69830-3

69830-3

NO. 69830-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

GARY FILION, Plaintiff/Respondent

v.

JULIE JOHNSON, et al., Defendant/Appellant

RESPONDENT'S BRIEF

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I. INTRODUCTION

Despite Gary Filion's efforts to end this lawsuit by voluntarily dismissing his Complaint against his ex-wife Julie Johnson (the Defendant/Appellant),[1] and then, after his death, his Estate's efforts to obtain agreement to voluntarily dismiss the case[2], Julie Johnson will simply not let this case go – all in an effort to obtain sanctions and attorney's fees against Filion's Estate under Washington's anti-SLAPP statute, RCW 4.24.500 *et seq.*[3] And so, despite losing again in the trial court, in an attempt to continue the underlying litigation and force the Estate to prepare for a second trial, Julie Johnson has now filed her third appeal.[4]

As frustrating as Johnson's efforts are to have this case continued when it could have been put to rest long ago, Johnson can blame much of her present dilemma on her own choices (the failure to accept voluntarily

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[1] The Order Granting Dismissal under CR 41was appealed by Julie Johnson and reversed by Division One in *Filion v. Johnson*, 63978-1-I on the basis that Filion no longer had an unfettered right to dismiss under CR 41(a) once the arbitrator filed his award since the arbitration, in essence, constituted a trial on the merits. "CR 41(a) cannot be used to circumvent the arbitration statute and the finality of judgments." Opinion, pp 2-3

[2] After substituting in (CP 184), Gary Filion's Estate, and Father, Lester Filion, have been forced to appear and defend the appeal and proceeding. By forced, the Estate means that it has attempted to voluntary dismiss this action on multiple occasions. (VR 38 ¶¶15-25, VR39 ¶¶1-15, VR 43 ¶¶18-25, VR 44 ¶¶1-3; CP 113, CR 41(a) Motion to Dismiss)

[3] And, on the day of trial, prior to entering a stipulated judgment against Johnson, when asked by Judge Michael Hayden, the Estate of Filion again offered to abandon the complaint if Johnson would agree to voluntary dismiss. (No transcript is available, but Johnson could not deny this occurrence).

[4] Johnson also filed a Motion for Discretionary Review on November 14, 2012 (App. Brief pg. 4, CP 355-365) which required an Answer from the Estate of Filion before it was abandoned.

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dismissal on at least three occasions, see FN 2-3) and the failure to have preserved (by pleading) the very basis and foundation for relief in her appeal. And, because she failed to preserve the anti-SLAPP statute by pleading it in her Answer, as either an affirmative defense or as a counterclaim, the trial Court correctly ruled that Johnson was precluded from asserting that defense at trial. Thus, on appeal, the Court may affirm the trial court on this issue alone and need not reach the other issues of the case.

However, even had Johnson pleaded the anti-SLAPP statute in her Answer (or Amended Answer), the anti-SLAPP statute still was correctly precluded by the trial court as a defense because the anti-SLAPP legislation was never intended to apply to a purely private dispute between recently divorced parties fighting over the language of their divorce decree and attempting to use the anti-SLAPP statute as a malicious sword against one other. In addition, the anti-SLAPP defense was never intended to apply, and does not apply, to completely bar malicious prosecution cases. Were the Court of Appeals to reverse the trial court, not only would malicious prosecution cases stand the prospect of being forever barred, but divorcing parties would be free to make up (and file various) allegations against their estranged spouse (from restraining and protection orders to CPS and assault claims) because the defending spouse will have no

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recourse due to fear of the anti-SLAPP defense. Thus, the Estate of Filion asks that the Court of Appeals affirm the trial court.

However, and importantly, the Court of Appeals need not address any of the foregoing issues if it finds that Johnson was not an "aggrieved party" (as required by MAR 7.1 and RCW 7.06.050) and therefore lacked standing to file for a trial De Novo since being "aggrieved" is a pre-requisite to standing to appeal the arbitration award. Because standing may be raised by the Parties or the Court at any time, the Court should reverse and dismiss Johnson's filing of the trial de novo because Johnson (at the time of the trial de novo filing) had not pleaded a counterclaim or affirmative defense – and therefore was never an aggrieved party. [5] The result of this would also be to vacate the judgment for attorney's fees currently held by Filion against Johnson (as there would be no basis for an award of fees for Filion as the prevailing party if there were no appeal in the first place).

