NO. 304051

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

JAMES HENRY AND AMY DAWN ESKRIDGE,
Plaintiffs/Respondents,

v.

DARLENE TOWNSEND, Ph.D.,
Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

The trial court erred in holding that Dr. Townsend waived her statutory immunity under RCW 4.24.510, and in holding that RCW 4.24.510 is negated by RCW 26.44.060. In an effort to salvage the trial court's ruling on waiver, the Eskridges use emotionally charged, but purely conclusory language to suggest that Dr. Townsend "ambushed" them, "misdirected" them from RCW 4.24.510, and "prejudiced" them. But the Eskridges furnish no specifics which are essential to support the conclusion they urge: they have completely failed to show either that Dr. Townsend was required to do more than plead her affirmative defense of immunity (which she did) and insist upon it when the legal context made that appropriate (which she did), and they have not hinted at any prejudice at all. They have shown neither that they would or could have done anything differently with their case nor that they could have escaped the application of immunity if they had addressed it earlier. The Eskridges' attempt to save the trial court's ruling that RCW 26.44.060 negated 4.24.510 is even weaker: they pay lip service to, then ignore, the clear requirement that the courts honor both statutes to the extent possible, and they misstate Dr. Townsend's argument, and seek to defeat the straw man they created. They offer no defense of their violation of the trial court's pretrial ruling forbidding them from having their witness, Denise Guffin, comment as she did on the credibility of the parties (favorably for the Eskridges,

and unfavorably for Dr. Townsend). Likewise, they do not defend on the merits of the trial court's error in instructing the jury that statutory immunity is lost if a report is not made within 48 hours, a mistake that neither Dr. Townsend nor the trial court noticed at the time (though the Eskridges did, and capitalized upon it in their argument to the jury). The judgment in favor of the Eskridges should be reversed, and the matter remanded for trial on the non-privileged aspects of their claim.

II. ARGUMENT

A. DR. TOWNSEND DID NOT WAIVE HER STATUTORY IMMUNITY.

1. Dr. Townsend Specifically Pleaded Statutory Immunity.

In her answer, Dr. Townsend specifically pleaded that she was entitled to immunity by statute from some or all of the Eskridges' claims:

> "Immunity. Townsend is entitled to statutory immunity for the acts and omissions alleged within the Complaint."

CP 160.

That was more than sufficient to put the Eskridges on notice of her claim to statutory immunity. Dr. Townsend took no step suggesting in any way that she had abandoned her claim to statutory immunity at any point in the proceedings.

The Eskridges make two arguments which, they claim, support their view that Dr. Townsend waived her entitlement to immunity: (1) that Dr. Townsend

never made specific reference to RCW 4.24.510 until the pretrial hearing; and (2) that Dr. Townsend "could" or "should" have raised her immunity under RCW 4.24.510 in some motion earlier than she did. Neither argument is sufficient to establish a waiver by Dr. Townsend.

As to the first, Dr. Townsend specifically pleaded statutory immunity as an affirmative defense. The Eskridges cite no authority holding that a defendant must state the precise legal authority in support of the defenses she has alleged in her answer. There is none; the law is to the contrary. For example, in *Malgarini v. Wash. Jockey Club*, 60 Wn. App. 823, 807 P.2d 901 (Div. 1, 1991), the court declined to find a waiver where the plaintiff argued that the defendant had waived "quasi-judicial immunity," because although it had pleaded immunity, it had not specifically named that precise legal rationale (or label) underlying the immunity:

> The fact WSHRC did not use the words "quasi-judicial immunity" in their answer does not defeat their motion for summary judgment. Washington State Horse Racing Commission's answer did claim "discretionary immunity", good-faith performance of duties, privilege, and lack of capacity to be sued. The trial memorandum developed the immunity argument and cited authority on this issue. While the words "quasi-judicial" are lacking, there is no doubt Malgarini was put on notice of the defense. CR 8, requiring the pleading of all affirmative defenses, was satisfied.

