive behavior recently from the Wherretts' daughter, Juliana Joy ("JJ").⁹ The Wherretts believe that this behavior is a direct result of the stress and harassment that has occurred over the last 2 years.¹⁰

(A) Specific Examples of Harassing Conducted Related to defendant Ekren

Replacement of the Community Mailboxes

In 2007, some of the community mailboxes were at the property line between defendant Crosson and the Wherretts' property. Sometime in 2007, Norm put a wooden support behind the two wooden posts of the community mailboxes, because the two posts were rotting, and the mailboxes were leaning backward. In early May 2008, the Wherretts noticed that the mailboxes were no longer safe, and the Wherretts feared that they may topple over, especially when their daughter (at the time 4 years old), JJ was out in the front yard or if she went to get the mail for the Wherretts (which she liked to do since the mailboxes were on their property line). The mailboxes were very old. Norm removed the

⁹ Deposition of Kathy Admire ("Admire deposition"), 63:6 to 64:20 [CP 982-1090]

¹⁰ Declaration of Norman Wherrett, ¶¶39-40; Declaration of Anabella Wherrett, ¶17. Ironically, defendant Crosson testified that even she had to take a several month "vacation" from the neighborhood due to all of the stress of the police visits—*police visits occasioned by defendant Crosson and her co-defendants*. Crosson Deposition, 37:11 to 38:6. [CP 774-75; 784; 951-970]

mailboxes from the rotting posts, and secured them to the bushes about three feet away.¹¹

Norm later went to the City of Redmond and the Post office and asked about getting new mailboxes. The Redmond Postmaster told Norm that he would need to obtain the approval of all his neighbors, and that they would have to contribute to the cost. Later Norm went to some his neighbors and asked them about contributing to a community mailbox, including defendant Ekren.¹² Ekren testified that sometime in June 2008, Norm asked her about getting new community mailboxes. Ekren testified that she had, in fact, already taken steps along with defendant Admire, to obtain new community mailboxes. Ekren testified she *intentionally* did not reveal this to Norm. Instead she told Norm she would not participate in his petition. She then called the police to complain he had threatened her with a lien. Ekren admitted that Norm had only been over to her house twice before.¹³

Norman Wherrett “Growls” at Ekren

On August 15, 2008, defendant Ekren claimed that she was outside for her daily “walk”, when Norm “growled” at her. Defendant Ekren proceeded to email defendant Kathy Admire, neighbors John and Diana Kinsella, and Officer Shari Shovlin of the RPD, over the space of 1 ½

11 Norman Wherrett Declaration ¶¶6-7 [CP 765-8]

12 *Id.*

hours that she had heard this. In her emails she claimed it was “funny” and she “laughed”.¹⁴

Ekren reports that the Wherretts are Installing a 2nd Driveway

On April 22, 2009, defendant Ekren sent an email to Kathy Admire, Carl McArthy, Pat Vache, Richard Cole, and Marlis Crosson that “there was a machine at Norm’s house seemingly compacting the area to the right of the home on this less than 7000 sq. ft (sic) lot”. Ekren accused Mr. Wherrett of adding a 2nd driveway and being “driven” with no respect for “this residential area”.¹⁵ If fact, an arborist had recommended that the Wherretts remove a tree on the western side of their property, as it was old and dying, and in danger of falling directly onto the house in a heavy wind. The Wherretts did not intend to put in a new driveway. However they did have equipment and a stump grinder at the property for the tree removal.¹⁶

Because of this, the City of Redmond came to the Wherrett property and initially cited them for code violations. The City of Redmond later rescinded the code violations, and simply suggested that the Wherretts replant another tree.¹⁷

13 Ekren Deposition, 16:15 to 21:4; Exhibit 1 [CP 951-970; 793-796]

14 Exhibit 2; Ekren Deposition, 43:11 to 50:2 [CP 796-801; 951-970]

15 Exhibit 4 [CP 802-804]

16 Norman Wherrett Declaration ¶¶17-19 [CP 769-771]

17 Exhibit 6 [CP 787-789]

*Ekren Complains that Norm is Talking to Third Parties in the
Neighborhood*

On May 7, 2009, Ekren emailed Lt. Nick Almquist and Carl McCarthy (the Code Compliance Officer) to complain that Norm had run up to a AAA tow truck driver and to speak with him. Ekren accused Norm of talking to service people, family and third parties as a way to “harass” the neighbors.¹⁸ Ekren testified that she didn’t think Norm was harassing third parties or family members, but was doing this to put the other neighbors “under surveillance”.¹⁹ In reality, Norm recognized the AAA driver as a person he had a friendly relationship with. Norm ran out to the truck waving at him, and the driver stopped to talk to Norm. There was no harassment of the driver or neighbors. The City did nothing about this.²⁰

“Divide and Conquer”

On May 14, 2009, defendants Ekren and Admire emailed each other and discussed tensions that had arisen over the neighborhood disputes. Admire and Ekren discussed that the first strategy of war was to “divide and conquer” and that they could not let Norm “win” the war.²¹ Admire testified in her deposition that, at this time, defendants Crosson,

18 Exhibit 7 [CP 789-791]
19 Ekren Deposition, 61:1 to 62:24 [CP 951-970]
20 Norman Wherrett Declaration ¶20 [CP 769-772]
21 Exhibits 8 and 9 [CP 811-818]

Ekren and Admire had all filed petitions for anti-harassment orders against Norm. Admire testified that this discussion related to “disagreements” Admire was beginning to have with Ekren. This included issues regarding the neighborhood goings-on. Admire testified that she just wanted the City of Redmond to change the laws to solve the problem with regard to the multiple cars on the Wherretts property—however that Ekren was starting to become more “aggressive” and to make things “personal.” Admire began thinking about distancing herself from the disputes with the Wherretts because of this.²² Admire also testified that she had a good relationship with her neighbors, John and Diana Kinsella and that they had made it clear to her that they did not want to embroil themselves in the other neighbors’ dispute with the Wherretts, and that they were concerned it was beginning to “snowball”. They told Admire that they would have to distance themselves from Admire if she stayed involved in the dispute.²³

Ekren Accuses A Redmond Police Officer for Being “Weak” and Wasting Her Time because the Officer Will Not “Arrest” Norm Wherrett

