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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GARY FILION, Respondent, vs. JULIE JOHNSON, et al., Appellant.	CASE # 69830-3-I [King County Superior Court Case # 07-2-06353-6 SEA] APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Names used in reference to parties:

This brief refers to the appellant as "Johnson" and to the respondent on appeal as "Filion" except where the name "Gary" or "Gary Filion" appears in quoted text or in the name of a document. The individual plaintiff, Gary Filion, passed away on August 9, 2010, while this case was pending on the prior appeal. Lester Filion, Personal Representative of the Estate of Gary Filion, was formally substituted as plaintiff.

Summary of the case:

The marriage between Gary Filion and Julie Johnson was dissolved by decree entered June 1, 2006, in Snohomish County Superior Court. The decree contains mutual restraining provisions which, among other things, prohibited Filion from entering upon or coming within 500 feet of Johnson's residence.

In the afternoon of August 1, 2006, Filion came upon the premises of Johnson's residence to take possession of certain personal property that was awarded to him by the parties' dissolution decree. He came in a moving truck with two men. His parents also came in a separate car but parked their car and remained some distance away from Johnson's house.

Filion parked the moving truck near the garage of Johnson's residence and walked to the door and knocked and/or rang the doorbell. Johnson saw him approach, had a panic attack, took a Xanax, called 911, and ran to the far

end of the residence in fear. A friend who was present helping Johnson pack in preparation for moving answered the door. He told Filion that Johnson had called 911 and the police were on their way. Filion left and was gone before the police officer arrived.

The officer took a statement from Johnson and from one of her sons. The Shoreline City Prosecutor filed a criminal complaint against Filion charging him with violation of the restraining order. Filion received s Summons/Subpoena/Notice to appear in court for arraignment. Filion appeared and pled "Not Guilty". The criminal case was dismissed in October 2006.

On February 21, 2007, Filion through counsel filed this action for money damages against Johnson. The action is based solely on Johnson's August 1, 2006, call and report to 911 and the responding deputy sheriff of Filion's restraining order violation committed hat afternoon.

On October 24, 2008, Johnson filed a CR 12(b)(6) motion to dismiss Filion's lawsuit on the basis of the unqualified immunity granted by RCW 4.24.510 and requested an award of her expenses and reasonable attorney fees plus statutory damages of $10,000.00.

Because the trial court considered matters outside of the pleadings, Johnson's motion to dismiss was heard and considered as a motion for summary judgment.

On November 21, 2008, the trial court entered an order denying Johnson's request for dismissal of Filion's claims.

A one-day mandatory arbitration hearing was held. The arbitrator issued an award in Johnson's favor dismissing Filion's claims but denied Johnson an award of her expenses, reasonable attorney fees, and statutory damages.

Johnson filed a request for trial de novo.

Filion changed lawyers and moved for voluntary dismissal under CR 41(a)(1)(B). The motion for voluntary dismissal was initially denied by one judge and later granted by a different judge. Johnson appealed. The Court of Appeals reversed the dismissal. Filion petitioned for review by the Supreme Court. Review was denied.

The matter was remanded and the Mandate filed in King County Superior Court on January 3, 2012.

Each party filed a motion for summary judgment in early October 2012.

Johnson's motion for summary judgment requested dismissal of Filion's claims. The basis for Johnson's motion was her claim of unqualified immunity from civil liability for Filion's claims under RCW 4.24.510. Filion agrees that his claims against Johnson in this case are based upon Johnson's call to 911 on August 1, 2006 and her report to the responding deputy sheriff

that Filion had violated their dissolution decree's restraining order by coming upon the premises of her residence that afternoon.

The basis stated by the trial court, Hon. Sharon S. Armstrong, for denying Johnson's motion for summary judgment is that Johnson's report of Filion's restraining order violation was made privately, in a call to the police, not in a public statement or in a public discussion, is a private matter, not made publicly, and was not an expression of political activity, and therefore is not within the scope of the immunity established by RCW 4.24.510.

Trial was scheduled to begin December 17, 2012.

Johnson filed for discretionary review by the Court of Appeals, Division One, on November 14, 2012. (CP 355 – 365) The earliest hearing date available in the Court of Appeals was February 22, 2013. Johnson's motion for stay of trial pending discretionary review was denied by the trial court.

The matter was reassigned to Hon. Michael J. Hayden for jury trial on December 19, 2012. The parties appeared for trial. After some hours of colloquy between court and counsel and negotiations, the parties agreed to waive jury trial and the Court entered a Stipulated Judgment which preserves Johnson's claims under RCW 4.24.510 for appeal. (CP 449 – 454) (Appendix pp. 17 – 22)

Johnson timely filed her Notice of Appeal on January 18, 2013.

Filion has not filed a cross appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of November 21, 2008, denying Johnson's CR 12(b)(6) motion to dismiss Filion's claims, which motion was heard and considered as a motion for summary judgment. (CP 109)

2. The trial court erred in entering the order of November 7, 2012, denying Johnson's summary judgment motion for dismissal of plaintiff's claims based on Johnson's claim of unqualified immunity under RCW 4.24.510 and ordering that the issue shall not be asserted at trial. (CP 341 - 348)

3. The trial court erred in ordering on December 19, 2012, that defendant is precluded and barred from asserting and raising her immunity defense and claims under RCW 4.24.510 at trial and, as a consequence of erroneously barring Johnson's defense and claims under RCW 4.24.510, ordering that Johnson did not improve her position at trial de novo and that Filion is entitled to recover attorney fees from Johnson under MAR 7.3. (CP 452 lines 8 – 15)

4. The trial court erred in assessing costs and attorney fees against Johnson as a party who has appealed the arbitrator's award and who has failed to improve the party's position on the trial de novo. (CP 625 – 627) This order and judgment should be vacated upon the court's reversal of the trial

court's decisions denying Johnson's claim and defense of immunity under RCW 4.24.510.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the trial court err in denying Johnson's October 2012 motion for summary judgment and in ordering that Johnson shall not assert her defense of immunity and claims under RCW 4.24.510 at trial? (Assignment of Error 1 and 2)

ISSUE 2: Is immunity under RCW 4.24.510 available to a person who calls 911 and reports a violation of a Chapter 26.09 RCW restraining order who is later sued for civil money damages based upon her communications to 911 and law enforcement? (All Assignments of Error)

ISSUE 3: Did the 2010 enactment of RCW 4.24.525 amend RCW 4.24.510 such that the immunity defense is only available to persons who engage in public political speech and no longer available to citizens who communicate with government agencies such as the 911 call centers and law enforcement agencies regarding private matters such as reports of restraining order and no contact order violations? (Assignments of Error 2, 3, and 4)

ISSUE 4: If the answer to Issue 2 is affirmative, does the 2010 amendment of RCW 4.24.525 apply retroactively to deprive Johnson of the protection of immunity under RCW 4.24.510 for her August 1, 2006 911 call and report of Filion's restraining order violation to the responding law enforcement officer? (Assignments of Error 2, 3, and 4)

ISSUE 5: Does the fact that defendant previously brought a CR 12(b)(6) motion to dismiss, which was denied on November 21, 2008 by a different judge who had since retired, preclude Johnson from re-asserting her request for dismissal based on her RCW 4.24.510 defense of unqualified statutory immunity via motion for summary judgment? (Assignments of Error 2, 3, and 4)

ISSUE 6: Must a defense asserted in a CR 12(b)(6) motion to dismiss which was heard and considered as a motion for summary judgment and which was denied, be re-asserted in a document labeled "answer" or "amended answer" for that defense to remain available to the defendant in the case? (Assignments of Error 2, 3, and 4)

IV. STANDARD OF REVIEW

The standard of review in this case is de novo.

Johnson claims that the trial court erroneously denied her summary judgment motion. This court does not generally review an order denying summary judgment after a case goes to trial where there were material factual issues prior to trial, unless the denial of the motion for summary judgment turns solely on a substantive issue of law. *Washburn v. City of Federal Way*, 283 P.3d 567, 169 Wn.App. 588 (2012)

A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder." *Brothers v. Pub. Sch. Employees of*

Washington, 88 Wash.App. 398, 409, 945 P.2d 208 (1997); *Johnson v. Rothstein*, 52 Wash.App. 303, 304, 759 P.2d 471 (1988).

However, such an order is subject to review "if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law." *University Village Ltd. Partners v. King County*, 106 Wash.App. 321, [65 P.3d 21] 324, 23 P.3d 1090, review denied, 145 Wash.2d 1002, 35 P.3d 381 (2001).

Issues of law are reviewed de novo. *Clayton v. Grange Ins. Ass'n,* 74 Wash.App. 875, 877, 875 P.2d 1246 (1994).