Malgarini, 60 Wn.App at 826, *see also Beaupre v. Pierce County,* 161 Wn.2d 568, 575-76, 166 P.3d 712 (2007) (citing *Malgarini,* holding that a defendant that pleaded "assumption of risk" had sufficiently given notice of a defense based on the "professional rescue doctrine" though it had not used those exact words to describe that precise doctrine).

That rule applies equally in this case. Dr. Townsend adequately put the Eskridges on notice of her claim of statutory immunity; the Eskridges were fully capable of examining the statutes to see what statutory bases for immunity might apply in the circumstances of this case.[1] Dr. Townsend's citation to one of the statutes under which she claimed immunity, following a sentence which summarized that statute's requirement that she report her suspicions to authorities in response to discovery which had not asked that she identify what statutes she was relying on, was in no sense a waiver of any right she had to rely on any other statute or case law in support of her claimed immunity.[2] Dr. Townsend did not waive her immunity.

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[1] It is noteworthy that although their counsel filed a declaration in support of the Eskridges' motion to bar Dr. Townsend from relying on RCW 4.24.510, CP 48, the lawyer never asserted in that declaration that he had *in fact* been unaware of RCW 4.24.510 or its potential application to this case.

[2] The Eskridges suggest that Dr. Townsend should have assumed that their discovery requests also related to their fifth through eighth causes of action, which had been dismissed with prejudice, because the trial court correctly ruled

2. *Dr. Townsend Was Not Required To Urge Her Immunity In Motions As Suggested By The Eskridges.*

The Eskridges criticize Dr. Townsend's explanation that she did not move for summary judgment of their fourth cause of action because it alleged four instances of asserted misconduct, only one of which was privileged, and since issues of fact existed as to the unprivileged items a motion would have been pointless. The Eskridges argue that Dr. Townsend "could" or "should" have brought motions under Civil Rule 12 (Resp. Br. p. 22), CR 56 (*Id.*, p. 22), or CR 10 (*Id.*, p. 22 n. 8) to address their allegation relating to the report the CPS.

Perhaps Dr. Townsend could have made one of these motions (her trial counsel had concluded it would not make sense, because dismissal of the Eskridges' fourth cause of action could not be obtained by showing that one of the four allegations of misconduct to support the claim was covered by statutory immunity). But even conceding that it was possible for her to bring any of these motions, Dr. Townsend's decision not to do so did not accomplish a waiver of her defenses. The Eskridges have cited no authority holding that a defendant waives her defenses who does not allege her defenses AND bring a motion to dismiss AND bring a motion for summary judgment AND (if plaintiff has elected to

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that all tort claims arising from rendition of health care services are "subsumed" in RCW 7.70 *et seq.* The Eskridges had not repleaded their medical malpractice claim to allege those facts, however, and those claims had all been dismissed.

combine allegations in a way that makes the foregoing motions unworkable) a motion to require the plaintiff to replead so that a motion for dismissal or summary judgment can be brought. There is not any such authority, because the assertion is preposterous. A defendant is obliged to give notice of her defenses, which Dr. Townsend did, and is free to raise her defenses at trial. *See, e.g., Bice v. Anderson,* 52 Wn.2d 259, 260, 324 P.2d 1067 (1958) (trial court dismissed plaintiff's case at mid-trial, based on immunity).

3. The Pretrial Stipulation Relied on by the Eskridges Did Not Waive Dr. Townsend's Statutory Immunity and Did Not Address Admissibility at Trial of the CPS Report.

Finally, the Eskridges claim that a pretrial stipulation among the parties relating to the production of the CPS report supports their argument that Dr. Townsend waived her immunity. This claim, an afterthought which completely misinterprets the stipulation, is meritless.

The stipulation had nothing to do with either the admissibility of the CPS report or Dr. Townsend's immunity defense. It did not make any mention of, and had nothing to do with, either of those issues. During pretrial discovery, the Eskridges had produced a redacted version of the CPS report which they had received (already in redacted form) from CPS. CP 177. Dr. Townsend's counsel wished to have access to an unredacted copy of the report to be used in preparation of her defense, and so issued a discovery request to CPS to produce it.