II. RE-STATEMENT OF THE CASE

The Johnson v. Filion saga flows from the Parties' marriage, acrimonious divorce proceedings[6] and ultimately from the divorce decree

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[5] Although this issue was raised in Filion 1, it was not addressed by the Court, see FN 4, Filion 1. In addition, RAP 2.5(c)(2) permits the Court of Appeals to revisit issues from a prior appeal in the case.

[6] See, e.g. CP 64-66, Decl. of P. Dornay at CP 65 "I was aware that Julie and Gary Filion were in a contentious dissolution..."; see also CP 257, Order on Motion to Enforce

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issued by the Snohomish County Superior Court on June 1, 2006. (CP 482-491, Decree of Dissolution, attached to Stipulated Judgment begin at 449, hereinafter "Decree CP 482-449") Those events were followed a short time later by Filion being criminally prosecuted (at Johnson's behest) for allegedly violating a mutual restraining order contained in the Parties' divorce decree and then by Filion's Superior Court claim (for malicious prosecution against Johnson). (CP 3-4, Complaint)

After a trial in Snohomish County, in which seven witnesses testified (CP 19-25, Findings of Fact at CP 19), a Decree of Dissolution was entered which ordered mutual restraints against the Parties (precluding them from disturbing the peace of the other or going onto the property of the other) but recognizing that Filion still didn't have the remainder of his personal belongings. And therefore a provision was included in the divorce decree ordering Filion to obtain his personal items:

¶9: The following items shall be picked up the by Husband:

a. Studio 56 vintage Christmas house
b. Golf hand cart, golf roller travel bag
c. Premarital Christmas ornaments
d. Samurai sword with case
e. Cremation ashes of "Siabo"
f. Any yard tools and ladders at the time of closing of the Shoreline house
g. Wedding gifts consisting of Complete 12 piece silver set with serving utensils, large quilt, small Christmas theme quilt (if located)

(Extending Mutual Restraining Order and entering attorney fees award and a sanction against Johnson if she continued to fail to refinance the real estate, awarded to her.)

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and large ceramic ornamental plate (if located) and wedding ….registry if located.

h. Tan sectional leather…sofa, matching tan chair and ottoman, glass topside lamptable, glasstop coffee table, one 3 light floor lamp.

10. The table leaves that belonged to the Wife's father that will be returned to the Wife at the time that the Husband picks up his personal property from the Wife.

(Decree, CP 482-449 at 485, 489-490)

Thus, the divorce decree contained competing language (or an exception to the mutual restraining order), as it required Mr. Filion to pick up his remaining separate property (which based on the communications between divorce counsel, made it clear that this was to be from the former marital home). (Decree, CP 482-449 at 485, 489-90; CP 57, Letter from M. Olson to P. Jorgenson, dated 7/28/06; and CP 99-101, Decl.of P. Jorgenson making clear that the intent is for Filion to pick up his items from the former marital home: "the Shoreline Residence" at CP 100, ¶4, "Julie's" at CP 57; & CP 449-494 Stipulated Judgment at CP 450, lns 8-14, at CP 475, Decl. of P. Jorgenson, ¶4).

But nothing came easy and the lawyers had to spend considerable time going back and forth to find a time and date that the Parties were willing to agree to. (See CP 57, Olson Letter; CP 99-101, Decl. of P.Jorgenson, ¶¶6-7; CP 449-494, Stipulated Judgment at CP 469 & 472) Finally, the Parties agreed on August 1 as the date upon which Filion could finally go to pick up the last of his personal belongings. (Id)

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Significantly for Filion, that August 1 date that the Parties' lawyers had agreed upon (or that Johnson had finally allowed) was set for a mere five (5) hours before the former marital home was to be a turned over at 9pm to a third party as part of a closing/sale. (CP 449-494, Stipulated Judgment at CP 450, lns 15-16; CP 492-494, Decl. of P. Dornay at CP 493, ¶6; CP 3-4, Complaint) So this was the only chance that Mr. Filion had to obtain his personal items. And by that time, it was understood that Johnson should have already moved out. (CP 57, Olson Letter; CP 440-494, Stipulated Judgment) Thus, at the time Filion was to arrive, Johnson was no longer supposed to be living at the Shoreline residence.