See *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 799-800, 65 P.3d 16, , (Wash.App. Div. 1 2003)

In reviewing a summary judgment motion, this court engages in the same inquiry as the trial court. *Young v. Estate of Snell*, 134 Wash.2d 267, 271, 948 P.2d 1291 (1997). Summary judgment is appropriate if, considering the evidence and reasonable inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Young*, 134 Wash.2d at 271, 948 P.2d 1291. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). Facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Bishop v. Miche*, 137 Wash.2d 518, 523, 973 P.2d 465 (1999). Conclusions of law are reviewed de novo. *Bailey v. State*, 147 Wn.App. 251, 260, 191

P.3d 1285(2008)

V. STATEMENT OF THE CASE

The marriage of Julie Johnson and Gary Filion was dissolved by decree entered on June 1, 2006, in Snohomish County Superior Court. (CP 210 - 219)

The decree divides the parties' real and personal property, and provides that the residence Johnson and her children were living in, referred to as the "Shoreline" house, shall be "listed and sold forthwith" (CP 212, l. 23), and awards Filion certain personal property items that were located at the Shoreline house when the decree was entered. (CP 211 to 213).

The decree restrains and enjoins Filion from

> "going onto the grounds of or entering the home, workplace, school or day care of the following named children: Emelie Nye, Mitchell Nye, Jordan Nye, Spencer Nye (Julie's children)."

and restrains both parties from

> "going onto the grounds of or entering the home, work place or school of the other party"
>
> "knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the other party, or the day care or school of these children listed above."
>
> (CP 217 l. 18 to CP 218 l. 16)

The personal property items Filion was to receive from Johnson's residence are listed in the decree at page 3, paragraph 10, and at page 4, paragraph 9. (CP 28 & 29; CP 212 & 213) Filion was to return "the table

leaves that belong to the Wife [when] when he picks up his personal property from the Wife." (CP 29 and CP 213 at l. 10 – 21)

A Residential Real Estate Purchase and Sale Agreement for the Shoreline house was signed by all parties in June, 2006. The closing date was set for August 1, 2006. Possession was to be turned over to the buyers on the closing date. (CP 200 – 201)

On August 1, 2006, Johnson and her children were at home and in the process of packing to move. The buyer was to receive possession of the premises at 9:00 p.m. that day. (Declaration of realtor Pat Dornay, CP 198 – 202)

Johnson's packing took longer than anticipated. Pat Dornay, the realtor, phoned Johnson in the morning of August 1, 2006, to check on her progress toward vacating the property. Johnson told Ms. Dornay she would not be moved out before 9:00 p.m. that evening. (CP 198, l. 6 – 8)

Ms. Dornay phoned Johnson in the morning of August 1, 2006, to check on her progress toward vacating the property. Johnson told her that she would not be moved out prior to 9:00 p.m. that evening. (CP 1`98, l. 6 – 8)

Ms. Dornay visited Johnson at the Shoreline house at 1:00 p.m. on August 1 to see for herself how things were going. She found that "It was obvious that Johnson would need all the time prior to her 9:00 p.m. deadline to finish packing and moving." (CP 198, l. 8 – 10)

Ms. Dornay phoned Filion and told him that Julie would not be out of the house until 9:00 p.m. that evening, at which time the house would be turned over to the buyers. Filion told Ms. Dornay that he was going over to the house at 4:00 pm with a truck to pick up some furniture & personal belongings. (CP 198, l. 14 – 17)

Ms. Dornay then phoned Johnson back and told her that Filion said he was planning to come over to pick some things up. Johnson told Ms. Dornay, "He better not or I'll call the cops." (CP 198, l. 18 – 19)

Filion called Ms. Dornay back and asked if she had told Johnson he was coming over. Ms. Dornay told him, "Yes, I did". Filion asked, "What did she say?" Ms. Dornay told him that Johnson said, "He better not!" and that the house is a mess and it will be a small miracle if Johnson completes her move by the 9:00 p.m. deadline. (CP 198, l. 20, to CP 199, l. 1)

Filion's lawyer had instructed him to pick up his personal property from Johnson's residence in the afternoon of August 1, 2006. Filion stated that, "I was advised by my lawyer, Peter Jorgenson, that I was authorized to go to the residence in Shoreline, WA on August 1, 2006 after 2:00 p.m. to pick up certain items of personal property." (Declaration of Gary Filion, CP 190 - 191, ¶ 2)

Filion admits in his declaration of November 7, 2008, that Pat Dornay told him that Johnson said he should not come to the residence that afternoon. Filion states "On August 1, 2006, I spoke with Pat Dornay, and she told me

that she had told Julie Johnson that I was coming over on that day and that Ms. Johnson had said in response "I hope he doesn't" ". (Declaration of Gary Filion, CP 190, at ¶ 3) Ms. Dornay stated that she told Filion that Johnson had said, "He better not." (CP 198, l. 21)

At 4:00 p.m. on August 1, 2006, through her kitchen window, Johnson saw a moving truck come up her driveway. It stopped near the garage door. She saw Filion get out of the truck. Johnson started having a panic attack and took a Xanax. Filion came up to the front door, knocked, and rang the doorbell. Johnson called 911. Her son Spencer answered the door, not knowing it was Filion. Johnson's friend Larry who was helping her move told Filion he should not be there and that the police are on their way. (November 14, 2008, Reply Declaration of Julie Johnson, CP 102 – 107, at ¶¶ 5 – 6) (Johnson's November 14, 2008, declaration submitted as working papers on Johnson's **October 2012 Motion to Summary Judgment**. See CP 185)

When Filion was told that the police had been called, he left the premises and was gone before the police arrived. (Declaration of Gary Filion, CP 190 -191, at ¶ 4).

The King County Sheriff Incident Report dated August 1, 2006, (CP 226 – 230) shows that a deputy sheriff was dispatched at 4:16 p.m. in response to Johnson's 911 call. The narrative report states that:

> V-Filion, Julie, and A-Filion, Gary are currently going through a divorce; they were married for 4.5 years. W-Nhye, Spencer is the son of Julie and the stepson of Gary. Gary and Julie currently have a restraining order

that prohibits either of them from contacting the other. It also prohibits Gary from going to 19814 8 AV NW. The order is #05-3-00679-1 through Snohomish County Superior Court in Everett and is currently active (6/1/06-6/30/09). The order was presented and explained to them both in court. The order specifically states that a violation of the order is a crime under RCW 26.50.110. Both parties have been served. See attached order for more details.

On 8/1/06 at 1616 hours, I responded to a court order violation call at 19814 8 AV NW. When I arrived I met with Julie and her son Spencer. They were packing up the house to move as a result of the recent divorce. According to Spencer and Julie, during the packing process Gary stopped by the house to pick up his possessions. He pulled into the driveway, walked up to the door and knocked on the door. Spencer saw him but, knowing the problems it could cause, would not let him in the house. Upon hearing that the police were being called Gary left the premises. Neither Julie nor Spencer knew where Gary would be going but he lives in Seattle and he was in his parent's car. I took statements from Spencer and Julie. I completed a DV Supplemental with Julie and gave her a DVPA form.

I am charging Gary A. Filion with RCW 26.50.110 DV Violation of a restraining order through Shoreline Municipal Court.
(CP 227)

Johnson's son, Spencer Nye, gave the following statement to the officer:

Today at about 4:15 I saw Gary come to the door. He knocked on the door and I did not answer it. I saw him walk back down the driveway to his U-Haul. He left shortly thereafter.
I am willing to assist in prosecution. This is true and accurate to the best of my knowledge.
This was written by deputy Rudolph.
Signed: Spencr Nye
(CP 228)

Johnson gave the following statement to the officer:

> Today at about 4:15 p.m. Gary came over and knocked on the door. Gary knows he has a restraining order that prevents him from contacting me at the house or anywhere else. My realtor had told me that Gary was coming despite their advice for him not to come.
> I am willing to assist in prosecution.
> This was written for me by deputy Rudolph.
> Signed: Julie Johnson
> (CP 230)

On August 16, 2006, the prosecuting attorney for the City of Shoreline, King County, Washington, filed a complaint in King County District Court charging Filion with willfully violating the terms of a restraining order in violation of RCW 26.50.110. (CP 206)

On August 16, 2006, the district court clerk issued a Summons/Subpoena/Notice for Filion to appear for arraignment on August 28, 2006 at 8:45 AM. (CP 204) Filion appeared and entered a plea of "Not Guilty". (CP 234) The criminal case was dismissed on October 12, 2006. (CP 236)

On February 21, 2007, Filion filed this action in King County Superior Court, case no. 07-2-06353-6 SEA against Johnson and her dissolution lawyer Mark Olson. The complaint sought money damages from Johnson based on her call to 911 and report to the responding deputy sheriff on August 1, 2006, regarding his violation of the restraining order. (CP 3 – 4)

Filion filed an amended complaint on April 9, 2007, stating essentially the same allegations. (CP 5 – 6)

Johnson filed her *pro se* answer and affirmative defenses on May 16, 2007. (CP 8 – 10)

Filion filed a Second Amended Complaint for Damages on August 15, 2007. (CP 11- 13)

Except for substitution of parties regarding Olsen, as explained below, the only differences between Filion's original complaint, amended complaint, and second amended complaint are as follows:

- Plaintiff's original COMPLAINT FOR DAMAGES filed February 21, 2007, alleges:

  > "When he arrived, the police were called and he was placed under arrest for violation of a no contact order." (CP 4, l. 4- 5).
  >
  > "Defendant Olson * * * made negligent misrepresentations in not preventing Mr. Filion from being arrested and falsely prosecuted." (CP 4, l. 10 – 14)

- Plaintiff's first AMENDED COMPLAINT FOR DAMAGES filed April 9, 20017, alleges:

  > "When he arrived, the police were called and they responded and attempted to arrest plaintiff for violation of a no contact order. (CP 6, l. 5 - 6).
  >
  > "Defendant Olson * * * made negligent misrepresentations in not preventing Mr. Filion from having police pursue him and being falsely prosecuted." (CP 6, l. 11 – 15)

- Plaintiff's SECOND AMENDED COMPLAINT FOR DAMAGES restores the allegations of the original complaint regarding arrest verbatim, as follows:

  > "When he arrived, the police were called and he was placed under arrest for violation of a no contact order." (CP 12, l. 4- 5).
  >
  > "Defendant Olson * * * made negligent misrepresentations in not preventing Mr. Filion from being arrested and falsely prosecuted." (CP 4, l. 10 – 14)

- Plaintiff's SECOND AMENDED COMPLAINT FOR DAMAGES no longer lists "MARK OLSON and JANE DOE OLSON, husband and wife and their marital community, as defendants in the caption or in the body of the complaint. Instead, it names "OLSON and OLSON, PLLC, a legal services corporation", as the defendant in their place.