CP 178. The Eskridges objected and sought a protective order that the report not be produced. CP 177-179. Dr. Townsend responded that she was entitled to the unredacted report, and had "no intention of using any information contained within the DSHS files other than to prepare an adequate defense". CP 185. The conflict was resolved with the stipulation, which provided that the unredacted report would be produced, and that there would be "no restriction upon the use" of the records "for purposes of litigating the above captioned matter." CP 191. The context and literal terms of the stipulation obviously relate to the right of parties to use the contents of the report in the preparation of their cases (and expert witnesses). The parties had not reached a point at which the admissibility of the report, and Dr. Townsend's ultimate defenses, were relevant to the discussion. They were resolving a discovery issue.

If there was any truth to the Eskridges' new-found notion that the stipulation waived Dr. Townsend's immunity defense then their trial counsel would surely have mentioned it to the trial court when the parties were arguing whether Dr. Townsend had waived her right to rely upon RCW 4.24.510 and over whether the CPS report could be admitted in evidence. Had the Eskridges secured a stipulation that fully resolved these questions, their counsel would surely have pointed this out to the court. He did not, because the stipulation had

no bearing on those issues. Dr. Townsend did not waive her immunity under RCW 4.24.510.

4. The Eskridges Have Shown No Prejudice.

In *Lybbert v. Grant County,* 121 Wn.2d 29, 1 P.3d 1124 (2000), the Supreme Court ruled that a defense of insufficient service of process was waived where the defendant delayed making it until after the statute of limitation had run. The court distinguished a prior decision, *French v. Gabriel,* 116 Wn.2d 584, 806 P.2d 1234 (1991), on the ground that in *French* the defense had been asserted over a year before the statute of limitation run. Prejudice to the plaintiff was clearly the decisive consideration.

Later, in *King v. Snohomish County,* 146 Wn.2d 420, 426, 47 P.3d 563 (2002), the Supreme Court explained that waiver was required where the defendant had failed to raise it and litigate it "at a time when the Kings could have remedied the defect."

In *Oltman v. Holland America Line USA, Inc.,* 163 Wn.2d 236, 178 P.3d 981 (2008), the Supreme Court held that it did not have to decide the waiver question because no prejudice was shown. Amicus curiae WSTLAF, had argued, on behalf the Oltmans, that *Lybbert* means a failure to timely answer and raise an improper venue defense waives the defense when it causes prejudice to the plaintiff, and the defendant knew or should have known the prejudice would

occur. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008), Brief Amicus Curiae Washington State Trials Lawyers Association Foundation, 2007 WL 4466025, *7. The Court assumed that prejudice must be asserted, noting that "[t]he Court of Appeals held that the waiver issue was not preserved because the plaintiffs did not claim prejudice in the trial court, . . . However, the Oltmans did claim prejudice in response to the Holland America's motion for summary judgment." *Id.*, at 243 (internal citations omitted). The Supreme Court plainly viewed prejudice as an essential element of the waiver argument, just as it had in the *Lybbert* and *King*; the Court went on to conclude it did not need to decide the waiver issue, because the Oltmans could not have avoided the problem even if it had been timely raised. *Lybbert*, *King*, and *Oltman* all find that a plaintiff arguing waiver must show prejudice. The Eskridges have shown none: just as in *Oltman*, there is nothing they could have done differently.

The Eskridges accuse Dr. Townsend of "ambush" and "misdirection." There was none. Dr. Eskridge properly pleaded immunity, and was entitled to rely on it at trial. The Eskridges assert "prejudice," but have shown none. This is a case like *Oltman*, not like *Lybbert* or *King* where the Eskridges could not have "remedied the defect" on their own. Finally, the Eskridges assert that Dr. Townsend sought to obtain a "tactical advantage"; but they do not say what that

was. There was no unfair advantage sought: Dr. Townsend sought only to invoke the immunity to which she is entitled and which she appropriately pleaded.

B. RCW 4.24.510 Is Fully Applicable And Is Not Nullified By RCW 26.44.060.

1. The Eskridges Simply Ignore the Rule That the Court is Obligated to Apply Both Statutes to the Extent Possible.

i. RCW 4.24.500 Plainly Applies in this Case.