Ultimately, on the day that Gary Filion arrived with the movers and his parents (to finally obtain the last of his personal items), Filion was sent away empty handed as a friend of Johnson's shouted at Filion from the home that Julie Johnson was not finished moving, was inside, and was calling the police. (CP 449-494, Stipulated Judgment at 450, lns 23-25) Although he had left the home without speaking to or seeing Johnson (CP 157) and without collecting his things (which could have been placed outside or in the garage if Ms. Johnson really wanted to return them), Julie Johnson did in fact call the police and did instigate a prosecution of Mr. Filion. (CP 449-494, Stipulated Judgment at CP 451, lns 1-3 & CP 477-481, Police Report; CP 5-6, First Amended Complaint) This in turn led

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not only to understandable anguish, but also the cost of having to hire a defense attorney to defend against the false police report (CP 5-6, First Amended Complaint) which was false because Johnson did not report the exception to the restraining order nor the agreement by counsel to the date and time for the property exchange nor the fact that she was no longer to be residing at the home. (See CP 226-230, Police Report, and absence of such facts/reporting; see also CP 314-315, Decl. of J. Taylor, Dep. Tr. of Johnson, attached thereto, CP 325, Lines 17-25)

After being charged and retaining a private attorney, Mr. Filion's criminal defense attorney was able to provide the missing information and have the charge dismissed. (CP 5-6, First Amended Complaint, CP 236 Criminal Docket Report) Upset that he didn't have his belongings and that Johnson was again excluding him from those, that he was wrongfully charged with a crime, that Johnson had filed a false police report and that he had to pay an attorney to defend him against the malicious charge by Johnson, Mr. Filion chose to recoup his attorney's fees by filing a malicious prosecution action against Johnson in the King County Superior Court. (CP 3-4) Filion's reaction was also due to the long and acrimonious private history of the Parties, as well as the false nature of Johnson's police report. (CP 3-4)

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Thus, the Complaint filed by Mr. Filion followed a series of events and retribution or outcroppings of angst between the Parties – a purely private matter which has also, unfortunately, led us back to the Court of Appeals (and which has evolved into Johnson's own counterattack against Filion – through the Anti-SLAPP statute and the use of the appellate process).

Now, for purposes of the present appeal and the ability of the Estate of Filion to defend and support the trial court's decision, there are at least four important considerations that weigh in favor of Filion and against Johnson's application of the Anti-SLAPP statute as a sword against Filion: These are: first, that while Ms. Johnson filed an Answer to the Complaint (CP 8-10, Answer), at no time did Ms. Johnson actually plead an affirmative defense or counterclaim under RCW 4.24.510 (the Anti-Slapp Statute). (See CP 8-10 and no reference to RCW 4.24.500-510). Johnson also did not pay the required fee necessary to assert the counterclaims – a precondition to filing a counterclaim.

After filing the Complaint(s) (CP 3-4, 5-6) and the Answer (CP 8-10), and after a Motion for Summary Judgment filed by Julie Johnson was denied (CP 109), eventually, the case progressed to mandatory arbitration. On the issue of Plaintiff's malicious prosecution claim alone, the arbiter found in favor of Johnson (i.e. thus, the arbiter found in favor of Johnson

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in terms of whether Filion was able to carry the burden of proving all elements of his claim for malicious prosecution). (CP 110-111) The arbiter denied Johnson's requests for fees without stating a reason. (CP 110-111) After disagreeing with the Arbiter's decision (that she was not entitled to the Anti-SLAPP sanction and attorney fees), Johnson requested a trial de novo pursuant to MAR 7.1 and RCW 7.06.050. (CP 649-673, CP 119-121)[7]

However, shortly after the request for a trial de novo, Filion moved for a voluntary dismissal of his action under Civil Rule 41(a). (CP 124-129). Upon the Court's grant of the Motion to Dismiss (CP 130-131, 7/9/09, Order of Dismissal under CR 41), Johnson filed her first notice of appeal.[8] After the Court of Appeals reversed on the basis that Filion no longer had the right to voluntarily dismiss since a trial on the merits had already taken place, and the case was reinstated, and after Johnson refused to voluntarily dismiss the claim without costs or fees to either side (VR 43, lns 20-25, VR 44, lns 1-3), Filion sought to have his malicious prosecution claim disposed of on summary judgment (CP 140-147). In response,

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[7] After the arbiter rendered a decision, Johnson filed a notice of appeal which was at first rejected (as late) by the Arbitration Department (CP 670). Thereafter, Johnson moved to reinstate the appeal and to sanction the Arbitration Department. (CP 649-673) The trial court (Judge Doerty) granted the motion to reinstate the appeal but denied Johnson's request for sanctions. (CP 765-767, Order of J. Doerty, 5/19/09)

[8] Johnson was successful in obtaining reversal solely on the issue that Filion no longer had an automatic right to dismiss after since he had not dismissed before resting (i.e. before proceeding with a trial on the merits in the form of the arbitration hearing).