Plaintiff's SECOND AMENDED COMPLAINT FOR DAMAGES was filed without leave to amend long past the 20 day deadline of CR 15(a) for amendment without leave of court or the written consent of the opposing party.

An order dismissing plaintiff's complaint as to Defendants Olson & Olson, PLLC, with prejudice was entered on February 8, 2008. (Appendix p. 8)

An Order dismissing Mark D. Olson, Leslie J. Olson, and their marital community, as defendants was entered on July 15, 2009. (CP 132 – 134).

The Declaration of Mark D. Olson filed on February 1, 2008, has a true copy of the parties' August 1, 2006, Findings of Fact and Conclusions of Law and Decree of Dissolution attached. (CP 13 to 35)

Johnson's *pro se* answer (CP 8 to 10) denies Filion's claims and asserts several affirmative defenses, including the defense of:

> 2. Failure to State a Claim on Which Relief Can Be Granted. Plaintiff has failed to state a claim against defendant Julie Johnson on which relief may be granted." (CP 9, l. 21 – 23)

and the prayer of her answer requests that plaintiff's claims be dismissed with prejudice, that the court enter judgment in Johnson's favor, the plaintiff be awarded nothing, for her costs and disbursements, for her reasonable and actual attorney's fees, and for such other and further relief as the court deems just and equitable. (CP 10, l. 11 – 22)

Johnson's MOTION TO DISMISS UNDER CR 12(b)(6), FOR CR 11 SANCTIONS, AND FOR COSTS, ATTORNEY FEES, AND STATUTORY DAMAGES, together with supporting attachments, was filed on October 24, 2008 (CP 36 to 63) raising her defense of absolute unqualified statutory immunity and requesting an award of her expenses, reasonable attorney fees, and statutory damages of $10,000.00 under RCW 4.24.510. (CP 40 to 42) Filion did not object to the manner in which Johnson asserted and pled her defense.

On October 27, 2008, Filion moved to strike the hearing on Johnson's CR 12(b)(6) motion, arguing that it should be heard as a motion for summary judgment per the last sentence of CR 12(b)(6) which provides that:

> "* * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56."
>
> (CP 70 – 72)

Johnson responded to Filion's motion to strike the hearing on Johnson's CR 12(b)(6) motion (CP 74 – 84) showing that Filion's lawsuit against Johnson should be dismissed under RCW 4.24.510 on the basis of the pleadings alone, explaining that:

> Plaintiff has no claim for damages against Johnson under any theory of recovery on the basis of his pleadings in this case. His complaint alleges (1) the existence of mutual restraining orders, (2) that he went to Johnson's residence on August 1, 2006, (3) when he arrived the police were called, (4) he was placed under arrest for violation of a no contact order, (5) Johnson by misrepresentation and false statements to police officers caused the false arrest and malicious prosecution of Filion. The sole alleged reason for plaintiff's claim against Johnson in this case is that she communicated information to the police and he asserts that the information she communicated was false. But, as shown below, the truth or falsity of that information and Johnson's good faith is irrelevant to the question whether the immunity afforded by RCW 4.24.510 applies to Johnson's 911 call.
>
> "Plaintiff's claim is barred by RCW 4.24.500 and 4:24.510, Washington's anti-SLAPP statute. "SLAPP"

is an acronym for Strategic Lawsuit Against Public Participation.

"The purpose of Washington's anti-SLAPP legislation is set out in RCW 4.24.500:

> "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."

"RCW 4.24.510, the remedy statute, provides that:

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

A hearing was held October 29, 2008. The trial court ordered that Johnson's motion would be heard as a motion for summary judgment under CR 56. The hearing was continued to November 21, 2008. (CP 73)

The following documents were filed in connection with Johnson's motion:

57	10-24-2008	Declaration Of Pat Dornay	CP 64 to 69
64	11-07-2008	Opposition To Mtn To Dismiss /pla	CP 86 to 96
65	11-07-2008	Declaration Of Gary Filion	CP 97 - 98
66	11-07-2008	Declaration Of Peter Jorgensen	CP 99 - 101
67	11-14-2008	Declaration Of Julie Johnson	CP 102 - 107

Filion's opposition (CP 86 – 91) to Johnson's CR 12(b)(6) motion extensively addresses and discusses Johnson's claim of immunity under RCW 4.24.510.

Johnson's reply declaration dated November 14, 2008, explains why she called 911 to report Filion's violation of the restraining order when she saw Filion approach and come to the door of her home on August 1, 2006. (CP 102 – 107)

The hearing on Johnson's motion was held on November 21, 2008, before the Honorable Douglas McBroom. The court entered an order that day which states in whole as follows:

> "This Court, having heard a motion to dismiss pursuant to (12)(b)(6)
>
> "IT IS HEREBY ORDERED that the motion is denied."
>
> "DATED this 21st day of November, 2008.

"Honorable Douglas D. McBroom"

(CP 70) (See Clerk's Minutes at CP 108)

The case was referred to arbitration under the Superior Court Mandatory Arbitration Rules. A one-day arbitration hearing was held. The arbitrator's award was filed on March 4, 2009. (CP 110 – 111)

Johnson filed and served a REQUEST FOR TRIAL DE NOVO AND FOR CLERK TO SEAL ARBITRATION AWARD on April 2, 2009, together with payment of the $250.00 trial de novo filing fee. (CP 122 – 123)

Filion changed lawyers on April 14, 2009.

The court's arbitration department erroneously rejected Johnson's REQUEST FOR TRIAL DE NOVO (but kept the filing fee). Johnson had to file a motion to compel the clerk to accept, file, and process Johnson's request for trial de novo. An order granting Johnson's motion was entered on May 19, 2009, and the request for trial de novo was accepted and filed by the clerk. (CP 119 – 121)

Filion had filed a MOTION TO DISMISS ALL CLAIMS on May 11, 2009. Johnson had responded. Filion had replied. The order of May 19, 2009, entered at 2:23 p.m., addresses Filion's motion to dismiss all claims as follows: *"Plaintiff's separately noted motion for dismissal of all claims is denied without prejudice."* (CP 120, l. 21 – 22)

At 4:43 p.m. on May 19, 2009, Filion filed a 2nd CR 41(a) MOTION FOR DISMISSAL OF ALL CLAIMS BEFORE RESTING. (CP 124 – 128)

On July 9, 2009, a different judge entered an ORDER GRANTING PLAINTIFF GARY FILION'S MOTION FOR DISMISSAL OF ALL CLAIMS. (CP 130 TO 131)

Johnson appealed the order of dismissal. The Court of Appeals reversed in an unpublished opinion filed November 22, 2010. Filion petitioned for review by the Washington Supreme Court. Review was denied. The Mandate was filed in King County Superior Court on January 3, 2012. (CP 135 to 139)

The case was set for trial.

The parties filed competing motions for summary judgment on October 5, 2012.