The Eskridges argue that RCW 4.24.510 does not apply to Dr. Townsend's report to CPS. But they never examine the language of the statute. As shown in Dr. Townsend's opening brief, the plain terms of the statute plainly and unambiguously apply to Dr. Townsend's reports to authorities. The statute broadly provides that *any* report of concern to *any* agency is immune. It makes no exception for CPS reports.[3]

The Eskridges do make an argument, discussed below, that RCW 4.24.510 should be ignored by the courts in cases involving reports to CPS, because these are also covered by RCW 26.44.060. But they make no effort whatsoever to

[3] The Eskridges imply that the "Anti-SLAPP" name means the statute applies to "public participation" in government in some political way. That is not its history: it was enacted following "a situation where a citizen reported a tax violation" and was sued for defamation. WA H.R. B. Rep., 2002 Reg. Session H.B. 2699, March 11, 2012 (Appendix A).

explain how that argument would address Dr. Townsend's reports to the Spokane Police Department, the Washington State Bar Association, and the State [MQAC]. By ignoring the point, they fully concede that these reports were privileged. In any event, the court had no authority to simply decide to ignore, and not to apply, RCW 4.24.510 to the report Dr. Townsend made to CPS.

ii. The Court Must Apply Both Statutes Unless the Legislature Clearly Intended Otherwise, Which the Eskridges Have Not Even Attempted to Show.

The Eskridges briefly acknowledge the rule that a court must apply all legislative enactments, and decline to do so only if there is a clear conflict between the two and clear evidence that the legislature intended to limit one statute by enactment of the other, but make no effort at all to apply the rule. Whereas Dr. Townsend showed in her opening brief that RCW 4.24.510 and RCW 26.44.060 can easily be harmonized so that the essential features of both work together, the Eskridges do not even try to do so. They offer the simple *ipse dixit* that since RCW 26.44.060 applies specifically to reports to CPS, then RCW 4.24.510 must not, even though its terms clearly include, and do not exclude, reports to CPS. The Court, however, is obliged to apply all the laws, unless it cannot do so. The Eskridges have not shown that it is not possible to apply both statutes according to their terms; Dr. Townsend has shown that it is perfectly possible.

iii. The "General/Specific Rule" Does Not Operate to Negate RCW4.24.510; Rather, it Mandates Application of Both Statutes.

The Eskridges ask the Court to apply the rule that if two statutes are in conflict, the more specific statute applies in preference to the more general. But as noted above, the Eskridges have not shown that there is any conflict between the two statutes. There is not; as Dr. Townsend showed in her opening brief, both statutes can easily be applied to the circumstances of this case. Moreover, the Eskridges ignore, and do not refute in any way, the authorities cited by Dr. Townsend (Appx. Br. pp. 31-33) to the effect that where two statutes grant rights or remedies, as opposed to rules limiting conduct or attaching negative consequences to it, then the rule is that *both* statutes apply, absent evidence that the legislature intended one statute to displace the other. The Eskridges, by their silence, concede that is the correct rule, and they cite no evidence to suggest that the legislature had any intention that one statute should limit or overrule the other.

2. There Is No "Conflict" Between the Statutes Unless a Defendant Has Been Convicted of False Reporting Under RCW 26.44.060.

The Eskridges mischaracterize Dr. Townsend's position. They assert that Dr. Townsend alleges that RCW 4.24.510 and RCW 26.44.060 are "in conflict". That is not true: Dr. Townsend's position is that the two statutes exist in absolute harmony, because RCW 4.24.510 contains no reference to the "good faith" of the

reporter, and, reading RCW 26.44.060 as a whole, the reference in RCW 26.44.060(a) to "good faith" must be understood as the absence of a conviction for false reporting under RCW 26.44.060(b)(4). Given this reading, which is necessary to avoid making pure surplusage from the provision in RCW 26.44.060 that immunity is only withheld on conviction for false reporting (and for no other specified reason) there is no conflict at all in this case whatsoever. Dr. Townsend has not been convicted of false reporting, and her report is immune under both RCW 4.24.510 and RCW 26.44.060. The only potential for conflict between the statutes might be presented in a case in which a reporter is convicted for false reporting under RCW 26.44.060 but nevertheless claims immunity under RCW 4.24.510. This Court need not reach out to decide that case now, as it is not presented here, but it would be perfectly rational to hold in due course that an intentionally false report sufficient to support a conviction under RCW 26.44.060(b)(4) would not be immune under RCW 4.24.510 either, because reports that have been shown beyond reasonable doubt to be criminally false cannot be "reasonably of concern" to any agency. RCW 4.24.510.