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Johnson filed her own motion for summary judgment (in which she argued that the Anti-SLAPP statute precluded Filion's claim and entitled her to attorney's fees and sanctions). (CP 162-172, CP 173-185)

After hearing argument from the Parties, the Court issued two Orders denying the Motions for Summary Judgment in part, and granting Filion's Motion in Part by precluding Johnson from asserting the anti-SLAPP statute since she had not preserved that claim or defense in an Answer and since even if she had, it did not apply in this case. (CP 338-340 & CP 341-348)

At trial, for purposes of not having to go through an extended trial and after again acknowledging that Johnson would not agree to a voluntary dismissal (see FN 10) the Parties acknowledged that without the anti-SLAPP claim that Johnson could not improve her position from the arbitration and that Filion was entitled to attorney's fees and costs (regardless of whether he won on his malicious prosecution claim). (CP 449-494 at CP 449-451) Thus, the Parties entered into a stipulated judgment.[9] (CP 449-494) A judgment was then entered on the award of attorney's fees and costs in the amount of $13,024.25. (CP 625-627)[10]

[9] Stipulated Judgments and Judgments rendered by the Court after a trial have the same force and effect. See e.g. *State v. Hallauer*, 624 P.2d 736, 28 Wn.App. 453, 458 (Wash.App. Div. 1 1981) (Construing the eminent domain chapter and finding "no distinction between a stipulated judgment and the judgment contemplated by RCW

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Johnson now appeals that judgment, Judge Armstrong's Order precluding Johnson's Anti-SLAPP defense, and the prior Order of the Court denying Johnson's earlier Motion for Summary Judgment.

III. STANDARDS OF REVIEW

Although a stipulated judgment was entered on the first day of trial, Johnson seeks to appeal the prior order of the Court denying Johnson's Motion for Summary Judgment. The Parties dispute the standard of review that should be applied.

Filion asserts that the Court of Appeals should apply an abuse of discretion standard to the Court's decision to strike the non-pleaded counterclaim or affirmative defense (the Anti-SLAPP statute). This is because it is within the trial court's province to determine whether to consider a party's late or untimely arguments. *State ex rel. Washington State Public Disclosure Com'n v. Permanent Offense*, 136 Wn.App. 277, 282, 150 P.3d 568, (Wash.App. Div. 1 2006) (court has considerable discretion); see also *Segaline v. State, Dept. of Labor and Industries*, 238 P.3d 1107, 169 Wn.2d 467, 478 (Wash. 2010) ("The trial court did not abuse its discretion by refusing to permit Segaline's amended complaint to

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8.28.040 and "hold[ing] that the statute is applicable whether a formal trial is held or not.")

[10] Counsel for the Estate of Filion represents that no collection action (on the Judgment) has taken place as of 9/23/13.

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relate back to the original filing date because Segaline did not establish excusable neglect.")

The decision to allow Johnson to raise the anti-SLAPP defense as an affirmative defense or counterclaim on the eve of trial despite it not having been pleaded was within the discretion of the court. Johnson could have argued excusable neglect, but failed to support such an argument in the record. All Johnson could assert was that it had been argued in a CR 12 Motion (after the filing of an Answer) which was within the trial court's discretion to find as untimely and not in conformance with the Civil Rules.[11]

Johnson, on the other hand, seeks to have the Court apply the summary judgment, *de novo* standard.[12] In that case, the Court reviews an

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[11] Johnson has asserted that although the CR 12 motion came after Johnson's Answer (CP 8-10) to the First Amended Complaint (CP 5-6) that it came before an answer was filed to Plaintiff's Second Amended Complaint. However, Johnson has also argued that Plaintiff's Second Amended Complaint is invalid since Filion never received leave of court to file the Second Amended Complaint. Johnson is correct. Thus, no additional Answer was needed. And, even if Plaintiff's Second Amended Complaint had been valid, CR 12 and CR 15 require that an Answer or Motion be made within the additional 10 day window. And, once Johnson's Motion (which was treated not as a 12b motion but as a CR 56 motion) was denied, Johnson was required to file an amended answer to add her alleged defense or counterclaim – which she did not do.