Johnson's Motion for Summary Judgment (CP 162 – 172; and CP 173 – 185) is supported by the previously filed documents listed in her INDEX TO DOCUMENTS IN WORKING COPY SET (CP 185) as follows:

SCOMIS Sub No.	**Date of Document**	**Document Name**	**Location in Clerk's Papers on Appeal**
To be assigned	10-05-2012	Amended Notice for Hearing on 11-02-2012	(Not in Clerk's Papers)
To be assigned	10-05-2012 Filed 10/08	Defendant's Motion for Summary Judgment (Corrected)	CP 173 to 185
To be assigned	10-05-2012	Order Granting Def's Motion For Summary Judgment **(proposed)**	(Not in Clerk's Papers)
None	02-02-2011	Ct of Appeals Div. One Order Granting Substi-tution & Denying Recon-sideration (63978-1)	CP 184

1	02-21-2007	Complaint	CP 1 to 4
8	04-09-2007	Amended Complaint	CP 5 to 6
10	05-16-2007	Answer to Amended Complaint	CP 8 to 10
15	08-15-2007	2nd Amended Complaint	CP 11 to 12
21	11-30-2007	Answer of Def Olsen to Amended Complaint	(Not in Clerk's Papers) (N/A to Issues on Appeal)
27	12-10-2007	Declaration of Mark Olsen with attachments	(Not in Clerk's Papers) (N/A to Issues on Appeal)
30	01-17-2008	Plaintiff Gary Filion's Decl. in Response to Motion to Dismiss Olsen	(Not in Clerk's Papers) (N/A to Issues on Appeal)
35	02-08-2008	Order Dismissing Olsen	Appendix
56	10-24-2008	Def Julie Johnson's Motion to Dismiss	CP 36 to 63
57	10-24-2008	Declaration of Pat Dornay	CP 64 to 69
67	11-14-2008	Declaration of Julie Johnson	CP 102 - 107
70	11-21-2008	Order Denying Johnson's Motion to Dismiss (Judge Douglas McBroom)	CP 109

Filion filed the Declaration of Lester Filion (CP 148 to 161) and the Declaration of Jamila Taylor (CP 186 – 237) in support of his Motion for Summary Judgment (CP 140 to 147), the latter of which includes copies of the following previously filed documents as attachments:

EXH #	Sub #	Description	Location in Clerk's Papers
EXH 1	65	Declaration of Gary Filion dated 11-07-2008	CP 97 – 98; CP 190 - 191
EXH 2	66	Declaration of Peter Jorgensen dated 11-07-2008	CP 99 – 101 CP 193 - 195
EXH 3	57	Declaration of Pat Dornay dated 10-24-2008	CP 64 – 69 CP 197 - 201
EXH 4		Summons/Subpoena/Notice for Case No. Y60227741 DV-Protection Order Violation	CP 204
EXH 5		City of Shoreline v. Gary Filion Complaint for Case No. Y6022741	CP 206
EXH 6		Declaration of Mark D. Olson filed December 10, 2007	CP 208 - 224
EXH 7		King County Sheriff's Incident Report (with statements and DV Supplemental Form) No. 06-22741	CP 226 - 230
EXH 8		Case Docket for City of Shoreline v. Gary Filion, Case No. Y60227741	CP 232 - 237

Filion's response to Johnson's motion for summary judgment was filed October 22, 2012. (CP 238 – 249)

Johnson's reply to Filion's response was filed October 29, 2012. (CP 330 – 334; CP 335 – 336)

Johnson's response to Filion's motion for summary judgment was filed October 22, 2012. (CP 250 – 280)

Filion's reply to Johnson's response was filed October 26, 2012. (CP 326 – 329)

The hearing on summary judgment was held November 2, 2012, before the Honorable Sharon S. Armstrong, Judge, King County Superior Court. (See VRP 11/02/2012)

An Order Denying Plaintiff's Motion for Summary Judgment was entered on November 5, 2012. (CP 338 – 340)

An ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT dated November 6, 2012, was filed on November 7, 2012. (CP 341 – 348) (Appendix pp. 9 – 16)

Johnson sought discretionary review of the trial court's order denying her motion for summary judgment. Her NOTICE OF DISCRETIONARY REVIEW was filed on November 14, 2013 (CP 355 – 365).

Trial was scheduled to begin on December 17, 2012.

On December 14, 2012, Johnson filed a MOTION FOR STAY OF TRIAL PENDING DISCRETIONARY REVIEW BY COURT OF APPEALS with true copies of the following documents attached (CP 369 – 412):

- Order Denying Defendant's Motion for Summary Judgment filed November 7, 2012 (CP 378 -385);
- Amended Motion for Discretionary Review filed in Court of Appeals, Division One, Case No. 69533-9-I (CP 386 – 405);
- Certification of Service of Amended Motion for Discretionary Review filed in Court of Appeals, Division One, Case No. 69533-9-I (CP 406 – 408);

- Amended Notice of Hearing on Motion for Discretionary Review filed in Court of Appeals, Division One, Case No. 69533-9-I (CP 409 – 410);
- Certification of Service of Amended Notice of Hearing on Motion for Discretionary Review filed in Court of Appeals, Division One, Case No. 69533-9-I (CP 411 – 412);

The matter was assigned case no. 69533-9-I in the Court of Appeals, Division One. (CP 455 – 365)

The motion for discretionary review was filed on November 29, 2012.

The earliest available hearing date in the Court of Appeals was February 22, 2013.

The date scheduled for jury trial was December 17, 2012.

Johnson's motion for stay of trial pending discretionary review (CP 369 – 412) was denied. (CP 447 – 448)

On December 14, 2012, the trial court entered an order denying Johnson's request for a stay pending discretionary review. (CP 447 – 448)

Although trial was scheduled for December 17, 2012, the case was placed on standby for a couple of days. The assigned judge, Honorable Sharon S. Armstrong, was retiring. An ORDER ON REASSIGNMENT was entered on December 19, 2012, providing that "Effective 12/19/2012 this matter is assigned from Judge Sharon S. Armstrong to Judge Michael Hayden." (CP 496)

The parties appeared for trial before the Honorable Michael J. Hayden, Judge, King County Superior Court, on December 19, 2012. The parties' counsel engaged in colloquy with the court and, rather than proceed to trial by jury, agreed to entry of a STIPULATED JUDGMENT which preserves for appeal Johnson's argument that her defense of immunity and claims under RCW 4.24.510 were erroneously denied, precluded and barred by the trial court. (CP 449 -454) (Appendix pp. 17 – 22)

The STIPULATED JUDGMENT provides, among other things, that:

> "For purposes of preserving her argument on appeal and making a record, the Parties agree that the Defendant did in fact again assert her anti-slapp defense to the trial Court before the jury trial was to begin on December 19, 2012, but the Court, in reliance on Judge Armstrong's prior ruling (which precluded the Defendant's attempt to raise the anti-slapp statute (RCW 4.24.510)), also precluded and barred the Defendant from raising the 4.24.510 immunity defense at trial." (CP 452, l. 8 – 14)
>
> # 5) Also added below. (CP 453, l. 20)
>
> "# 5) This stipulation and judgment is not intended to be construed to prejudice or preclude Defendant's rights to appeal the denial of her claim for the defense of RCW 4.24.510 (immunity/antislapp)" (CP 454, l. 10 - 17

The proceedings on December 19, 2012, consisted primarily of colloquy between the court and counsel and were not reported. (See Clerk's Minutes at CP 495)

Filion subsequently filed a MOTION FOR ATTORNEY'S FEES PURSUANT TO MAR 7.3 ON December 31, 2012, (CP 497 – 555) supported by several exhibits as follows:

EXHIBIT A: Arbitration Award (CP 505)

EXHIBIT B: Stipulated Judgment (CP 507 – 512)

EXHIBIT C: Declaration of Noah C. Davis (CP 554 – 555)

Johnson's RESPONSE AND OBJECTION TO MOTION FOR ATTORNEY FEES AND COSTS was filed on January 7, 2013. (CP 558 – 563)

Filion filed a REPLY on January 8, 2103, (CP 564 – 569) and an AMENDED DECLARATION OF NOAH DAVIS on January 16, 2013. (CP 570 - 608)

Johnson's NOTICE OF APPEAL was timely filed and the filing fee paid on January 18, 2013. (CP 609 – 624)

The trial court entered its JUDGMENT FOR ATTORNEY'S FEES AND COSTS PURSUANT TO MAR 7.3 on January 29, 2013, eleven days after Johnson's Notice of Appeal was filed. RAP 2.4(g) provides that Johnson's appeal from the decision on the merits brings up for review the award of attorney fees entered after her appeal was filed. (CP)

VI. ARGUMENT

(Argument applicable to all assignments of error)

The November 7, 2012, order denying defendant Johnson's motion for summary judgment (Appendix pp. 9 – 16) not only denies summary judgment

but goes further and precludes Johnson from asserting her defense of immunity and claims for an award of expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510 at trial:

> "This court concludes that the conduct of defendant here is not within the scope of RCW 4.24.510. Therefore, defendant's motion to dismiss is denied, and the issue shall not be asserted at trial. The issue for trial is whether defendant acted with malice, or whether there is some explanation for her call to police and her assertion that plaintiff violated the restraining order."
> (CP 348, l. 5 - 10)

The matter was reassigned from Judge Sharon S. Armstrong to Judge Michael J. Hayden for trial.

After being on standby for two days the parties appeared in Judge Hayden's courtroom on December 19, 2012, for trial. Rather than go forward with a jury trial, the parties entered into a stipulated judgment which preserves Johnson's claims under RCW 4.24.510 for appeal. (CP 449 – 454) A true copy of the stipulated judgment is attached at Appendix pp. 17 -22

Johnson's motion for summary judgment is based on her claim of immunity under RCW 4.24.510. Summary judgment should have been granted and Filion's claims against her should have been dismissed on Johnson's CR 12(b)(6) motion filed in October 2008 (CP 36 -63) and on her motion for summary judgment filed in October 2012. (CP 162 – 172; CP 173 – 185)

The purpose of summary judgment is to avoid a useless trial. *Moore v. Pac. NW Bell*, 34 Wn.App. 448, 662 P.2d 398 (1983). The trial court's denial

of Johnson's motions required the parties to continue with useless, time-consuming, and expensive litigation.