Dr. Townsend's reading of the two statutes best fosters the Legislature's overwhelming goal to promote and protect reports to government of matters of concern to it, especially in cases of suspected child abuse, where the legislature went so far as to make it a crime for required persons (like Dr. Townsend) who

fail to report. RCW 26.44.080 also properly promotes the Legislature's intent to protect parental relationships by punishing false reporters with a different criminal sanction and loss of immunity, while providing an essential "bright line" that required reporters can understand, relieving them of the cruel dilemma of facing potential criminal sanction if they fail to report, and of potential civil liability if they do report.

C. THE ESKRIDGES' VIOLATION OF A COURT ORDER PROHIBITING COMMENTARY BY THEIR WITNESSES ON THE CREDIBILITY OF OTHER WITNESSES IS FULLY REVIEWABLE, AND MERITS REVERSAL.

The Eskridges argue that Dr. Townsend is not entitled to complain on appeal about their witness' improper negative commentary on the credibility of Dr. Townsend and equally improper positive commentary on the credibility of the Eskridges. Denise Guffin, a CPS investigator, was called by the Eskridges and permitted to testify at length about hearsay statements of the Eskridges and their children, and to comment that she found them credible; she also testified about statements of Dr. Townsend, and commented that she found them not credible.

The Eskridges claim that there is insufficient analysis in Dr. Townsend's opening brief concerning the hearsay. That is just silly: it is a simple, uncontroversial principle of hornbook law of evidence that Denise Guffin's recitation of out of court statements of the Eskridges and their children are

hearsay[4]; it was not necessary to say more than point that out, and that the Eskridges and the trial court had no valid exception to the hearsay bar. Ms. Guffin was never qualified as an expert, and even if she had been, there was no foundation that the statements of the Eskridges about which she testified are the kind of information typically relied upon by experts in her field, which is a necessary showing before hearsay by experts is admitted. (ER 703). .

The Eskridges also contend that Ms. Guffin's testimony bolstering the credibility of the Eskridges and attacking that of Dr. Townsend cannot be challenged on appeal because Dr. Townsend did not object at the time Ms. Guffin offered her improper opinions. Again, they are incorrect. At Dr. Townsend's request, the trial court clearly and emphatically ruled *in limine* that any attempt to have a witness comment on the credibility of any other witness is improper and forbidden. The court correctly ruled that "No witness is entitled to comment on the credibility of any witness whether they are an expert of they are a lay person. . . . It is absolutely verboten . . . It is up to the jury to decide the credibility of the witnesses, not the individual experts, they cannot do that . . . [They] cannot say it no matter what." RP 953-954.

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[4] There was and is no objection to the testimony about Dr. Townsend's statements, which were obviously not hearsay. ER 801(d)(2). It was improper, however, for Ms. Guffin to weigh in on the credibility of Dr. Townsend.

The Eskridges violated that ruling, repeatedly and with gusto. They had Ms. Guffin characterize her views about the credibility of the Eskridges and their children (RP 607, 610, 612, 620) and testify at length that she found Dr. Townsend not credible (RP 607, 613, 615, 616, 617, 621).

Parties to lawsuits seek rulings *in limine* for a number of reasons; one important reason is to get rulings as to the inadmissibility of prejudicial evidence *before* the jury ever hears it, so that they are not placed in the uncomfortable position of attempting to "unring the bell" after having, by their objections, alerted the jury to the especially prejudicial nature of the evidence. The Eskridges heard the court's ruling, and they violated it. They cannot now be heard to argue that their violation is unreviewable because opposing counsel preferred not to underscore the testimony by repeating an objection in the presence of the jury.

