

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

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

APPELLANT'S REPLY BRIEF AND RESPONSE TO EKREN AND  
WHITE CROSS-APPEALS

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## **1. INTRODUCTION**

Respondents LaVonne Ekren (“Ekren”) and David and Mary White (“Whites”) have cross-appealed the lower court’s denial of statutory damages pursuant to RCW §4.24.510.<sup>1</sup> The Whites, alone have also cross-appealed on the lower court’s denial of CR 11 sanctions against the Wherretts’ counsel, Brian H. Krikorian, and further the Court’s rejection of the Whites’ claim that RCW 4.24.510 should be “extended” to Mr. Krikorian.

## **2. STANDARD OF REVIEW ON THE WHITE AND EKREN’S CROSS-APPEAL**

An appeal of a court’s decision to award or to deny sanctions or costs or fees is based upon an abuse of discretion standard. See *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Diamaco, Inc. v. Mettler*, 135 Wn.App. 572, 576, 145 P.3d 399 (2006). Abuse occurs when the lower court’s discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *Boeing Co. v. Heidi*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002). The Wherretts submit that the trial court’s denial of \$10,000 damages to Respondents LaVonne Ekren and David and Mary White was not “manifestly unreasonable or

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<sup>1</sup> Respondent Marliss Crosson has dismissed her appeal of the Court’s denial of statutory damages.

based upon untenable grounds or reasons.” Nor was the Court’s denial of CR 11 sanctions against their attorneys an abuse of discretion.

**3. THE “COMMUNICATIONS” MADE BY DEFENDANT EKREN WERE NOT MADE IN GOOD FAITH**

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.

However, the legislature kept the “good faith” requirement for the determination of statutory damages. In *Right Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wash.2d 370, 46 P.3d 789 (2002), the Washington Supreme Court analyzed former RCW 4.24.510 and ruled that the good faith requirement did not chill free speech and required plaintiffs to prove in a defamation action that “by clear and convincing evidence, that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.” *Id.* 46 P.3d at 796.

In this matter, there were numerous examples of communications that were not communications made to governmental agencies that are reasonably of concern to that agency. There were emails and communication between some of the defendants and other non-government parties.<sup>2</sup> There were also emails that were to governmental

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<sup>2</sup> Exhibits 2, 3, 4, 7, 8, 9, 11 and 30 [CP 796-818; 829-834; 901-905; 919-921].

employees that were not of reasonable concern to them.<sup>3</sup> Finally—there were examples where calls to the police, or emails to third parties were clearly frivolous or not based upon any basis in fact.<sup>4</sup>

The clear and convincing evidence presented to the lower court was that the respondents were acting together to put pressure and harass the Wherretts from removing vehicles legally parked on their property. For example, Defendant Crosson acknowledged that she didn't know if the Wherretts were doing anything illegal, but was concerned about her property values. 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 laws.<sup>5</sup> Defendant Admire testified that she wanted to distance herself from the other defendants' conduct because it was getting "aggressive" and "personal."<sup>6</sup> 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 McArthy.<sup>7</sup>

Moreover, when the defendants did call the police, often times it

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3 *Id.*

4 *Id.* [Exhibits 1, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 27, 28 and 29]

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

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

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

was over trivial matters, or matters they knew in advance were 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. 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 Norm would be dumping a dead body on the sidewalk in a bag—but he called the police anyway to report it.<sup>8</sup>

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.<sup>9</sup> 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

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<sup>8</sup> White Deposition, 28:6 to 30:14 [CP 971-982]

<sup>9</sup> Exhibit 27; Crosson Deposition, 46:3 to 52:8; White Deposition, 33:3-22 [905-908; 932-950; 971-982]

anti-harassment order against him.<sup>10</sup>

Defendant Ekren emailed neighbors and representatives of the City of Redmond officials to report to them that she thought Norm had “growled” at her.<sup>11</sup> 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 actual facts to support this claim.<sup>12</sup>

Plaintiffs respectfully submit that the clear and convincing evidence submitted to the trial court was that the bulk of communications were not made in good faith, and were done so with the clear intent to harass the Wherretts and with reckless disregard for the truth. Even assuming the lower court was correct in finding blanket immunity under the Anti-SLAPP statute existed, the defendants were not acting in good faith.

Accordingly, in the event this Court upholds the lower court’s ruling on summary judgment, the lower court nonetheless did not abuse its discretion by refusing to award statutory damages to Ekren and the Whites.