Just two days later on May 16, 2009, defendant Ekren called the RPD to accuse Norm of “speaking” to Ekren while she went to get her mail.²⁴ Ekren claimed that Norm was outside washing his cars, when Ekren walked down the street to get her mail. She alleged that Norm

22 Admire Deposition, 51:17 to 58:13 [CP 982-1090]

23 Admire Deposition, 58:2 to 58:13 [CP 982-1090]

made “pig calls” and other statements. Ekren alleged Norm was making those statements directly to her, which violated a temporary anti-harassment order.²⁵ Officer Corbray reported in her statement that she returned to her patrol car and stopped by to speak with Norm. The officer had a conversation with Norm, went to her patrol car, and returned to defendant Ekren. Officer Corbray told Ekren she would not arrest Norm and that there was no evidence he had violated any order. Ekren accused Officer Corbray of being “weak” and threatened to report Officer Corbray to her Lieutenant. Ekren confirmed this in her deposition testimony, and stated that the Officer should not have spoken to Norm before she spoke to Ekren, and that Officer Corbray had wasted Ekren’s “valuable time”. Ekren also said the officer didn’t take her seriously because she misspelled her name.²⁶

*Ekren Contacts the Redmond CERT to Accuse Norm of Having
Ulterior Motives and a Criminal Record*

During 2009, Norm volunteered, and personally paid a \$35 enrollment fee for C.E.R.T. (Community Emergency Resource Team) training in the City of Redmond. Norm devoted 25 hours over eight weeks to training by Janeen Olsen and Redmond Fire Department Capt. Rob Torre. Norm candidly discussed the events in their cul-de-sac with Capt.

24 Exhibit 10

25 *Id.*

Torre. Capt. Torre advised Norm that if he had to deal with some of his neighbors who had anti-harassment orders, "Just leave them with a black card in a real emergency". Near the end of the training, Norm detected a change in attitude towards him by Ms. Olsen.²⁷

It was later discovered that on May 17, 2009, Ekren emailed Janeen Olson, who was a volunteer for C.E.R.T, and apparently not affiliated with the City of Redmond. Ekren also copied Lt. Nick Almquist, and Carl McCarthy (who deals with Code enforcement). Ekren testified that she had learned that Norm was volunteering for the CERT program, and contacted Ms. Olson. In her email, Ekren stated that Norm thinks "he will acquire" special rights in their neighborhood in the event of an emergency, that Norm should undergo a background check, that Norm "wouldn't consider [an anti-harassment order]...to enter" the defendants' property if there were an emergency (emphasis in original), that Norm had signed up for the CERT training course because his "ulterior motive" is to have more power, that Norm "is a man that makes his own rules in obeying the law and the codes of Redmond", and that criminal records regarding Norm "exist in more than one court in King County." In her

26 Ekren Deposition, 77:9 to 78:25; 79:1-12 [CP 951-970]

27 Norman Wherrett Declaration ¶24 [CP 769-773]

deposition, Ekren conceded she had no independent facts to support any of her charges, including that Norm had a criminal record.²⁸

Photographing and Putting the Wherretts Under Surveillance

Ekren has conceded she has taken photographs of the Wherretts' property and the vehicles on their property. Ekren has also taken photographs of people coming to the Wherretts' property to unload or pick up vehicles.²⁹ While none of the defendants deposed seem to recall who took the pictures, many of the defendants have custody of photographs of the Wherretts' back yard, and have sent those to various parties and the City of Redmond.³⁰ Ekren has also taken photographs of Ann Wherrett and their 6 year old daughter, JJ.³¹ Ekren has been observed walking down the street to photograph the Wherretts' property as recently as the last couple months, a fact she admits.³²

In addition, Ekren has continued to "report" on the activities of the Wherretts. For example, on October 9, 2009, Ekren emailed defendant Adrienne Zuckerberg to advise her that Kathy Admire had "observed"

28 Exhibit 11; Ekren Deposition, 79:20 to 85:16 [CP 829-834; 951-970]

29 Exhibit 12; Norman Wherrett Declaration ¶13; Anabella Wherrett Declaration ¶10 [CP 834-839; 765-770; 778-82]

30 Exhibits 12, 13 and 22 [CP 834-850; 877-888]

31 Exhibit 12 [CP 834-840]

32 Anabella Wherrett Declaration ¶10; Ekren Deposition, 96:17 to 97:17; See also Madeline Ando Declaration, ¶5 [CP 778-82; 951-970; 788-9]

someone at the Wherretts' home looking at the cars under the covers, and offered that maybe Norm was "perpetrating an insurance fraud now!"³³

Provocations After Receiving Anti-Harassment Orders

Even though defendant Ekren has obtained an anti-harassment order against Norm, and has claimed she is in fear of her safety from him, Ekren intentionally walks in front of the plaintiffs' home, even when plaintiffs are outside—on their property—conducting themselves in a legal and inoffensive manner.³⁴ Ekren testified that even if she notices that Norm is outside when she begins her daily walks, she won't cross to the other side of the street to avoid him. She says she might get hit by a car if she has to cross the street twice. She also suggested that she should not be inconvenienced by having to walk on the opposite side of the street to avoid Norm.³⁵ Defendant Admire, on the other hand (who until recently went on daily walks with Ekren), testified that she *always* walked on the opposing (north) sidewalk when she saw that Norm was outside. Admire testified that since obtaining her anti-harassment order, she had not had any significant incidents of harassment from Norm and did not intentionally provoke any incidents with him.³⁶

33 Exhibit 30; Ekren Deposition, 93:5 to 94:13 [CP 919-921; 951-970]

34 See Gerry O'Brien Declaration; Madeline Ando Declaration, ¶¶2-3; Norman Wherrett Declaration ¶¶11-16; Anabella Wherrett Declaration ¶¶9-14 [CP 785-787; 788-789; 765-771; 778-84]

35 Ekren Deposition, 69:7 to 72:16 [CP 951-970]

36 Admire Deposition, 59:3 to 61:25 [CP 982-1090]

Neighbors such as Madeline and Hirotaka Ando, and Gerry and Diane O'Brien have observed defendant Ekren seem to intentionally walk in front of plaintiffs home while plaintiffs are already outside, and also have observed defendant Ekren taking photographs of the Wherretts' home, cars, as well as the cars and property of other third parties not associated with the Wherretts.³⁷ On some occasions, defendant Ekren has used incidents that have occurred while plaintiff was on his property, and not directly interacting with Ekren, to report him to the City of Redmond, the RPD, or her other neighbors.³⁸