[12] Johnson also argues that the 2010 version of RCW 4.24.525 should be applied by the Court and with it the anti-SLAPP motion mechanism (and de novo review). *See Vess v. Ciba-Geigy Corp.,* 317 F.3d 1097, 1102 (9th Cir.2003); & *Lam v. Ngo,* 91 Cal.App.4th 832, 111 Cal.Rptr.2d 582, 592 (2001) ("[D]enials of anti-SLAPP suit motions are reviewed de novo by appellate courts."). And See *State v. Pillatos*. 159 Wn.2d 459, 471, 150 P.3d 1130 (2007) (a statute is not retroactive in effect merely because it applies to conduct predating its effective date; it is retroactive in effect only if the triggering event for its application occurred before its effective date).

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order granting or denying summary judgment *de novo*, engaging in the same inquiry as the body that decided it. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c) The moving party has the burden of proving that there is no genuine issue of material fact. *Black*, 153 Wn.2d at 160-61. If the moving party meets its burden, the burden shifts to the nonmoving party to "'set forth specific facts showing that there is a genuine issue for trial.'" *Black*, 153 Wn.2d at 161

The Court may also have to interpret RCW 4.24.500 *et seq* (the Anti-SLAPP statute) which would be done pursuant to *de novo* review. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 9, 43 P.3d 4 (2002) The fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Campbell & Gwinn,* 146 Wash.2d at 9, 43 P.3d 4. If a statute's meaning is plain on its face, then effect is given the plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy,* 151 Wash.2d 226, 242, 88 P.3d 375 (2004) The Court discerns plain meaning not only from the provision in question but also from closely related statutes and the underlying legislative purposes. *Murphy,* 151 Wash.2d at 242, 88 P.3d 375.

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At the same time, and in favor of Filion as the Respondent, the Court of Appeals may affirm the trial court on any basis the record and the law support. *State v. Kelley,* 64 Wash.App. 755, 764, 828 P.2d 1106 (1992) (emphasis added)

IV. ARGUMENT

Johnson asserts four separate Assignments of Error, though all four relate to essentially the same issue: Johnson's attempted use of the anti-SLAPP defense (RCW 4.24.500 *et seq.*). However, before getting into the individual Assignments of Error, the issue of standing must be addressed.

A. DOES JOHNSON HAVE STANDING AS AN AGGRIEVED PARTY TO APPEAL THE ARBITRATION AWARD

Filion's first contention in defending Johnson's appeal is that Johnson was not an "Aggrieved Party" under RCW 7.06.050 or MAR 7.1(a) and therefore never had standing to file for a trial *de novo*. Should the Court agree with Filion on this point, then the trial court was without jurisdiction to hear Johnson's appeal and therefore the judgment held by Filion (as the prevailing party in arbitration) should be vacated *ab initio* or *nunc pro tunc*. And thus, the Court would not need to address any other issue raised by Johnson in this Appeal.

An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Cooper v. City of Tacoma*, 47 Wash.App.

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315, 316, 734 P.2d 541 (1987)[13] Thus, and by way of example, an attorney sanctioned by a court may appeal the sanctions on his own behalf, but his client is not aggrieved by the sanctions and may not appeal them. *Breda v. B.P.O. Elks Lake City 1800 So-620,* 120 Wash.App. 351, 353, 90 P.3d 1079 (2004)

In this case, there is (and never was) any evidence that upon receiving an Arbitration Award (which she asserts was in her favor) that Johnson's propriety, pecuniary or personal rights were somehow substantially affected. They weren't. In fact, there lacks any evidence presented that Johnson had any interests substantially affected by the Arbitration Award. (See CP 110-111) She simply won by defeating Filion's claim. Case over. And she failed to present any evidence that she had preserved a claim for attorney's fees or that she had actually paid attorney's fees in

[13] The use of the term " aggrieved party" in MAR 7.1(a) is analogous to the use of the same term in RAP 3.1. *Russell v. Maas*, 272 P.3d 273, 166 Wn.App. 885, 891 (Wash.App. Div. 1 2012) An "aggrieved party" is one whose proprietary, pecuniary, or personal rights are substantially affected. *Breda v. B.P.O. Elks Lake City 1800 So.-620,* 120 Wash.App. 351, 353, 90 P.3d 1079 (2004) (attorney sanctioned by a court becomes a party to the action and as an aggrieved party may appeal the sanctions on the attorney's own behalf, but clients are not aggrieved by the imposition of sanctions against their attorneys and may not appeal the sanctions on behalf of their attorneys); *Splash Design, Inc. v. Lee,* 104 Wash.App. 38, 44, 14 P.3d 879 (2000) (attorney sanctioned under CR 11 is an aggrieved party and may appeal the sanction under RAP 3.1); *Johnson v. Mermis,* 91 Wash.App. 127, 955 P.2d 826 (1998) (attorney could appeal CR 11 and CR 37 monetary sanctions, but could not appeal the trial court's denial of his client's motion to strike the trial date, its dismissal of his client's third party claims, or its exclusion of the testimony of one of his client's witnesses as a discovery sanction); *In re Guardianship of Lasky,* 54 Wash.App. 841, 850, 776 P.2d 695 (1989) (removed guardian who was not a party to the original action could appeal the order denying fees and imposing sanctions because the order substantially affected pecuniary rights).