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

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

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

**4. RCW 4.24.510 DOES NOT EXTEND “PERSONAL”  
LIABILITY TO ATTORNEYS.**

The Whites make the extraordinary argument that Mr. Krikorian should be subject to the attorney’s fees and damage provisions of RCW 4.24.510, simply because the statute does not specifically exclude attorneys from the language. This argument is frivolous and not based upon any Washington authority.

A review of §§4.24.500 and 4.24.510, as well as the history of the Anti-SLAPP statutes establishes that the legislature clearly intended to provide a remedy to a party who prevails under the Anti-SLAPP statute. Nowhere in the language of the statute or the legislative history of the Anti-SLAPP statute did the legislature indicate an intention to hold a party’s attorney personally liable for those fees or statutory damages. The Whites cite to absolutely no case law to support such an interpretation of the statute—because none exists.<sup>13</sup> Not a single case where damages were awarded under the statute mentions including the plaintiff’s attorney personally. See for example *Gontmakher v. City of Bellevue*, 120 *Wash.App.* 365, 366, 85 P.3d 926 (2004), *Segaline v. State Department of Labor and Industries*, 144. *Wash.App.* 312, 182 P.3d 480 (2008), review

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<sup>13</sup> In the lower court, the Whites’ attorney, James McBride, cited to an unpublished Federal Court opinion from Judge Marsha Pechman as support for this proposition. On appeal, defendants mention this case in a footnote. It should be noted that pursuant to GR 14.1 the citation and reliance of an unpublished decision in the State of Washington or its jurisdiction is prohibited. It should also be noted that Judge Pechman found a CR 11

granted, 165 Wn. 1044, 205 P.3d. 132 (2009); *Bailey v. State*, 147 Wn.App. 251, 191 P.2d 1285, 1291-2 (2008). It is clear that the Legislature intended that RCW 4.24.510 provide an adequate remedy to a prevailing defendant—and there is no legal basis to “include” the plaintiff’s counsel as an advocate, simply because the plaintiff “lost” his or her case. The Whites continued reliance on this argument should be rejected.

**5. UNDER THE OBJECTIVE STANDARDS OF CR 11, DEFENDANTS HAVE NOT MET THEIR BURDEN OF ESTABLISHING A VIOLATION BY MR. KRIKORIAN OF CR 11**

In determining whether a violation of CR 11 has occurred, three conditions must be met: (1) the action is not well grounded in fact; (2) it is not warranted by law; and (3) the attorney signing the pleadings has failed to conduct a reasonable inquiry into the factual or legal basis of the action.

A filing is also baseless if a good faith argument for an alternation of existing law cannot be reasonably advanced. *Madden v. Foley*, 83 Wn.App. 385, 389. 922 P.2d 1364 (1996). An objective standard is used to determine whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *Id.* The trial court is to avoid using the wisdom of hindsight. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220. CR 11 is not intended to chill an attorney’s

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violation—which the lower court in this case did not.

enthusiasm or creativity in pursuing factual or legal theories. *Id.* at 219.

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir.1990).

To avoid being swayed by the benefit of hindsight, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *In re Cooke*, 93 Wn.App. 526, 969 P.2d 127 (1999); *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996). CR 11 sanctions are not appropriate because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect. *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wn.App. 106, 780 P.2d 853 (1989); "The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable." *Bryant*, *supra*, at

220. Cases of first impression, particularly those that present debatable issues of substantial public importance, may be maintained without violating the rule. *Collinson v. John L. Scott, Inc.*, 55 Wn.App. 481, 778 P.2d 534 (1989); *Moorman v. Walker*, 54 Wn.App. 461, 773 P.2d 887, review denied, 113 Wn.2d 1012, 779 P.2d 730 (1989). 15A, *Washington Practice Series*, §8.