(B) Specific Examples of Harassing Conducted Related to the defendant Crosson

Crosson Reports Norm to the RPD for Bringing In Her Garbage

Cans

On June 18, 2007, Crosson notified the RPD that Norm was being a nuisance for bringing in her garbage cans. According to the RPD report, Crosson acknowledged that Norm was trying to help her.³⁹ Crosson testified that defendant David White called her to report that he saw Norm moving her garbage cans. She could not provide any reason why David White would be reporting this to her.⁴⁰ She testified she called the police

37 See O'Brien and Ando declarations [CP 785-787; 788-789]

38 Norman Wherrett Declaration ¶16 [CP 765-771]

39 Exhibit 23 [CP 896-900]

40 Crosson Deposition, 26:4 to 29:23 [CP 932-951]

“to go over to Mr. Wherrett and tell him to stay away from my property and from me.” Crosson admitted she had never told Norm not to come onto her property or touch her garbage cans before this, and in fact had only one or two face to face interactions with him.⁴¹

According to plaintiffs, Norm was cleaning up yard debris in the street in front of his property that had been blown there by the wind. In the process of cleaning up the debris, he put away, the garbage cans of their neighbors the O’Briens, and Adrienne Zuckerberg, who is the mother of Norm’s son. When he returned to my home, he also put away defendant Crosson’s garbage cans. After he did this, defendant Crosson came out of her home, and screamed at Norm to stop what he was doing. Norm explained that he was just trying to move the cans out of the sidewalk so his daughter could bicycle around the cul-de-sac.⁴²

Crosson reports Norm to the RPD for “Selling Cars” in the Cul-De-Sac

On October 9, 2007, Crosson reported Norm to the RPD for “selling cars” in the cul-de-sac. She complained he was selling cars on his property and had a car-carrier at the home the week before. Crosson also

41 *Id.*
42 Wherrett Declaration ¶5 [CP 765-768]

told the police that she wanted to remain “anonymous”.⁴³ Crosson did not “recall” doing this in her deposition.⁴⁴

On February 18, 2008, Crosson again reported Norm to the RPD for having too many cars parked in the street. Again Crosson told the police she wanted “no contact” after she reported the Wherretts. According to Crosson, she wanted the police to come out and make sure that a fire truck could get through the street.⁴⁵

Crosson Reports Norm to the RPD for Removing the Community

Mailboxes

On May 19, 2008, Crosson also reported Norm to the RPD for trying to remove the props for the community mailboxes. Crosson testified that she was concerned that she could not get her mail. Crosson also did not witness Norm do anything but relied upon defendant Mary White’s version of what she saw.⁴⁶

Crosson Reports Norm to the RPD for Putting a Limb From Her

Tree in her Yard

On March 21, 2009, plaintiffs were outside the front of their property. Their daughter JJ was playing in front as well. JJ asked Norm if she could go bicycling around the cul-de-sac. Norm wanted to clear the

43 Exhibit 24 [CP 898-900]

44 Crosson Deposition, 32:4 to 33:19 [CP 932-950]

45 Exhibit 25; Crosson Deposition, 33:22 to 35:10 [CP 901-903; 932-950]

46 Exhibit 26; Crosson Deposition, 35:13 to 36:24 [CP 903-905; 932-950]

sidewalk of a big tree limb that was lying in front of Crosson's home. The tree limb had fallen from defendant Crosson's tree on her property, and was stretched across the sidewalk. It had been there for 7 to 10 days, and had not been removed because defendant Crosson apparently was not physically able to do it. Norm picked up the limb, and moved it slightly onto Crosson's property and onto defendant Crosson's lawn, so that the sidewalk would be clear for JJ to play and go bicycling.⁴⁷

Apparently defendant White called Crosson to tell her that Norm had moved the tree limb that was sitting on the sidewalk. This resulted in Crosson calling the police, and David White erroneously telling the police that Norm had violated the anti-harassment order against him. The police advised Crosson there was nothing they could do, and it didn't violate David White's anti-harassment order.⁴⁸

Crosson Reports Norm to the RPD for Saying "Good Morning" to her Daughter

On the morning of May 7, 2009, Norm was outside in the front of his property working on his yard and some of the cars parked on the plaintiffs' property. Norm noticed a car parked on the street with the headlights still on. Norm went to look at the car to see if he recognized it and to alert whomever had parked the car that they had left the headlights

47 Wherrett Declaration ¶8 [CP 765-67]

48 Exhibit 27; Crosson Deposition, 46:3 to 52:8; White Deposition, 33:3-22 [CP

on. Norm saw it was defendant Crosson's daughter, and said "Good morning" and returned to his property.⁴⁹

Crosson witnessed Norm walking up to her daughter's car and saying something, and immediately called the police.⁵⁰ She emailed defendant Ekren the next day, and claimed that Norm was "sick" for saying "Good Morning" to her daughter, and was nothing other than a ploy to harass Crosson.⁵¹ Crosson testified that she did not witness Norm do anything threatening or harassing to her daughter, and that she could not hear anything because she was inside the house. Crosson testified that she was very concerned about surgery Crosson was going to have that day.⁵²

Crosson Reports Norm to the RPD Because His Garbage Cans Are In front of Her Property

On August 2, 2009, Crosson contacted the RPD to report that she had returned home from Church, and noticed that the Wherretts' garbage cans were on the sidewalk in front of her home, and that this was a violation of the anti-harassment order she had received along with defendants Ekren and Admire. The RPD came to the scene and observed two garbage cans near the property line. Crosson admitted she had no idea

905-908; 932-950]

49 Wherrett Declaration ¶10 [CP 765-68]

50 Exhibit 28 [CP 908-914]

51 Exhibit 8 [811 to 818]

52 Crosson Deposition, 52:19 to 55:8 [CP 932-950]

who placed the cans in front of her property—in any case there was no violation of the anti-harassment order.⁵³

(C) Specific Examples of Harassing Conducted Related to the White Defendants

Mary and/or David White Calls To Report Norm Is Looking In Mailboxes

On August 3, 2006, the Redmond Police Department (“RPD”) took a call from Mary and David White. In the RPD report, it indicated that Mary White and David White were both calling, although David White testified in his deposition that he called, and he and his mother Mary had discussed making the call.⁵⁴ The RPD report indicated that incident occurred “a few weeks” ago and that the RPD could not understand why the Whites were calling the department now to complain about this. According to the RPD, Norm was allegedly looking for a missing piece of mail.