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defending the suit (as opposed to the suit being conducted *pro bono* or taken on a contingency). Instead, the only alleged pecuniary, proprietary or personal right that was allegedly substantially affected was the notion and attempt to assert RCW 4.24.500 as a sword to obtain a punishment against Filion for $10,000 in sanctions and a future award of attorney fees.

But Johnson had not plead and paid for a counterclaim in an Answer or Amended Answer or in a Motion to Amend, nor had she preserved this claim as an affirmative defense . (CP 8-10 Answer) Thus, she had no such claim to be lost, or right that was affected by the arbitration award in her favor.

Because Johnson failed to plead a counterclaim and failed to pay for that counterclaim (as required by RCW 36.18.020(2)(a)) she failed to preserve such a claim, and cannot state that her claims had not been adjudicated since they did not exist. And, without an actual (as opposed to a perceived) pecuniary, proprietary or personal right, being substantially affected, Johnson did not have standing under MAR 7.1(a) as an aggrieved party. The failure to have standing meant that Johnson did not comply with MAR 7.1(a). The failure to strictly comply with MAR 7.1(a) in turn prevents the superior court from conducting a trial de novo. *Nevers v.*

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Fireside, Inc., 133 Wash.2d 804, 811-12, 947 P.2d 721 (1997)[14]

Even when a notice for trial de novo is timely filed and served, if it was filed by a non-aggrieved party; the notice is a nullity. *Russell v. Maas*, 272 P.3d 273, 166 Wn.App. 885 (Wash.App. Div. 1 2012) *citing Wiley v. Rehak*, 143 Wash.2d 339, 347, 20 P.3d 404 (Wash. 2001) Since the notice was a nullity, the action which flows from the null trial de novo, like the fruit of the poisonous tree, is also rendered a nullity.

Thus, Filion's judgment should be vacated and the case dismissed.

B. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

Now turning to the first assignment of error raised by Julie Johnson, that the trial court erred in denying Johnson's original Motion for Summary Judgment filed 11/21/2008 (App. Brief. Pg. 5; CP 109, Order Denying Johnson's Motion for Summary Judgment), there are at least four reasons that the November 21, 2008 Order is not properly before the Court. First, the 11/21/2008 Order Denying Summary Judgment was not designated in the Notice of Appeal filed January 12, 2008. (CP 609)

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[14] Substantial compliance with the rule is insufficient. *Id.* at 815. This is because strict compliance better effectuates the Legislature's intent in enacting the statutes upon which the arbitration rules are based, namely to "alleviate the court congestion and reduce the delay in hearing civil cases." *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 302, 693 P.2d 161 (1984) (citing Senate Journal, 46th Leg., Reg. Sess. 1016-17 (1979)); *see also Nevers*, 133 Wash.2d at 815, 947 P.2d 721 (The objectives behind these rules are clearly apparent: promoting the finality of disputes, alleviating court congestion, and reducing the delay in having civil cases heard.)

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Johnson only designated her second Motion for Summary Judgment (for which an Order was entered on 11/7/2012). (CP 609)