The purpose of the immunity granted by RCW 4.24.510 is to prevent the filing of a lawsuit in the first place. This court has held that:

> "It is particularly important that good faith (or its absence) in a qualified immunity situation be determined promptly ... a prompt determination is vital because qualified immunity is not simply a defense to liability but a protection from suit." *Dutton v. Washington Physicians Health Program, 87 Wash.App.* 614, 622-23, 943 P.2d 298 (1997).

Even more so in a case such as this where unqualified absolute statutory immunity applies.

RCW 4.24.500 explicitly recognizes that *"The costs of defending against such suits can be severely burdensome."* Johnson's repeated requests for dismissal based on RCW 4.24.510 were denied by the trial court. As a result, both sides continued to incur substantial attorneys' fees, costs, and expenses in this matter.

Filion should not have filed this lawsuit in the first place. When Johnson first asserted her RCW 4.24.510 immunity defense, Filion should have recognized that his claims are barred and taken this case no further.

The superior court's order denying Johnson's motion for summary judgment (Appendix pp. 9 – 16) states

> "However, because trial is imminent, the court takes this opportunity to discuss whether RCW 4.24.510, Washington's Anti-SLAPP statute, applies to these facts at all."
>
> (CP 342 l. 9 – 12)

> " * * * the content of defendant's call to police concerned a private matter: her attempt to keep the husband off her property so she could complete her packing. The expression was made privately, in a call to police, not in a public statement. And the purpose of the speech served her private concern to keep the husband off her property, not a public discussion."
> (CP 347 l. 17 – 22)
>
> "This court concludes that the conduct of the defendant here is not within the scope of RCW 4.24.510."
>
> (CP 348 l. 5 – 6)

The November 7, 2012 order reviews the statutory history of RCW 4.24.500 et. seq., discusses how the courts have applied the immunity granted by RCW 4.24.510, and concludes, in essence, that the 2010 enactment of RCW 4.24.525 render RCW 4.24.510's grant of immunity no longer available to citizen's protected by restraining orders and, by implication, not available to persons protected by RCW Chapter 26.09 restraining orders who report violations to law enforcement through a call to 911 or otherwise.

RCW 4.24.500 provides that:

> "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."

RCW 4.24.510 provides that:

> "A person who communicates a complaint or information to any branch or agency of federal, state, or local

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

The 2002 statutory amendments to RCW 4.24.510 removed the "good faith" element and made the grant of immunity under RCW 4.24.510 absolute and unqualified. There is no issue of "good faith" on the question whether Johnson is protected by immunity under RCW 4.24.510. Immunity under RCW 4.24.510 is not qualified or conditioned upon considerations of whether the communication to the government agency by the target of the lawsuit was made in good faith. *Bailey v. State*, 147 Wn.App. 251, 260-63, 191 P.3d 1285 (2008).

Although RCW 4.24.500 references protection for "good faith" reports, as explained in *Bailey*, intent statements do not control over the express language of an otherwise unambiguous statute. Id. 147 Wn. App. at 262-63. The legislative decision to remove a good faith reporting requirement from RCW 4.24.510 cannot be undone by its failure to similarly amend the intent section. Id. See also *Lowe v. Rowe*, 294 P.3d 6 (Decided 12/06/2012; Ct of App Div 3 case no. 30282-2; Publication Ordered Jan. 31, 2013)

For RCW 4.24.510 immunity to apply, Johnson only needed to establish that she communicated to law enforcement concerning a matter within its responsibility. She so established. Filion admits that Johnson so established. The trial court erred in concluding that the RCW 4.24.510 statutory immunity does not apply to Johnson's August 1, 2006 call to 911 and report to the responding law enforcement officer.

Johnson is entitled to the protection of immunity under RCW 4.24.510 because Filion's claims against her are based on her communication to the 911 call center and to the responding law enforcement officer regarding a "matter reasonably of concern to that agency or organization."

This court has held that RCW 4.24.510 immunity applies to communications with the police and law enforcement. *Dang v. Ehredt*, 95. Wn. App. 670, 977 P.2d 29, review denied. 139 Wn.2d 1012 (1999) (bank employees called 911 to report what they mistakenly believed was a counterfeit check); to communications with officials of a land development division and county executive. *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697, review denied, 125 Wn.2d 1010 (1994); and to communications with judicial offices such as Superior Court Administration. *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 20 P.3d 946 (2001).

The facts of this case are similar to *Dang v. Ehredt,* supra. In *Dang* a bank, through its employees, called 911 to report that *Dang* was attempting to pass a counterfeit check. The police came to the bank and arrested *Dang,* who

later sued the bank and its employees among others for damages. When it was later determined that the check was valid and not counterfeit, *Dang* was released and the charges were dismissed. The *Dang* court held that the bank and its employees, who did nothing to restrain or otherwise imprison Ms. Dang other than call and make a report to 911, are entitled to immunity from liability for their actions under RCW 4.24.510.

Synopsis of RCW 4.24.510 Statutory History:

The operative provision of the act to this case is RCW 4.24.510. As originally enacted, this statute provided that any "person who in good faith" communicated to a government agency "any matter reasonably of concern" was "immune from civil liability" for claims based on that communication. Laws of 1989, ch. 234, § 2. The act also provided that the individual could recover "costs and reasonable attorneys' fees." Id. After a 1999 amendment[1] to add reports to self-governing organizations, the statute was again amended in 2002. Laws of 2002, ch. 232, § 2. It then assumed its current form:

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

[1] 2 Laws of 1999, ch. 43, § 1.

> incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510 (2002).3

The 2002 amendments eliminated the "good faith" reporting language of the 1989 law and created statutory damages of $10,000, which could be denied if the communication was made in bad faith. There was no amendment to the statement of intent found in RCW 4.24.500.

The 2002 legislation had its own intent section, which clearly identified SLAPP actions as the target of the expanded statute, and identified those cases in terms of actions taken against individuals who had communicated "on a substantive issue of some public interest." Laws of 2002, ch. 232, § 1. Citing this language, the superior court's order reasons that Johnson's August 1, 2006, report to law enforcement of Filion's restraining order violation does not present an issue of public interest and, therefore, the anti-SLAPP statutes do apply to Filion's lawsuit against her.

This conclusion ignores both the stated intent codified in RCW 4.24.500 to protect individuals and the operative language of subsection .510 that an individual who communicates to local government

> "is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization."

The language of section 4.24.510 broadly grants immunity from civil liability for communications to an agency concerning a matter "reasonably of concern to that agency." There is no doubt that giving effect to the protection extended by RCW Chapter 26.09 restraining orders and the enforcement of the state criminal laws, specifically RCW 26.50.110 is a matter of concern to this state's law enforcement agencies.

Johnson's call to 911 and her report of Filion's restraining order violation was clearly a matter within the concerns of law enforcement. The superior court's ruling that Johnson's report is not protected by immunity under RCW 4.24.510 is in error.

See Justice Madsen's concurring opinion in *Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2nd 467, 238 P.3d 1107 (2010) which discusses the statutory history of RCW 4.24.510.

The trial court's November 71, 2012 order denying Johnson's motion for summary judgment (Appendix pp. 9 – 16) reasons that Johnson's August 1, 2006 call to 911 and her report of Filion's restraining order violation is not protected by RCW 4.24.510 because making a call to the police is a private matter rather than an expression of political activity:

> "Does the wife's call to the police meet the definition of **an action involving public participation and petition**? The wife's call to police does not meet the definition of 2(a), (b), (c), or (d) because it was not made in a "proceeding", was not reasonably likely to "encourage public participation", and was not made in "a place open to the public" or in "a public forum" concerning "an issue of public concern." Section 2(e), which permits lawful conduct in furtherance of

> the exercise of the constitutional right of petition, refers to Washington Constitution, art. 1, section 4, which provides that "The right of petition and of the people peaceable to assemble for the common good shall never be abridged." This section has reference only to the exercise of political rights. Housing Auth. v. Saylors, 87 Wn. 2d 732 (1976). The state right is consistent with the First Amendment. Richmond v. Thompson, 79 Wn. App. 327 (1995), aff d, 130 Wn. 2d 368 (1996). **Making a call to police is not an expression of political activity.**
>
> (November 7, 2012, Order Denying Defendant's Motion for Summary Judgment, CP 341 – 348, at CP 36 l. 1 – 13) (emphasis in **bold** added)

The trial court seems to reason that the enactment of RCW 4.24.525 in 2010 (Laws of 2010 c 118, § 2 eff. 6/10/2010.) reduced the protection afforded by RCW 4.24.510. However, there is nothing in RCW 4.24.525 which purports to amend or detract from the operation and scope of the immunity granted by RCW 4.24.510.