David White Reports that Norm Is Damaging the Mailboxes

In 2007, some of the community mailboxes were at the property line between defendant Crosson and the Wherretts’ property. Sometime in 2007, Norm put a wooden support behind the two wooden posts of the community mailboxes, because the two posts were rotting, and the

53 Exhibit 29; Crosson Deposition, 59:5 to 62:19 [CP 914-918; 932-950]

54 Exhibit 14; David White Deposition (“White Deposition”), 11:18 to 13:13 [CP

mailboxes were leaning backward. In early May 2008, the Wherretts noticed that the mailboxes were no longer safe, and the Wherretts feared that they may topple over, especially when their daughter (at the time 4 years old), Juliana Joy (“JJ”) was out in the front yard or if she went to get the mail for the Wherretts (which she liked to do since the mailboxes were on their property line). The mailboxes were very old. Norm removed the mailboxes from the rotting posts, and secured them to the bushes about three feet away.⁵⁵

On May 19, 2008, David White contacted the RPD and admitted he had videotaped Norm “destroying mailboxes”. White further stated that Mr. Wherrett had damaged the mailboxes “a couple of times” and Mr. Wherrett was “insane”. White testified he discussed calling the police with his mother.⁵⁶

David White Calls the RPD to Report that Norm Parked a Vehicle in Front of His House

In the summer of 2008, Norm began noticing that many of the cars parked on his property had scratches. He suspected that it may be David White, but was not sure. Norm contacted the RPD about his concerns, and was told he should seek an anti-harassment order against David White if

850-854; 971-982]

55 Norman Wherrett Declaration ¶¶6-7 [CP 765-768]

56 Exhibit 15; White Deposition, 15:18 to 18:23. White testified that contrary to the RPD report, he did not tell the police that Norm was “insane.” [CP 853-857; 971-

necessary. At the hearing on the Anti-Harassment Order, David White denied doing anything to the Wherretts' cars and the matter was dismissed.

According to David White, Judge Linda Jacke recommended he get an anti-harassment order against Norm.⁵⁷ David White testified in his deposition that other than seeking his own anti-harassment order against David White, Norm had done nothing before to harass or threaten the Whites.⁵⁸ Judge Jacke issued a temporary protection order on August 18, 2008, restraining Norm from contacting David White.⁵⁹

According to the RPD, on August 23, 2008, David White contacted the Redmond Police Department to claim that he was told by Marlis Crosson that Norm had "parked a vehicle [in front of the Whites] home." Mr. White told the Redmond police that Norm was ordered to stay "100 feet from" the White residence. The police confirmed that the anti-harassment order at the time did not have a distance requirement and that the judge had denied White's request.⁶⁰ The police further interviewed Crosson and confirmed that all Norm had done was park his vehicle in front of the White home for 30 minutes and then move it back onto his property. Norm did not enter the White's property or otherwise interfere with the

982]

57 Norman Wherrett Declaration ¶¶26-29; White Deposition, 19:4 to 20:23 [CP 770-771; 971-982]

58 See David White Declaration, Exhibit B thereto [CP 93-107]

59 *Id.*

60 Exhibit 16 [CP 857-867]

Whites or contact them.⁶¹ David White testified that he did not look at the temporary anti-harassment order to confirm if there was a distance requirement.⁶²

David White Calls the Police to Report that Norm is Moving Norm's Cars and Covering them

On August 30, 2008, the RPD reported that David White called them to tell them that he suspected Norm was at home and not out of town, even after he had asked for a continuance for a court hearing. David White admitted to the police he had not seen Norm, only one of his cars.⁶³

On August 31, 2008, David White called the Redmond Police Department to report that Mr. Wherrett was "moving his cars around and covering them up."⁶⁴ David White testified that he did not call the police and report this, although he had no explanation why the police had taken this report in his name.⁶⁵

David White Calls the Police to Report that Norm is Violating the Anti-Harassment Order by Pulling Norm's Vehicles into the Street

61 *Id.*; White Deposition, 23:11 to 25:20 [CP 971-982]

62 White Deposition, 23:11 to 25:20 [CP 971-982]

63 Exhibit 17; David White testified he could not recall making this call, although he did recall Judge Jacke allegedly telling him to call the police if Norm was in town. White Deposition, 25:21 to 26:20. However, according to David White's declaration and Exhibit B thereto, Judge Jacke had already continued the hearing on August 27, 2008, three days earlier. [CP 867-870; 971-982; 93-107]

64 Exhibit 18. [870-875]

65 White Deposition, 26:24 to 27:25 [CP 971-982]

On September 10, 2008, Judge Jacke issued a permanent protection order for only 1 year. It required that Norm not come within 10 feet of David White's person.⁶⁶

On September 27, 2008, David White called the Redmond Police Department to report that Mr. Wherrett was "harassing him." Mr. White reported that the harassment consisted of Mr. Wherrett putting one of his vehicles within 10 feet of Mr. White's property line. The Redmond police interviewed Mr. White who claimed that Mr. Wherrett had violated the anti-harassment order by "walking to the center of the public roadway." The police concluded that no violation had occurred.⁶⁷

David White testified that at the time, Norm had pulled his School Bus in front of his neighbor's home, and that David White thought it was "within the barriers" of where Norm was not supposed to go. David White testified he was in his home at the time, and not within 10 feet of where Norm was.⁶⁸ David White testified that he then left his home, and went over to defendant Ekren's house to talk to her. David White admitted that Ekren's home was more than 10 feet from Norm. Again White stated he had "forgotten" that the order only prohibited Norm from being 10 feet from him when he called the police.⁶⁹

66 Exhibit B to the David White Declaration [CP 93-107]

67 Exhibit 19 [CP 874-883]

68 White Deposition, 28:6 to 30:14 [CP 971-982]

69 *Id.*

David White Calls the RPD and Reports that Norm Put A Bag With
A Body On The Street

On January 18, 2009, David White called the RPD to report that Norm had “just put out a large green bag that looks like a body”, and that it looked very suspicious. David White told the police he was “adamant” that his name not be given out and that no officer come to his door.⁷⁰ In fact the bag contained an artificial Christmas tree that was missing some parts. Since it was not usable, the plaintiffs had placed the bag on the curb with their garbage.