Second, the first Order Denying the Motion for Summary Judgment was entered 11/21/2008 (CP 109), a date that preceded the Arbitration Hearing and Award (CP 110-111). As recognized by the Court of Appeals in Johnson v. Filion No. 63978-1-I (Filion #1) once the arbiter filed an arbitration award, Plaintiff no longer had the absolute right to dismiss under CR 41 (as if a judgment had been entered or a hearing on the merits had). That decision is in accord with at least two published cases that have treated an arbitration as a trial, and a trial de novo following arbitration, as an appeal. See *Singer v. Etherington,* 57 Wash.App. 542, 789 P.2d 108 (1990); and *Valley v. Hand,* 38 Wash.App. 170, 684 P.2d 1341 (1984) And, once there has been a subsequent (subsequent to the motion for summary judgment) fact finding trial, the pre-trial order is rendered a nullity. *Thomas-Kerr v. Brown*, 59 P.3d 120, 114 Wn.App. 554 (Div. 1 2002) This is because the primary purpose of a summary judgment procedure is to avoid a useless trial. *Olympic Fish Prods., Inc. v. Lloyd,* 93 Wash.2d 596, 602, 611 P.2d 737 (1980); *Ryder v. Port of Seattle,* 50 Wash.App. 144, 148, 748 P.2d 243 (1987). Thus, because a trial (in the form of the arbitration hearing) was had after the

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first Order Denying the Motion to Dismiss/Motion for Summary Judgment, the Order Denying the Motion to Dismiss is rendered moot.[15]

The third reason that the first Order Denying Summary Judgment is moot is because Johnson renewed this Motion for Summary Judgment before a second judge, Judge Armstrong, who, despite the objections of Plaintiff (that the Motion had been previously attempted), did hear and then denied Johnson's Motion. Thus, the first denial of the Motion for Summary Judgment (CP 70) has been superseded by or merged into the second (and more substantive denial) of Judge Armstrong. (CP 152, Order Denying Motion for Summary Judgment 11/7/12)

And finally, by entering the Stipulated Judgment and not expressly preserving the first summary judgment denial (CP 70) (which the Parties

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[15] The same or similar issue arose in *Cook v. Selland Constr., Inc.*, 81 Wn.App. 98, 100-02, 912 P.2d 1088 (1996) (emphasis added), where the court wrote:

> The arbitrator ...had [the] authority to resolve both the question of Selland's duty to the Cooks and, of course, whether that duty had been breached. Selland concedes as much since those issues were fully litigated in the arbitration. It nevertheless contends that it can appeal the earlier denial of its summary judgment motion. We disagree.
>
> The arbitrator here was no more bound by the trial court's interlocutory order denying Selland's motion for summary judgment than the trial judge would have been had the case been tried in superior court rather than before an arbitrator. Once the case has been tried on its merits, review of a pretrial order denying summary judgment is neither possible nor appropriate. See *Johnson v. Rothstein,* 52 Wash.App. 303, 305, 759 P.2d 471 (1988). Selland's approach would circumvent an important purpose of summary judgment--avoiding useless trials. *Id* at at 307.

The Court of Appeals in Filion 1, also cited to the *Cook* case at FN 5 and denied Johnson's request to consider the prior Interlocutory Order Denying Johnson's Motion for Summary Judgment.

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most definitely did not stipulate to preserve and never mentioned. See the lack of any such record or reference), Johnson should be precluded from revisiting that prior Order.

C. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

Johnson's second Assignment of Error challenges the trial court's 11/7/12 Order which precluded Johnson from raising the Anti-SLAPP defense. (CP 152) That Order is properly before the Court of Appeals.

However the trial court was absolutely correct in its analysis, findings and legal conclusions. The King County Superior Court (Judge Sharon Armstrong) found that Johnson had not properly raised (pleaded) the Anti-SLAPP defense in its Answer as an affirmative defense or as a counterclaim. (CP 341-348, 11/7/12 Order Denying Defendant's Motion for Summary Judgment) And, the court found, that even if Johnson had properly pleaded the Anti-SLAPP statute, that the defense would still not apply in this case i) because it does not involve substantive issues of public concern or social significance;[16] ii) because it was not made in a proceeding protected by the statute (such as exercising the right to petition or exercising political rights); and iii) not protected by the Washington

[16] Especially in cases where the action is between two contentious litigants in a divorce case, and centered over two competing clauses in a divorce decree resulting in a malicious attempt by one litigant to punish the other.

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Constitution since her complaint to the police was, based on the peculiar facts of this case, an abuse of the right to speak freely. (CP 341-348)

1. Failure to Plead an Affirmative Defense or Counterclaim in the Answer

The defendant did not raise RCW 4.24.500 et seq (the "Anti-SLAPP" statute) as an Affirmative Defense in her Answer, nor did she file a Counterclaim in the trial court action below (which would have required her to pay the required counterclaim filing fee). (CP 8-9)