In this regard, the trial court's November 7, 2012 order states as follows:

> The scope of the anti-SLAPP statute, and what constitutes a matter of public concern, were clarified in the 2010 amendments to the statute. Those amendments added section RCW 4.24.525, which provides for a "special motion to strike claim." The motion to strike was intended to stay discovery in a SLAPP suit and dismiss it early, if certain showings are made.
>
> The new section applies to any claim that is based on an action involving public participation and petition.
>
> > [subsections (a) – (e) of RCW 4.24.525(2) are then listed here verbatim in the order]
>
> Section 4(a) authorizes a party to bring a special motion to strike any claim that is based on an action involving public

> participation and petition, as defined above. Section 4(b) provides that the moving party has the initial burden of showing **the claim (in the SLAPP suit) is based on an "an action involving public participation and petition."** If the moving party meets this burden, the responding party must establish by clear and convincing evidence a probability of prevailing on the claim. If the responding makes this showing, then the motion to strike is denied.
>
> In this case, a prior decree of dissolution between plaintiff and defendant contains both mutual restraining orders and a provision requiring the husband to come onto the wife's property to retrieve his personal property at a mutually agreeable time. Counsel for the parties arranged such a time, to occur the last day before the property was to be delivered to the new owners. **The evidence is expected to show the wife unilaterally chose to exclude the husband from the property because she was not finished packing.** She called the police and he was arrested. She did not provide information to the police about the pre-arranged pick-up of his property. The prosecuting attorney, being advised of this additional information, dismissed the charges against the husband. The husband then sued the wife for malicious prosecution. Whether he prevails on that claim turns on whether he establishes the wife's malice.
>
> (emphasis in **bold** added)
>
> (CP 343 l. 22 to CP 345 l. 5)

The record shows that the wife, Johnson, did not "unilaterally choose to exclude the husband from the property because she was not finished packing" as stated in the above quoted section of the November 7, 2012 order. The husband was excluded from the premises by the three year restraining provisions of the Snohomish County Superior Court's Decree of Dissolution which had been entered just 60 days prior to Filion's August 1, 2006, restraining order violation. (CP 217 l. 18 to 218 l. 16)

The trial court's November 7, 2012 order cites a number of Court of Appeals decisions at CP 343, l. 6 – 15, in support of the assertion that for immunity under RCW 4.24.510 to be available, "the protected communication must concern issues of public interest or social significance." (CP 343 l. 6 – 15) However, a close reading of the cited cases reveals that none of them stand for the assertion for which they are cited in the order.

The 2010 enactment of RCW 4.24.525 was not accompanied by any change or amendment to RCW 4.24.500 or 4.24.510.

As an additional basis for denying Johnson's motion for summary judgment the superior court's November 7, 2012, order states that:

> "Defendant previously brought the same motion to dismiss, and the motion was denied by Judge McBroom on November 21, 2008. KCLCR 7(b)(7) bars the remaking of the same motion to a different judge absent " a showing by affidavit any new facts or other circumstances that would justify seeking a different ruling from another judge."
>
> "Defendant has not made such a showing."
>
> (CP 342 l. 1 – 6)

It is true that Johnson raised the immunity defense under RCW 4.24.510 in a CR 12(b)(6) motion to dismiss in October 2008. (CP 26 – 63) and that the motion was denied. (CP 109).

That the motion was filed previously and denied does not preclude the court from revisiting and reconsidering Johnson's claim of the RCW 4.24.510 immunity defense. CR 54(b) provides in the last clause that:

> " * * * any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties."

Under the plain terms of CR 54(b), the November 21, 2008 Order on Civil Motion, which denies defendant Johnson's 12(b)(6) motion for dismissal of plaintiff's claims on the basis of RCW 4.24.500 - .510, was subject to revision by this court at any time.

CR 54(b) provides, inter alia, that:

> " * * * In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and **the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."**

Furthermore, CR 54(c) provides that

> " * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

It was an abuse of discretion for the trial court to deny Johnson's summary judgment motion on this ground. Doing so forced the parties to engage in further useless litigation and prepare and appear for jury trial and potentially waste the time

and resources of the court, the parties, the jurors, and the witnesses who may be called to testify.

The superior court's decision states:

> "Nor has the defendant pled the statute as a defense or affirmative defense, and the date for amending claims has long passed. The motion should be denied for these reasons."
> (CP 342 l. 7 – 12)

Johnson pled the RCW 4.24.510 immunity claim as an affirmative defense in writing in her October 2008 CR 12(b)(6) motion to dismiss, which was heard as a motion for summary judgment, and again in her October 2012 CR 56 motion for summary judgment. (CP 26 – 63; CP 162 – 165)

Johnson's RCW 4.24.510 immunity defense has been in this case for since October 2008. There is no surprise or prejudice to plaintiff. It is an affirmative defense, not a counterclaim.

Affirmative defenses may be raised either in an answer, in a CR 12(b) motion, or tried by the actual or implied consent of the parties. Johnson's defense of immunity under RCW 4.24.500 - .510 was properly raised in October 2008, and was addressed on the merits multiple times by Filion, including in the proceedings on Johnson's October 2012 summary judgment motion.

A filing fee is not required for an affirmative defense.

An affirmative defense s raised in a CR 12(b) motion is not waived by failing to plead it in a document labeled "answer". Civil Rule (CR) 8(c)

requires responsive pleadings to set forth "any ... matter constituting an avoidance or affirmative defense," including statutes of limitation. Affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the parties' express or implied consent. *In re Estate of Palmer*, 187 P.3d 758, 145 Wn.App. 249, 258 (2008); *Harting v. Barton,* 101 Wash.App. 954, 962, 6 P.3d 91 (2000).

In *Henderson v. Tyrrell*, 910 P.2d 522, 80 Wn.App. 592 (1996) this court explained that

> "Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties." Bernsen v. Big Bend Elec. Coop., 68 Wash.App. 427, 433-34, 842 P.2d 1047 (1993). However, in light of the rule's policy to avoid surprise, affirmative pleading sometimes is not required:
>
> "It is to avoid surprise that certain defenses are required by CR 8(c) to be pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. Tillman v. National City Bank, 118 F.2d 631, 635 (2d Cir.1941) [cert. Denied, 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521 (1941)]. Also, objection to a failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense. Joyce v. L.P. Steuart, Inc., 227 F.2d 407 (D.C.Cir.1955). There is a need for such flexibility in procedural rules. In the present case, the record shows that a substantial portion of [910 P.2d 541] plaintiff's trial memorandum and the entire substance of the hearing on summary judgment concerned the effect of the liquidated damages clause. **To conclude that**

> **defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c), and we refuse to reach such a result.**
> (Emphasis in **bold** added)

Even where an affirmative defense is not "(1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties", the defense is not waived. "[I]f the substantial rights of a party have not been affected, noncompliance is considered harmless and the defense is not waived." See *Bernsen v. Big Bend Elec. Co-op., Inc.*, 842 P.2d 1047, 68 Wn.App. 427 (1993) where the appellate court ruled that the affirmative defense of failure to mitigate was not waived though not affirmatively pleaded nor asserted in a motion under CR 12(b) because the parties had argued mitigation and the trial court ruled on it. Thus, the defense of mitigation was treated as if raised in the pleadings.

Filion cannot claim prejudice or surprise against Johnson's defense of immunity under RCW 4.24.510 after having fully briefed and argued the issue on Johnson's CR 12(b) motion tin 2008 and again in 2012. Filion's argument that Johnson's immunity defense is waived is ludicrous at best and mendacious at worst.

The state of Washington has a strong policy of protecting parties from domestic violence and from violations of restraining orders issued in dissolution and domestic violence cases. See RCW 26.50.110; RCW Chapter 10.99; State v. Bunker, 169 Wn.2d 571, 238 P.3d 487 (2010).

VII. ATTORNEY FEES

Appellant Johnson requests an award of her expenses and reasonable attorney fees on this appeal pursuant to RCW 4.24.510 which provides that:

> " * * * A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. * * *."

Upon prevailing on this appeal appellant Johnson is entitled to an award of attorney fees under RCW 4.24.510 both on appeal and in the trial court. *Lowe v. Rowe*, 294 P.3d 6 (Decided 12/06/2012; Ct of App Div 3 case no. 30282-2; Publication Ordered Jan. 31, 2013); Bailey v. State, 191 P.3d 1285, 147 Wn.App. 251 (2008).

VIII. CONCLUSION

Appellant respectfully asks this Court to:

1. Reverse the trial court's November 6, 2012 order (filed November 7, 2012) denying Johnson's motion for summary judgment.

2. Determine and order on the basis of the uncontroverted evidence that there is no genuine issue of material fact and that Johnson is entitled to judgment as a matter of law that she is immune from civil liability for Filion's claims and lawsuit which are based on Johnson's August 1, 2006 call to 911 and report to law enforcement.

3. Reverse the trial court's decision of December 19, 2012 which precludes and bars Johnson from asserting her RCW 4.24.510 immunity defense at trial.

4. Reverse the Stipulated Judgment of December 19, 2012, to the extent that on the basis of the November 7, 2012 order denying Johnson's motion for summary judgment, it precludes and bars Johnson from asserting her RCW 4.24.510 immunity defense at trial.

5. Determine and order that Johnson has improved her position from the arbitration award (CP 110 – 111) and that Filion was not and is not entitled to an award of costs and reasonable attorney fees under MAR 7.3 against Johnson.

6. Determine and order on the basis of the uncontroverted evidence that there is no genuine issue of material fact and that Johnson is entitled to judgment as a matter of law that her August 1, 2006 call to 911 and report to law enforcement were made in good faith and, accordingly, that Johnson shall have judgment against Filion for $10,000.00 statutory damages under RCW 4.24.510.