Defendant White testified in his deposition that he had no basis for calling the police, and “basically, my thoughts were just running away with me.”⁷¹ White admitted that he did not go look at the bag, smell it or verify that there was a body in the bag. He admitted despite that, he called the police anyway.⁷²

David White Notifies the RPD that Norm is Talking to His Yard
Worker

On May 8, 2009, David White called the RPD to advise them that Norm was outside “talking to a person” that was caring for the Whites’ lawn. White admitted that Mr. Wherrett had not come onto his property or come within 10 feet of White’s person, as prohibited by the current Anti-

70 Exhibit 20 [CP 882-886]

71 White Deposition, 32:2-24 [CP 971-982]

Harassment Order. The police told Mr. White there was no violation “or other circumstance that needs PD attention.”⁷³ On that occasion, Norm had walked over to the yard worker to mention that he had a spare lawnmower, and that to tell the Whites if they would like to use it to cut the lawn he would loan it to them. The man thanked Norm, and said he would mention it. Norm left and returned to his house.⁷⁴

White testified in his deposition that he, again, was in his house when he saw Norm talk to the yard worker, and was not within the 10 feet distance. Again White testified he had forgotten that there was a 10 feet order.⁷⁵ White admitted that Norm never approached him or did anything that was threatening or harassing to the Whites.

Photographing and Putting the Wherretts Under Surveillance

White has conceded he has also taken photographs of the Wherretts’ property, vehicles on their property. White stated he took pictures to show all the vehicles he had parked in various spots around the cul-de-sac.⁷⁶

III. ARGUMENT

1. STANDARD OF REVIEW

An appeal of a summary judgment is reviewed de novo. *Castro v.*

72 *Id.*

73 Exhibit 21 [CP 877-883]

74 Wherrett Declaration ¶32 [CP 772-773]

75 White Deposition, 34:2 to 35:10 [CP 971-982]

Stanwood School Dist. No. 401, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004). A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all evidence and inferences in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

2. THE WASHINGTON ANTI-SLAPP STATUTE DOES NOT PROVIDE DEFENDANTS WITH ABSOLUTE IMMUNITY TO PLAINTIFFS' CLAIMS IN THIS CASE

(A) RCW 4.24.501 Only Protects Communications Regarding Matters "Reasonably of Concern" to a Specific Agency, Not All Conduct

RCW 4.24.510 grants immunity to a person who communicates a complaint or information to any branch or agency of federal, state, or local government. Immunity extends to any "claims based upon the communication to the agency or organization regarding any matter reasonably of concern" to that agency. RCW 4.24.510 is referred to as the "anti-SLAPP statute." "SLAPP" stands for Strategic Lawsuits against Public Participation. The Anti-SLAPP law was enacted to encourage the reporting of potential wrongdoing to governmental entities. *Gontmakher v. City of Bellevue*, 120 Wash.App. 365, 366, 85 P.3d 926 (2004). Former RCW 4.24.510 (1999) contained express language that the communication to a governmental agency be made in "good faith," but this language was deleted by way of a 2002 amendment to the statute. Some courts have

interpreted the amendment to mean that the legislature intended to remove the “good faith” requirement from the communication as to anything but the award of attorney’s fees and sanctions. *Segaline v. State Department of Labor and Industries*, 144. Wash.App. 312, 182 P.3d 480 (2008), review granted, 165 Wn. 1044, 205 P.3d. 132 (2009), affirmed in part and reversed in part in *Segaline v. State of Washington Department of Labor and Industries*, 169 Wash.2d 467, 238 P.3d 1107 (2010) (Madsen, J., Concurring). Cf. RCW 4.24.500, which is the “Purpose” section of the Anti-SLAPP law, still provides, even after the 2002 amendment to RCW 4.24.510, that “[t]he purpose of RCW 5.24.500 through 4.24.520 is to protect individuals who make *good-faith* reports to appropriate governmental bodies.” (Emphasis added) (Also see §1B below).

In this matter, there are numerous examples of communications that were not communications made to governmental agencies that are reasonably of concern to that agency. First—there were emails and communication between some of the defendants and other non-government parties.⁷⁷ Second—there were emails that were to governmental employees that were not of reasonable concern to them.⁷⁸ Finally—there are examples where calls to the police, or emails to third

77 Exhibits 2, 3, 4, 7, 8, 9, 11 and 30 [CP 793-849; 901-931]

78 Exhibits 2 and 7 [CP 793-812]

parties were clearly frivolous or not based upon any basis in fact.⁷⁹

Plaintiffs' case is not limited to seeking civil liability for a few "isolated" calls or emails to governmental agencies. As the court can glean from the evidence presented by plaintiffs, this has been an ongoing campaign by many of the defendants to use the power and threat of government action, along with other harassing conduct unrelated to communications to governmental agencies, as a means to an end. Focusing on the entirety of the actions of the defendants, it is clear that plaintiffs are not seeking to base this case solely on "a few" communications between the defendants and governmental agencies for good faith purposes. To the contrary, all reasonable inferences that are drawn from the evidence are that the defendants were acting together to put pressure and harass the Wherretts from removing vehicles legally parked on their property. Defendant Crosson acknowledged that she didn't know if the Wherretts were doing anything illegal, but was concerned about her property values.⁸⁰ Defendant Ekren testified that the mutual goal was to "stymie" Norm Wherrett at every turn. In her own testimony, her goal was to send a "message" to Norm that his vehicles "just didn't belong" in their neighborhood, even if he was not breaking any

79 Exhibits 1, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 27, 28 and 29 [CP 793-97; 850-931]

80 Crosson Deposition, 64:17 to 65:18; Ekren Deposition, 50:5-54:12; Declaration of Norman Wherrett, ¶¶34-5; Exhibits 31 and 32 [CP 932-950; 951-970; 772-775; 901-

laws.⁸¹ Defendant Admire testified that she wanted to get the laws changed so that the Wherretts would remove the vehicles—but also testified that she wanted to distance herself from the other defendants’ conduct because it was getting “aggressive” and “personal.”⁸² It is important to note that the Wherretts have always remained in compliance with the Redmond City Ordinances, a fact acknowledged by the code compliance officer, Carl McCarthy.⁸³