The Eskridges have offered no argument to support Ms. Guffin's testimony. There is not any to be made; it was completely improper. Ms. Guffin's testimony, that she investigated Dr. Townsend's report that Mr. Eskridge may have violated his children and concluded it was unfounded, was of only marginal relevance to begin with – the statute mandates reports on pain of criminal prosecution for failure to report, and does not require that the report be correct. *The whole point of the statute is to require a report so that CPS can investigate*; it is immaterial whether the report was well-founded or not. But even

assuming it was properly an element of the Eskridges' case to show that the CPS investigation showed no abuse, Ms. Guffin could have said simply that; she had no warrant to go further and testify as to her opinions about the credibility of the parties. The verdict and judgment in favor of the Eskridges should be reversed no matter how this Court rules on the issue of statutory immunity.

D. THE ESKRIDGES WERE NOT ENTITLED TO CAPITALIZE ON A LEGAL ERROR THAT ESCAPED DR. TOWNSEND'S AND THE COURT'S ATTENTION, BUT NOT THEIRS.

Shortly before the conference to discuss jury instructions, the trial court correctly rejected the Eskridges' motion for directed judgment that Dr. Townsend was not immune because she had not reported the suspected abuse of the Eskridge children within 48 hours of forming her suspicions, as required by statute. The trial court correctly reasoned that it could not have been the Legislature's intent to withhold immunity if a reporter waited 49 hours, or 3 days, or (as in Dr. Townsend's case, where she was concerned about retaliation against the children if she reported before Mrs. Eskridge had returned to town) a month. (RP 838-841). The purpose of the statute is to ensure that reports are made, to which end immunity for reporting, and criminal sanctions for failure to report, were provided. The trial court correctly ruled that it would in no way serve the Legislature's intent to cut off immunity at 48 hours.

Soon thereafter, the trial court approved a modified version of a jury instruction proposed by the Eskridges that instructed the jury, contrary to the trial court's ruling, that immunity is lost if no report is made within 48 hours. This was clearly a mistake by the trial court – and Dr. Townsend's counsel who, as the Eskridges correctly note, did not except to the instruction (having, like the court, failed to notice the error). The Eskridges argue that the instruction is the law of the case, which is the usual rule for an instruction to which no exception is taken. That rule does not apply here, however, where the trial court made a considered, and correct decision that immunity was *not* cut off if no report were made within 48 hours, and the record reflects *no* reconsideration, and *no* considered decision that a contradictory instruction to the jury would be made. In those circumstances, the court's considered ruling was the law of the case, and the erroneous instruction is not.

The trial court did not notice its error, and neither did Dr. Townsend's counsel. The Eskridges' counsel did notice the error, however. Rather than call the attention to the court that it had approved an instruction that was contradictory to the legal ruling it had just previously made, the Eskridges argued the erroneous instruction to the jury. (RP 873). That mistake can be remedied under the plain error doctrine, to the extent it is clear that it could have decided the outcome. *See, e.g., Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 622, 465 P.2d 657 (1970).

This case should be reversed because Dr. Townsend was immune under two statutes, and never had any burden to prove her own good faith. But if it is not, a new trial should nevertheless be ordered to correct the effect of the erroneous instruction that Dr. Townsend could not claim immunity where she did not report within 48 hours of forming her belief that Mr. Eskridge was possibly abusing his children.

RESPECTFULLY SUBMITTED, this 19th day of November, 2012.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 19th day of November, 2012, the foregoing APPELLANT'S REPLY BRIEF was caused to be filed with the following Court:

Court of Appeals of the
State of Washington,
Division III
500 N Cedar St
Spokane, WA 99201-1905

- ☐ By Hand Delivery
- ☒ By U.S. Mail
- ☐ By Overnight Mail
- ☐ By Facsimile Transmission
- ☐ By Email to

*1 Original, plus 1 Copy

Also, Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 19th day of November, 2012, the foregoing APPELLANT'S REPLY BRIEF was caused to be served to the following:

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Lennie M. Rasmussen

APPENDIX

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WA H.R. B. Rep., 2002 Reg. Sess. H.B. 2699

Washington House Bill Report, 2002 Regular Session, House Bill 2699

March 11, 2002
Washington House of Representatives
Fifty-seventh Legislature, Second Regular Session, 2002

As Passed Legislature

Title: An act relating to communications with government branches or agencies and self-regulatory organizations.