In the instant case, the Whites essentially advance the argument that because plaintiffs did not “succeed” on their claims, then a fortiori the matter was without merit. See *Saldivar v. Momah*, 145 Wash.App. 365, 186 P.3d 1117 (2008)—holding that because the attorney took reasonable steps to investigate his client’s claims, the trial court could not reasonably sanction him solely for failing to accurately assess his client's ultimate credibility. As established by the supporting declaration and evidence, there can be no question that defendants have not met the strict, objective standards which guide the court under CR 11. First – as established in the evidence before the court, the Wherretts’ counsel, Mr. Krikorian, undertook a thorough and extensive investigation of the facts and law of the case prior to filing the same. This included both a review of the documents and material provided to Mr. Krikorian, several meetings with the plaintiffs, review of statements from third parties, photographs, and documents from the City of Redmond. Mr. Krikorian also conducted

extensive legal research prior to filing the complaint. Cf. *Watson v. Maier*, 64 Wn. App. 889, 827 P.2d 311 (1992), holding that CR 11 sanctions were appropriate where the attorney blindly relied upon a report by a consultant without any independent investigation whatsoever. Second—when the Whites’ counsel first raised the issues of damages under RCW §4.24.510 and also CR 11, Mr. Krikorian re-reviewed the evidence and legal authority, and believed a good faith factual and legal basis existed to proceed with the lawsuit.

In a recent Division 1 decision, *Truong v. Allstate Property & Casualty Insurance Company*, 151 Wash.App. 195, 211 P.3d 430 (2009), the Court of Appeals held that even where they affirmed the dismissal of the matter, it was not proper to find CR 11 sanctions simply because the plaintiff’s case was “weak.” In *Truong*, a motorist injured in an automobile accident with another driver, brought an action against his own insurer, alleging it acted in bad faith by refusing to waive reimbursement of the personal injury protection (PIP) provisions of their insurance contract, after insurer had paid medical bills of \$4,172 and insured had settled with other driver's insurer for only \$9,347.54, which the insured contended did not fully compensate him. The lower court dismissed the insured’s claim, and found in favor of Allstate under CR 11 for fees. On appeal, the Court affirmed the dismissal of Truong’s claim. However, the

court reversed the awarding of fees against plaintiff’s lawyers under CR 11 because it dealt with legal issues which were still not fully resolved, and that Truong’s counsel was making a tenable argument for an extension of the legal precedent, noting that a “weak” case did not equate with a “groundless case. Like Truong, and as argued above, there exists a legal and factual basis for plaintiffs’ claims. First—existing Washington cases have held that RCW 4.24.510 only protects communications made to governmental agencies that are reasonably of concern to that agency, and does not prevent claims based upon other conduct. See *Gontmakher v. City of Bellevue*, *supra*; *Segaline v. State Department of Labor and Industries*, *supra*.

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).” (Emphasis added)

*Reid v. Dalton*, 124 Wash.App. 113, 126, 100 P.3d 349 Wash.App. Div. 3, 2004. Second—at the time the Wherrets case was filed, the Washington Supreme Court was considering the *Segaline* case, including breadth of application of the Anti-SLAPP statutes, and other courts have indicated the law is unsettled. Third—at the time, no existing Supreme Court

decision had addressed the 2002 amendments to RCW 4.24.510.<sup>14</sup>

Finally—several reported cases have concluded that RCW 4.24.510 did not apply to the facts of the given case. Certainly, there existed sufficient merit to establish a prima facie case against the defendants when the case was filed, and the complaint was amended. The fact that the defendants ultimately prevailed on their motions for summary judgment does not make the case frivolous, harassing or meritless. As the Courts have noted, CR 11 is not intended to act as “fee shifting mechanisms”.

Clearly, the lower court did not “abuse its discretion” by denying CR 11 sanctions against the Wherretts’ counsel simply because the Whites’ counsel disagreed as to the merits of the case.

## **6. 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.

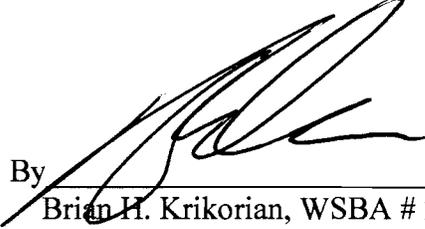
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<sup>14</sup> Even in the Supreme Court’s *Segaline* decision, the issue of the “good faith” provisions were only addressed in Justice Madsen’s concurring opinion, *not* in the majority opinion.

The Appellants further submit that the lower court did not abuse its discretion by refusing to award statutory damages against the Wherretts or CR 11 sanctions against the Wherretts' counsel.

Dated: May 10, 2011

LAW OFFICES OF BRIAN H. KRIKORIAN

By 

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On May 10, 2011, I caused to be served a copy of the document described as Appellant's Reply Brief and Response to Cross-Appeal on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

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

Executed this 10<sup>th</sup> day of May, 2011.



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Brian H. Krikorian