Moreover, when the defendants do call the police, often times it is over trivial matters, or matters they know in advance are not actionable. For example, David White has called the police on several occasions, knowing (or should have known) in advance that Norm Wherrett was either not committing a crime or violating any anti-harassment orders. David White testified that he had either “forgotten” or did not confirm that Norm was not in violation prior to calling.⁸⁴ On another occasion, David White admitted to calling the police to report that Norm had put a dead body in front of his home—and admitted in deposition testimony that he did this without any factual basis and because his thoughts were “running away with me.” Defendant White admitted that it made no sense that

931]

81 See Exhibit 3; Ekren Deposition, 52:5 to 53:12 [CP 801-803; 951-970]

82 Admire Deposition, 51:17 to 58:13 [CP 982-1090]

83 Exhibits 6, 31, 32; Norman Wherrett Declaration ¶35 [CP 807-810; 901-931; 772-775]

84 White Deposition, 28:6 to 30:14 [CP 971-982]

Norm would be dumping a dead body on the sidewalk in a bag—but he called the police anyway to report it.⁸⁵

Defendant Crosson has called the police because Norm put her garbage cans on her property, even though she admitted to the police he was just trying to help her.⁸⁶ On another occasion, defendant White called Crosson to tell her that Norm had removed a tree limb that was sitting on the sidewalk for seven to ten days that had fallen from her own tree, and moved it back on her property. This resulted in Crosson calling the police, and David White erroneously telling the police that Norm had violated the anti-harassment order against him.⁸⁷

Defendant Ekren has emailed neighbors and representatives of the City of Redmond officials to report to them that she thought Norm had “growled” at her.⁸⁸ Ekren emailed Janeen Olsen, a volunteer (not an employee or representative of Redmond) that Norm had ulterior motives for volunteering for an emergency response team, did not respect the laws and ordinances of Redmond, and had a criminal record. Ekren admitted in her deposition admitted she could not cite to any facts to support this.⁸⁹

Plaintiffs respectfully submit that at a minimum, and taking all

85 White Deposition, 32:2-24 [CP 971-982]

86 Exhibit 23 [CP 889-900]

87 Exhibit 27; Crosson Deposition, 46:3 to 52:8; White Deposition, 33:3-22 [905-908; 932-950; 971-982]

88 Exhibit 2; Ekren Deposition, 43:11 to 50:2 [CP 796-801; 951-970]

89 Exhibit 11; Ekren Deposition, 79:20 to 85:16 [CP 829-834; 951-970]

reasonable factual inferences from the evidence in favor of plaintiffs, that a reasonable mind could conclude that many of the defendants' contacts with the City of Redmond and the RPD were not of reasonable concern for those agencies, and did not fall under the Anti-SLAPP provisions. A reasonable trier of fact could also conclude that many of these communications were not made in good faith, and were done so with the intent to harass the Wherretts and with reckless disregard for the truth.

(B) The Anti-SLAPP Statute Does not Reach Conduct or Communications Unrelated to Governmental Agencies

In *Gontmakher v. City of Bellevue*, supra, at 372, the Washington Supreme Court held “it is important to note that RCW 4.24.510 protects only communications made to governmental agencies that are reasonably of concern to that agency. RCW 4.24.510 does not provide immunity for any other acts.” See also *Segaline v. State Department of Labor and Industries*, 144. Wash.App. 312 at Footnote 3—“RCW 4.24.510 does not provide immunity for any other acts, such as negligent infliction of emotional distress, that are not ‘based upon’ the communications.” See also *Emmerson v. Weilep*, 126 Wash.App. 930, 110 P.3d 214 (2005), holding that the Anti-SLAPP statute does not prevent a party from obtaining a temporary restraining order. Cf. *Gallimore v. State Farm Fire & Casualty Insurance Company*, 102 Cal.App. 4th 1388, 1398, 126

Cal.Rptr. 2d 560 (2002), holding that under California’s Anti-SLAPP statute, “The mere fact that a plaintiff has filed an action after a defendant has engaged in some protected activity does not mean that the plaintiff’s action arose from that activity.” Even assuming there are some protected communications that *might* fall under the Anti-SLAPP statute, a majority of the conduct by the defendants has involved either non-governmental communications, or conduct unrelated to communications with governmental entities at all, including photographing the plaintiffs, the plaintiffs’ property, the plaintiffs’ backyard, the vehicles parked in front of plaintiffs’ house, videotaping plaintiffs, and intentionally provoking incidents with the plaintiffs.⁹⁰

(C) The Anti-SLAPP Statute Does Not Prohibit Plaintiff from Seeking Equitable Remedies under the Anti-Harassment Statutes

RCW 10.14.010 states that the legislative intent of RCW. 10.14 et seq. “is intended to provide victims with a speedy and inexpensive method of obtaining civil anti-harassment protection orders preventing all further unwanted contact between the victim and the perpetrator” RCW 10.14.020 defines harassment to mean “knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a

⁹⁰ For example see Exhibits 12, 13, 22 [CP 834-850; 877-888]

reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.”

Course of conduct is defined to mean “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. “Course of conduct” includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication.” Constitutionally protected activity is not included. See also *Burchell v. Thibault*, 74 Wash.App 517, 521, 874 P.2d 196 (1994)—holding that “the elements of a cause of action appear clearly from the face of the statute and require ‘[1] a knowing and wilful [2] course of conduct [3] directed at a specific person [4] which seriously alarms, annoys, or harasses such person, and [5] which serves no legitimate or lawful purpose.’ RCW 10.14.020(1). The course of conduct may be brief, but must evidence ‘continuity of purpose.’”

As the defendants have pointed out, a claim specifically under RCW 10.14 does not allow for the recovery of civil damages. However, it does permit the granting of anti-harassment orders, which plaintiffs have requested as relief. Since it is undisputed that plaintiffs cannot recover damages under RCW 10.14, et seq. for past redress, then plaintiffs claims

for an anti-harassment order are not an action for damages barred by the Anti-Slapp statute. See *Emmerson v. Weilep*, supra, holding that the Anti-SLAPP statute does not prevent a party from obtaining a temporary restraining order. Plaintiffs have established that the course of conduct of the plaintiffs is ongoing, and continues through this date. For example, defendant Ekren testified that she continues to take pictures of plaintiffs' property and home, and plaintiffs have continued to observe defendant Ekren and some of the other defendants provoke incidents with the plaintiffs when they are minding their own business.