Brief Description: Providing immunity for communications with government agencies and self-regulatory organizations.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Lantz, Ahern, Benson, Crouse, Morell, Miloscia, Schindler, Dunshee and Esser).

Brief History:

Committee Activity:

Judiciary: 2/7/02 [DPS].

Floor Activity:

Passed House: 2/18/02, 97-0.

Senate Amended.

Passed Senate: 3/5/02, 47-0.

House Concurred.

Passed House: 3/11/02, 94-0.

Passed Legislature.

Brief Summary of Substitute Bill

•Amends the law that gives immunity to persons who make communications to a governmental agency to: remove the requirement that the communication be made in good faith; include communications to branches of the government; and allow recovery of expenses and statutory damages of $10,000.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Hurst, Vice Chair; Carrell, Ranking Minority Member; Boldt, Dickerson, Esser, Jarrett, Lovick and Lysen.

Staff: Edie Adams (786-7180).

Background:

In 1989 the Legislature passed a law to help protect people who make complaints to government from civil suit regarding those complaints. The law was a request from the Governor and Attorney General to address concerns that arose from a situation where a citizen reported a tax violation to a state agency, and the person who was in violation of the tax law sued the citizen for defamation. This type of suit is referred to as a SLAPP suit. SLAPP stands for "Strategic Lawsuit Against Public Participation." SLAPP suits are instituted as a means of retaliation or intimidation against citizens or activists for speaking out about a matter of public concern. Typically, a person who institutes a SLAPP suit claims damages for defamation or interference with a business relationship.

The anti-SLAPP law passed in 1989 provides that a person who in good faith communicates a complaint or information to any federal, state, or local governmental agency is immune from civil liability for any claim relating to that communication. An individual who prevails with the immunity defense is entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. This provision is also applicable to communications made to a self-regulatory organization that regulates persons in the securities or futures business and that has been delegated authority by a government agency and is subject to oversight by that agency.

Under appellate court interpretation of this statute in cases involving defamation actions, the court has held that the plaintiff has the burden of showing that the communication was not made in good faith, by showing that the communication was made with knowledge that it was false or with reckless disregard for its truth. A recent appellate court case found that the statute's application to communications made to a government "agency" includes communications made to the courts.

Summary of Substitute Bill:

A legislative finding and intent section is provided that states that: SLAPP suits are intended to intimidate the exercise of First Amendment rights and rights granted under Article I, Section 5 of the Washington Constitution; the anti-SLAPP law has failed to set forth clear rules for early dismissal of these kinds of suits; and United States Supreme Court precedent has established that as long as government petitioning is aimed at having some effect on government decision-making, the petitioning is protected, regardless of content or motive, and the case should be dismissed.

The anti-SLAPP law is amended to remove the requirements that the communication be made in good faith and to cover communications to a branch of the federal, state, or local government. In addition, the law is amended to allow a person who prevails on the defense to recover "expenses," as opposed to "costs," incurred in establishing the defense and statutory damages of $10,000. The court may deny statutory damages if it finds the communication was not made in good faith.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: SLAPPs are an abuse of the legal system involving civil complaints against citizens who speak out against special interests of public concern. They are intended to stifle free speech and the right to petition the government. They are usually filed by deep pocket plaintiffs against average citizens of modest means. Even if the suits are eventually dismissed, the time, cost and emotional toll of years of litigation makes people give up. Public officials can be sued for comments made in a public forum relating to their official duties. This discourages people from speaking out, but also discourages people from running for public office. This bill improves the existing statute which is not working as intended. The problem with the good faith standard in the law is that it creates a question of fact and a judge won't dismiss early if there is a question of fact. People should be able to petition their government, regardless of good or bad intentions, as long as they are seeking government action.

Testimony Against: None.

Testified: Representative Lantz, prime sponsor; Phil Watkins, Taxpayers for Accountable Government; Cherie Rodgers, Spokane City Council; Steve Corker, Spokane City Council; and Shawn Newman, attorney.

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