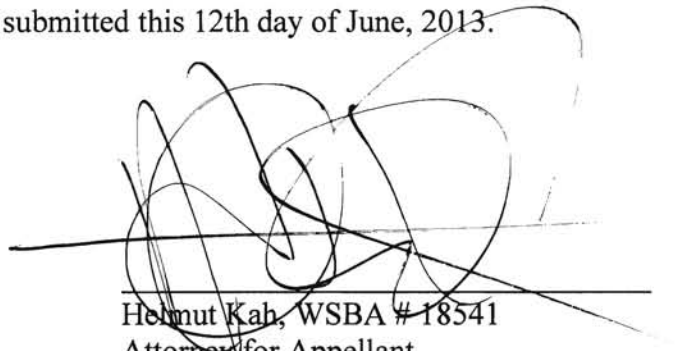
7. Dismiss Filion's claims against Johnson s with prejudice.

8. Reverse and vacate the judgment for attorney fees and costs awarded to Filion against Johnson under MAR 7.2 on January 29, 2013. (CP 625 – 627)

9. Award Johnson her costs, expenses and reasonable attorney fees on this appeal pursuant to RCW 4.24.510.

10. Award Johnson her costs, expenses, and reasonable attorney fees in this matter both on appeal and in the trial court pursuant to RCW 4.24.510, including Johnson's costs, expenses, and attorney fees incurred on the prior appeal in this matter.

Respectfully submitted this 12th day of June, 2013.



Helmut Kah, WSBA # 18541
Attorney for Appellant

§ 4.24.500. Good faith communication to government agency - Legislative findings - Purpose

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.

Cite as RCW 4.24.500

History. 1989 c 234 § 1.

4.24.510 Communication to government agency or self-regulatory organization -- Immunity from civil liability.

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

[2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

NOTES:

Intent -- 2002 c 232: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." [2002 c 232 § 1.]

§ 4.24.525. Public participation lawsuits - Special motion to strike claim - Damages, costs, attorneys' fees, other relief - Definitions

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4) (a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5) (a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the

court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6) (a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others

similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

Cite as RCW 4.24.525

History. Added by **2010 c 118, § 2**, eff. 6/10/2010.

Note:

Findings -- Purpose -- 2010 c 118 : "(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate." [2010 c 118§ 1.]

Application -- Construction -- 2010 c 118 : "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." [2010 c 118§ 3.]

Short title -- 2010 c 118 : "This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation." [2010 c 118§ 4.]

FILED
KING COUNTY, WASHINGTON

FEB 08 2008

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Marriage of:

GARY FILION,

Plaintiff,

vs.

JULIE JOHNSON, and OLSON and OLSON, PLLC, a legal services corporation,

Defendants.

IC JUDGE: Hon. Joan DuBuque

NO. 07-2-06353-6 SEA

ORDER GRANTING MOTION TO DISMISS AS TO DEFENDANTS OLSON & OLSON, PLLC

(ORDMS)

The court received Defendant's Motion to Dismiss Under CR12(b)(6) as to Defendant Olson & Olson, PLLC's motion for order of dismissal. Having reviewed the motion and the court file, the Court finds that as a matter of law, the defendants Olson owe no duty of care to the Plaintiff, who was an adversarial party in a dissolution of marriage action in which Defendants Olson represented the wife, Julie Johnson. It is hereby ORDERED that the Complaint for Damages action is dismissed as to Defendants Olson & Olson, PLLC, with prejudice.

Dated: 2/8/08

Hon. Joan DuBuque

Presented by:

Mark D. Olson, WSBA #9656
Defendant

Timothy McGarry, WSBA #8486
Attorney for Plaintiff

OLSON & OLSON, PLLC
1601 FIFTH AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101-1651
TELEPHONE: (206) 625-0085
FACSIMILE: (206) 625-0176

Hon. Sharon S. Armstrong

FILED
KING COUNTY, WASHINGTON
NOV 07 2012
SUPERIOR COURT CLERK
BY Carolina Ceja
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LESTER FILION as Personal Representative of the Estate of GARY FILION, Plaintiff, vs. JULIE JOHNSON,, Defendant.	No. 07-2-06353-6SEA ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on defendant Julie Johnson's motion for summary judgment, under RCW 4.24.510, to dismiss plaintiff's malicious prosecution claim against her. The court has heard oral argument and considered the following materials:

1. Defendant Johnson's (Corrected) Motion for Summary Judgment
2. From the court file, sub numbers: 1, 8, 10, 15, 21, 27, 30, 56, 57, 67, 70, 122 submitted by defendant
3. Plaintiff's Response
4. Declaration of Jamila Taylor

Hon. Sharon S. Armstrong
King County Superior Court
King County Courthouse, 516 Third Avenue
Seattle, Washington 98104
(206) 296-9363

5. Defendant's (Corrected) Reply.

Defendant previously brought the same motion to dismiss, and the motion was denied by Judge McBroom on November 21, 2008. KCLCR 7(b)(7) bars the remaking of the same motion to a different judge absent " a showing by affidavit any new facts or other circumstances that would justify seeking a different ruling from another judge."

Defendant has not made such a showing. Nor has the defendant pled the statute as a defense or affirmative defense, and the date for amending claims has long passed. The motion should be denied for these reasons. However, because trial is imminent, the court takes this opportunity to discuss whether RCW 4.24.510, Washington's Anti-SLAPP statute, applies to these facts at all.

The statute was adopted in 1989, amended in 2002 (to remove a good faith requirement and to expand protection to the right of petition), and amended again in 2010 (adding a motion to strike procedure).

RCW 4.24.510 provides that:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonable of concern to that agency or organization.

The purpose of the statute is to protect a person's exercise of First Amendment rights and rights under Article I, section 5 of the Washington State Constitution, concerning "a substantive

issue of some public interest or social significance." Laws 2002, ch. 232, section 1. The amendments made clear that the communication to a government agency need not be a good faith report. Bailey v. State, 147 Wn.App. 251 (2008). The statute protects a defendant's statements even when they are made in bad faith or are defamatory per se.

Several Washington courts, however, have held that the protected communication must concern issues of public interest or social significance. Valdez-Zontek v. Eastmont School Dist., 154 Wn. App. 147 (2010); Eugster v. City of Spokane, 139 Wn. App. 21 (2007); Skimming v. Boxer, 119 Wn. App. 748 (2004). The Washington Supreme Court in Right-Price Recreation, LLC v. Connells Prairie Community Council, 146 Wn. 2d 370 (2002), cert. denied 124 S. Ct. 1147, rehearing denied 124 S. Ct. 1708, characterized the statute as involving communications made to influence a governmental action or outcome, which result in (1) a civil complaint or counterclaim (2) filed against nongovernmental individuals or organizations on (3) a substantive issue of some public interest or social significance.

On the other hand, calls to police have been held protected under the statute. For example, in Dang v. Ehredt, 95 Wn. App. 670, rev. denied, 139 Wn.2d 1012 (1999), bank employees' 911 calls to report an alleged counterfeit check was protected by the anti-SLAPP statute.

The scope of the anti-SLAPP statute, and what constitutes a matter of public concern, were clarified in the 2010 amendments to the statute. Those amendments added section RCW

4.24.525, which provides for a "special motion to strike claim." The motion to strike was intended to stay discovery in a SLAPP suit and dismiss it early, if certain showings are made.

The new section applies to any claim that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

Section 4(a) authorizes a party to bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined above. Section 4(b) provides that the moving party has the initial burden of showing the claim (in the SLAPP suit) is based on an "an action involving public participation and petition." If the moving party meets this burden, the responding party must establish by clear and convincing evidence a probability of prevailing on the claim. If the responding makes this showing, then the motion to strike is denied.

In this case, a prior decree of dissolution between plaintiff and defendant contains both mutual restraining orders and a provision requiring the husband to come onto the wife's property to retrieve his personal property at a mutually agreeable time. Counsel for the parties arranged such a time, to occur the last day before the property was to be delivered to the new owners. The evidence is expected to show the wife unilaterally chose to exclude the husband from the property because she was not finished packing. She called the police and he was arrested. She did not provide information to the police about the pre-arranged pick-up of his property. The prosecuting attorney, being advised of this additional information, dismissed the charges against the husband. The husband then sued the wife for malicious prosecution. Whether he prevails on that claim turns on whether he establishes the wife's malice.

Does the wife's call to the police meet the definition of an action involving public participation and petition? The wife's call to police does not meet the definition of 2(a), (b), (c), or (d) because it was not made in a "proceeding", was not reasonably likely to "encourage public participation", and was not made in "a place open to the public" or in "a public forum" concerning "an issue of public concern." Section 2(e), which permits lawful conduct in furtherance of the exercise of the constitutional right of petition, refers to Washington Constitution, art. I, section 4, which provides that "The right of petition and of the people peaceable to assemble for the common good shall never be abridged." This section has reference only to the exercise of political rights. Housing Auth. v. Saylors, 87 Wn. 2d 732 (1976). The state right is consistent with the First Amendment. Richmond v. Thompson, 79 Wn. App. 327 (1995), aff'd, 130 Wn. 2d 368 (1996). Making a call to police is not an expression of political activity.