(D) Plaintiffs' Outrage and Negligent Infliction of Emotional Distress Are Not Barred by the Anti-SLAPP statute and Triable Issues of Fact Exist

(1) Outrage

The tort of outrage, or intentional infliction of emotional distress, has long been recognized in Washington. *Browning v. Slenderella Sys.*, 54 Wn.2d 440, 341 P.2d 859 (1959). In *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975), the Washington Supreme Court adopted the definition of the tort of outrage from the Restatement (Second) of Torts § 46 (1965). The basic elements of the tort are (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. Liability exists "only where the conduct has been so outrageous in

character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Grimsby*, supra, at 59, citing the Restatement (Second) of Torts §46. “Clearly a case-by-case approach will be necessary to define the precise limits of such conduct. Nevertheless, among the factors a jury or court should consider are the position occupied by the defendant (comment e), whether plaintiff was peculiarly susceptible to emotional distress and defendant's knowledge of this fact (comment f), and whether defendant's conduct may have been privileged under the circumstances (comment g).” *Id. Robel v. Roundup Corp.*, 148 Wn.2d 35, at 51, fn. 7 (2002) (“outrage encompasses causes of action based on reckless and intentional conduct”). The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether their conduct was sufficiently extreme to result in liability. 16 Wash. Prac., Tort Law And Practice § 13.21 (3d ed.)

(2) Negligent Infliction of Emotional Distress

A plaintiff can recover for negligent infliction of emotional distress if he proves: (1) negligence, i.e., duty, breach, proximate cause, and injury; and (2) the additional requirement of objective symptomatology. *Kloepfel v. Bokor*, 149 Wash.2d 192, 199, 66 P.3d 630 (2003); *Snyder v. Med. Serv.*

Corp., 145 Wash.2d 233, 243-46, 35 P.3d 1158 (2001); see also *Segaline*, supra, at 327-8. The defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. See *Snyder*, 145 Wash.2d at 245, 35 P.3d 1158. To be foreseeable, “the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” *Christen v. Lee*, 113 Wash.2d 479, 492, 780 P.2d 1307 (1989) (quoting *Maltman v. Sauer*, 84 Wash.2d 975, 981, 530 P.2d 254 (1975)).

Plaintiffs submit that taking all reasonable factual inferences from the evidence in favor of plaintiffs, that a reasonable trier of fact could conclude that the defendants intentionally and recklessly sought to cause the plaintiffs severe emotional distress, or in the alternative, should have reasonably foreseen that their conduct would cause the plaintiffs emotional distress, and breach defendants' duties owed to the plaintiffs. The objective evidence establishes that the conduct of the defendants in issue escalated to the point of, as defendant Ekren stated, sending the plaintiffs a “message.” The evidence clearly implicates harassing conduct by each defendant that has nothing to do with the Anti-SLAPP statute. For example in one document, defendant Ekren states that if the City of

Redmond and its various agencies “can’t deal” with Norman Wherrett “[w]e certainly have some other thoughts on how to deal with this.” In emails between Ekren and Admire, they refer to their dealings with the Wherretts as a “war” and discuss strategies of “divide and conquer.” Defendant Admire has testified that this discussion was based upon her feelings that the activities by the defendants against the Wherretts were taking on a personal and aggressive tone, and that other neighbors had told her they wanted to distance themselves from her if she became more involved.

In another email to defendant Adrienne Zuckerberg, defendant Ekren claims that defendant Kathy Admire saw someone on the Wherretts’ property looking under car covers and noted that defendant Admire’s “observation” was that “maybe [Norman Wherrett] is perpetrating insurance fraud now! thought (sic) this story might make your day.” (Emphasis added). There are dozens more emails and communications amongst the defendants and others that have nothing to do with reporting matters to a governmental agency and which support plaintiffs claims that defendants were engaged in a strategy to harass the plaintiffs because the defendants were unhappy with the legal manner in which plaintiffs were using their property. Some of the defendants have even conceded that they knew that plaintiffs were not breaking the law, but that defendants were

not happy with that either—continuing their campaign to keep up pressure and harassment on the plaintiffs.

Plaintiffs have also suffered objective distress as a result of the conduct over the last 2 to 3 years. Since 2008, plaintiffs have had to endure countless visits by the RPD related to frivolous and unfounded complaints made by the defendants. On almost every occasion, the police did nothing. As one can imagine, it is absolutely foreseeable that these repeated police visits have become very stressful for plaintiffs and their daughter. Norm has become more and more agitated and defensive as the calls continued and the police visits increased. This is also compounded by the City of Redmond routinely coming by to inspect the plaintiffs' property after meritless calls from the neighbors. Plaintiffs are often told that they are not in violation and the City leaves the plaintiffs alone. Ann is from the Philippines and the repeated police visits and conduct of the defendants have been very agitating to her, as she is unfamiliar with all of the customs of the United States. On a couple occasions City representatives or attorneys for the other parties have come to the house and have startled her, and put her in fear. It has made Ann very reluctant to answer the front door. The last two years have been extremely stressful for the Wherretts and have affected their daily lives, their marriage and how they deal with our daughter JJ, who the Wherretts have noticed a

change in her demeanor and attitude that is not normal for a 6-year-old girl. The Wherretts have sought and received medical treatment from Dr. Frederick Davis for their emotional distress.

3. THE PURPOSE OF THE ANTI-SLAPP STATUTE IS TO PROTECT SPEECH DIRECTED TO INFLUENCE A GOVERNMENT ACTION OR OUTCOME, AND SHOULD NOT BE CONSTRUED BROADLY TO ELIMINATE ALL REMEDIES OF A PLAINTIFF

(A) The Court Erred In Granting Summary Judgment Based Upon Immunity Under The Statute Because There Is A Question Of Fact Regarding Whether The State Acted In Good Faith.

Even though RCW § 4.24.510 does not explicitly require a good faith determination,” RCW § 4.24.500 specifies:

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.

Although the Supreme Court recently addressed the Anti-SLAPP statute as currently amended in *Segaline v. State of Washington Department of Labor and Industries*, 169 Wash.2d 467, 238 P.3d 1107 (2010), the majority of the court declined to address the application of a “good faith” element in the current statute. However, even though RCW § 4.24.510 no longer contains a good faith element/allegation requirement, if

the statute applies, the court must construe the legislative intent contained in RCW § 4.24.500 to require the court to determine whether or not the defendant contacted the government on a good faith basis. The issue of good faith is a fact that should be determined by a jury, since there is a material issue of fact as to the good faith of defendants as set forth above.

Furthermore, in *Reid v. Dalton*, 124 Wash. App. 113, 126, 100 P.3d 349 (2004), the court held:

The purpose of anti-SLAPP statutes is to protect the First Amendment right of citizens to petition the government for redress of grievances. Litigation that does not involve a bona fide grievance does not come within the First Amendment right to petition. See, e.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743. 103 S. Ct. 2161, 76 L.Ed. 2d 277 (1983).

Therefore, if there is no bona fide grievance, then there should be not protection for a defendant via RCW § 4.24.510. Here, there was a plethora of evidence which showed that all of the defendants at issue here made knowingly false claims to some authorities solely to harass or cause distress to the Wherretts. To the extent the Anti-SLAPP statute is applicable, the lower court erred by ruling broadly that all conduct of the defendants fell under the statute, regardless of the issues of fact surrounding the nature of their conduct and whether that conduct was advanced for the purpose of influencing a government action or outcome in good faith.

(B) Interpreting The Statute To Dismiss This Case In its Entirety Will The Wherretts' Right Of Access To The Courts.

Based upon the interpretation of the lower court, the Wherretts' right of access to the courts will be abridged if the court upholds such a broad grant of immunity under RCW § 4.24.510. In *Hough v. Stockbridge*, 113 Wash.App. 532, 539 - 40, 54 P.3d 192 (2002), the court held:

Access to courts is a fundamental constitutional right. See *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). The Supreme Court has grounded the right of access to the courts in several provisions of the Constitution, including the Petitions Clause of the First Amendment, the Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fifth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Christopher v. Harbury*, U.S., 122 S. Ct. 2179, 2186-87 n.12, 153 L. Ed. 2d 413 (2002)

In *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343 (1996), the court addressed the issue of whether citizen complaints regarding police conduct are absolutely privileged under either the federal and state constitutions or common law in a defamation case. There the court held:

Similarly, we are not persuaded that the petition clause of the First Amendment is a basis for affording Thompson an absolute privilege. In *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), the Supreme Court considered and flatly rejected the argument that the petition clause provides greater protection than the speech clause. . . . The defendant argued that when a citizen communicates directly with the government about matters of public concern, the petition clause requires the court to accord an absolute privilege to such communication rather than the

New York Times qualified privilege. *McDonald*, 472 U.S. at 481-82. The Court rejected this argument, stating “the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment.” *McDonald*, 472 U.S. at 482.

The Court went on to explain that the petition clause was never intended to provide absolute immunity for defamation: To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions. *McDonald*, 472 U.S. at 485 (citations omitted).

Id. at 378.

If the court applied this statute without requiring that there is a finding of good faith, then the statute is void on the basis of an over breadth challenge. In general, the First Amendment prevents the government from proscribing speech or expressive conduct. *R.A. V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Over breadth analysis measures how statutes that prohibit conduct fit within the universe of constitutionally protected conduct. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). “A law is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment.” *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). “The first task in over breadth analysis is to determine if a statute

reaches constitutionally protected speech or expressive conduct.” Id. at 122-23. If the answer is yes, then the court examines whether the statute prohibits a “real and substantial” amount of protected conduct in contrast to the statute's plainly legitimate sweep. Id. at 123.

The right of citizens to contact the government to seek help cannot, and should not, be granted an absolute immunity, rather it must be qualified with a good faith requirement, or else the right to free speech is made superior to the right to petition, and neither constitutional right is pre-eminent over the other. Here, the evidence provided to the lower court established that many of the reports made by the defendants were done either in bad faith (such as David White reporting to the RPD that the Wherretts had a “dead body” in front of their house), or at a minimum with conscious disregard of the truth (such as Marliss Crosson calling the police to report Norm for “moving” her trash receptacles, or LaVonne Ekren advising Janeen Olsen that Norm had a “criminal record”). These actions go beyond petitioning the government for a legitimate purpose or outcome, but rather were frivolous and malicious efforts to cause distress to the Wherrett family. To apply the Anti-SLAPP statute to give the defendants an absolute, blanket, immunity would both pervert the justice system, and allow any citizen to trample on the first amendment rights of a citizen so long as the actions were “directed” at a governmental agency.

IV. CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the lower court erred in finding no issues of material fact, and further broadly applying the Anti-SLAPP statute so as to impermissibly prevent the Wherretts from seeking redress in the justice system. Appellants respectfully submit that the court reverse the findings of the lower court, and remand the matter for further proceedings.

Dated: February 22, 2011

LAW OFFICES OF BRIAN H. KRIKORIAN

By 

Brian H. Krikorian, WSBA # 27861
Attorneys for Appellants

On February 22, 2011, I caused to be served a copy of the document described as **Appellant's Opening Brief** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

Adrienne Zuckerberg
16905 NE 104th Court
Redmond, WA 98052-2778

M. Colleen Barrett
Barrett & Worden
2101 4th Ave Ste 700
Seattle, WA 98121-2393

James McBride
Julin & McBride, P.S.
16088 NE 85th Street
Redmond, WA 98052

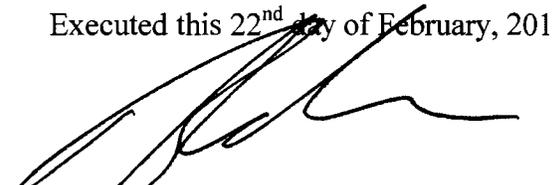
Nancy Hawkins
6814 Greenwood Avenue N
Seattle, Washington 98103

John P. Hayes,
WSBA #21009
William C. Gibson, WSBA #26472
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164

Bradley D. Westphal
WSBA #1241
Lee Smart, P.S., Inc.
701 Pike Street, Suite 1800
Seattle, WA 98101-3292

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

Executed this 22nd day of February, 2011.



Brian H. Krikorian