Tom Wyrich analyses the effect of the 2010 amendments in his Washington Law Review article "A Cure for a 'Public Concern': Washington's New Anti-SLAPP Law" (October 2011). The author traces the origins of the 2002 amendment to a similar California statute, and argues under the "borrowed statute" doctrine that the similarities to the California law permit reliance on California precedent, while the differences require evaluation of other authorities. Specifically, the Washington amendment departs from California law in its use of "issues of public concern" rather than "issues of public interest." The author argues that "issues of public concern", which is a narrower standard, has a well-established meaning in Washington jurisprudence, dating to the U.S. Supreme Court decision Connick v. Myers, 461 U.S. 138 (1983).

For the past twenty-five years, Washington courts have decided whether speech is "of public concern" by adopting the U.S. Supreme Court's test from Connick. In Connick, an assistant district attorney circulated a questionnaire around the district office concerning office morale, an office transfer policy, the need for a grievance committee, and the level of confidence in superiors. The district attorney learned of the questionnaire and fired her. The U.S. Supreme Court held that the attorney's expressive conduct did not pertain to a matter of public concern, and did not deserve First Amendment protection.

The Court analyzed three factors: the content, the form, and the context of the speech. When analyzing the content, courts look to see if the expression relates to public, rather than private, matters. When analyzing the form, court consider whether the actor made the expression public, or if the speech was made in a private manner. And when analyzing the context, courts look to the purpose of the speech, particularly whether the speech was part of a public discussion or whether it merely served a private purpose. Wyrich at 685-686.

Applying the Connick three-part test here, the content of defendant's call to police concerned a private matter: her attempt to keep the husband off her property so she could complete her packing. The expression was made privately, in a call to police, not in a public statement. And the purpose of the speech served her private concern to keep the husband off her property, not a public discussion.

This interpretation is consistent with the Washington State's Constitution's guarantee of free speech, which is broader than its federal counterpart. Wash. Const. art. I, section 5 provides

that "Every person may freely speak, write and public on all subjects, being responsible for the abuse of that right." In this case, while defendant had the right to make a complaint to police, she is responsible for abuse of that right.

This court concludes that the conduct of the defendant here is not within the scope of RCW 4.24.510. Therefore, defendant's motion to dismiss is denied, and the issue shall not be asserted at trial. The issue for trial is whether defendant acted with malice, or whether there is some explanation for her call to police and her assertion that plaintiff violated the restraining order.

Based on the foregoing,

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

DATED this 6TH day of November, 2012

Sharon A. Armstrong

Honorable Sharon S. Armstrong

Hon. Sharon S. Armstrong
King County Superior Court
Courthouse, 516 Third Avenue
Seattle, Washington 98104
(206) 296-9363

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KING COUNTY
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SEATTLE, WA.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ESTATE OF GARY FILION (by and through LESTER FILION as Personal Representative) Plaintiff, v. JULIE JOHNSON, Defendant.	NO. 07-2-06353-6 SEA **STIPULATED JUDGMENT**

STIPULATED JUDGMENT

This matter was set for trial on December 19, 2012. The Plaintiff Estate (Plaintiff passed away in 2010) appeared through its personal representative Lester Filion and trial counsel, Noah Davis and Jamila Taylor of IN PACTA PLLC. Defendant Julie Johnson appeared through her trial counsel, Helmut Kah.

Although a jury demand had been filed by Plaintiff, in order to expedite the Court's resolution of this matter, counsel for the Parties have agreed to waive the Parties' right to a jury trial and have stipulated to entry of this Judgment by the Court.

While the Parties disagree on many of the facts, they can agree to the following

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stipulated facts:

This case was premised on the Plaintiff's alleged August 1, 2006 violation of a mutual restraining order contained in a divorce decree which prevented Plaintiff from coming within a certain distance of Defendant Johnson's residence (a copy of the June 1, 2006 divorce decree has previously been filed with the Court and which is incorporated herein).

The Parties also agree that, pursuant to a separate provision in the divorce decree, Gary Filion was to pick up a list of items from the Shoreline Property ("Shoreline Property"). Pursuant to that language in the Decree, the lawyers for the Parties communicated with one another and that one or more letters had been exchanged by the lawyers for the purpose of scheduling Gary Filion to pick up certain personal property from the "Shoreline Property" on August 1, 2006 at 4pm.

The Shoreline Property had been sold and the closing (including the turn-over of possession to the buyer) was to be completed on August 1st by approximately 9pm.

On August 1st, 2006, before 4pm (and therefore before Mr. Filion's arrival at the Shoreline Property) he had been informed by real estate agent Pat Dornay during a telephone call that Julie Johnson would likely still be present at the Shoreline Property at 4pm (as she had not yet moved out).

Ultimately, a short time after Mr. Filion arrived at 4pm, August 1, 2006 at the Shoreline residence with a moving truck and movers, he was told by a third party (who had come out of, or from, the Shoreline Residence) that Julie Johnson was present in the home

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and that she had called the police. Mr. Filion then left with his parents (whom he had also asked to be present at 4pm at the Shoreline Residence) without collecting his personal property.

Defendant Johnson did in fact call 911. In response to the call, an officer from the King County Sheriff's office came to the Shoreline Property and took a statement from Defendant Johnson. Thereafter, Mr. Filion was later charged with violation of the restraining order. After Mr. Filion hired a criminal defense attorney, the charges were dismissed. Plaintiff Filion then filed a civil action for malicious prosecution.

Although the Parties dispute the nature of the conversations between Parties and their counsel (or between the Parties and third parties) and although the Parties disagree as to the nature of the agreements that emanated from these conversations, for purposes of trial, the Parties agree that Plaintiff has the burden of proof on the estate's malicious prosecution claim and that the issue that had remained for trial was whether the Defendant acted with malice (or reckless disregard) as this issue is defined and set forth in Judge Armstrong's prior Orders on Summary Judgment.

And while the Parties disagree on whether or not Plaintiff would have ultimately been successful on the claim for malicious prosecution (i.e. in proving the Defendant acted with malice when she called the police and filed a police report), the Parties can agree that the trial has become useless or futile because regardless of whether or not the Plaintiff is successful on its claim, the Defendant is unable to improve her position from mandatory arbitration (in the absence of her proffered immunity defense under RCW 4.24.510). In order to improve her

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position, Defendant would have to prevail on her immunity defense under the anti-slapp statute: RCW 4.24.510. However, for the reasons stated in Judge Armstrong's (two) Orders Denying Summary Judgment, the Defendant's anti-slapp defense was denied (and the Defendant was precluded from raising anti-slapp at trial). Thus, without the immunity defense, the Defendant is unable to improve her position at trial (that is, from the arbitration award which awarded no damages to either Party).

For purposes of preserving her argument on appeal and making a record, the Parties agree that the Defendant did in fact again assert her anti-slapp defense to the trial Court before the jury trial was to begin on December 19, 2012, but the Court, in reliance on Judge Armstrong's prior ruling (which precluded the Defendant's attempt to raise the anti-slapp statute (RCW 4.24.510)), also precluded and barred the Defendant from raising the 4.24.510 immunity defense at trial.

Thereafter, the Parties stipulate that judgment be entered by the Court as follows:

1) That (solely for the purpose of the malicious prosecution claim and not with relation to the anti-slapp defense) because the Plaintiff may not be able to prove that the Defendant acted with malice when she called the police and followed with a reported violation of a mutual restraining order, Plaintiff's claim of Malicious Prosecution fails (solely for purposes of this stipulated judgment without prejudice to a new trial if one ever becomes necessary);

2) That the Defendant had filed for a trial de novo from Mandatory Arbitration but, in

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the absence of the immunity defense under RCW 4.24.510) cannot improve her position from the Arbitration Award and that therefore Plaintiff is entitled to reasonable attorney's fees and costs in accordance with the MARs. And thus Plaintiff shall bring its Motion for attorney's and costs to be heard without oral argument and within the time prescribed under the MARs.

3) That the Caption of this Judgment be used as the Caption for all future pleadings and filings with the Court.

4) That the following exhibits be filed be admitted into evidence and filed with the Court:

Declaration of Gary Filion

Declaration of Mark Olsen with attachments

Declaration of Pete Jorgenson

Police Report of King County Sheriff's Office Taken 8/1/06

Declaration of Pat Dornay

~~#4~~ are #5) Also added below

SO ORDERED AS THE JUDGMENT OF THE COURT this 19 Day of December 2012

Judge Michael Hayden
King County Superior Court

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THE ABOVE FACTS AND JUDGMENT ARE STIPULATED TO BY THE PARTIES THROUGH COUNSEL:

IN PACTA PLLC

Noah C. Davis, WSBA #30939
Jamila A. Taylor, WSBA #32177
For the Estate of Gary Filion

Helmut Kah, WSBA# _____
For Defendant Julie Johnson

#5) The stipulation & judgment is not intended to be construed to prejudice or preclude Defendant's rights to appeal the denial of her claim for the defense of (immunity/anti-SLAPP). RCW 4.24.510

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