Prior to the Legislature's 2010 amendment of RCW 4.24.525 courts and parties were unclear of how to procedurally use and preserve the anti-SLAPP statute.[17] The 2010 amendment is intended to fix that issue by creating a process for utilizing the anti-SLAPP statute by requiring that the party asserting the anti-SLAPP statute file a special motion to strike within 60 days of the service of the most recent complaint. *See* RCW 4.24.525(5)(a) However, the 2010 amendment came into existence after both the conduct at issue in the Complaint and the date by which the Complaint was originally filed (CP 3-4, filing date of

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[17] As originally enacted, sections 4.24.500-.520 did not afford a SLAPP target with a particularly efficient remedy. While the target could ordinarily expect to prevail, it had to endure considerable litigation before it could do so. *Segaline v. State, Dept. of Labor and Industries*, 238 P.3d 1107, 169 Wn.2d 467, 480 (Wash. 2010) (J. Madsen, Concurring) (citation omitted)

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2/21/2007).[18] Therefore, the use of the anti-SLAPP statute as a motion was not yet authorized. Instead, and noting the legislature's recognition that prior to 2010, a motion was not the available form for challenging lawsuits, it is Filion's position the statute must have been pleaded as a counterclaim or affirmative defense for it to have been a claim or defense by Johnson.

i. Johnson's attempted Anti-SLAPP claim is actually an attempted but unfiled Counterclaim

The first point of contention is that Johnson's use of the Anti-SLAPP statute was as a counterclaim and not an affirmative defense. This is because her claim is alleged to constitute more than a simple defense to the lawsuit brought by the Plaintiff, and instead, exists as an independent ground and claim for relief in the form of a statutory penalty of $10,000 and attorney's fees (in fact, as discussed below, because malicious prosecution claims are not done away with, the anti-SLAPP defense does not immunize Johnson, it only provides her a claim prior to 2010).

This rationale finds support in *In re Marriage of Parker:*

> A counterclaim is defined as 'any claim which at the time of the serving of the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the

[18] While Johnson never invoked the 2010 statute to bring a "special motion to strike", the Court did consider the elements of the 4.24.525 Motion process and found that Johnson failed to carry her burden in proving her initial elements to apply the anti-SLAPP statute.

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subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties(.)'

78 Wn.App. 405, 409, 897 P.2d 402, (Wash.App. Div. 1 1995) *citing* CR 13(a); s*ee also Farmers Ins. Exch. v. Dietz*, 87 P.3d 769, 121 Wn.App. 97, 101 (Div. 1 2004) (defendant's claim stood for independent adjudication – i.e. a counterclaim).[19]

Whereas, on the other hand "[a]n affirmative defense is a 'matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it'. *Snohomish County v. Anderson*, 881 P.2d 240, 124 Wn.2d 834, 838 (Wash. 1994) *quoting* Black's Law Dictionary (6th ed.1990), at 60. An affirmative defense undermines the validity of a claim, while a counterclaim is a separate and distinct claim for relief. *Cavexsa (U.S.A.), Inc. v. Nassau Tool Works, Inc.,* No. 85 C 9102, slip op. at 3 N.D.Ill. Nov. 19, 1986, [Available on WESTLAW, 1986 WL 13742]

Determining whether claims/defenses were properly made as an affirmative defense instead of a counterclaim was an issue facing the

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[19] Similarly, the Connecticut Supreme Court has held a counterclaim to be a claim which could exist as an independent action. *See Hanson Development Co. v. East Great Plains Shopping Center, Inc.*, 195 Conn. 60, 63, 485 A.2d. 1296 (1985); *see also Schurman v. Schurman*, 188 Conn. 268, 270, 449 A.2d 169 (1982). It has been defined as "a cause of action existing in favor of a defendant against a plaintiff which a defendant pleads to diminish, defeat or otherwise affect a plaintiff's claim and also allows a recovery by the defendant. " *Home Oil Co. v. Todd*, 195 Conn. 333, 341, 487 A.2d 1095 (1985) (citing 1 Stephenson, Conn. Civ. Proc. (2d Ed. 1982 Sup.) § 129b.) The same treatment is found in Georgia. See *Gwinnett Commercial Bank v. Flake,* 151 Ga.App. 578, 579-580(1), 260 S.E.2d 523 (1979) (noting that a counterclaim is defined as "a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff") (punctuation omitted). According to Black's Law Dictionary, a " counterclaim" is defined as " [a] claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim." Black's Law Dictionary 402 (9th ed.2009).

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District Court in *Clarke v. Max Advisors*, LLC, where the Court denied the improperly pleaded claims:

> The remaining affirmative defenses, including breach of contract (sixth affirmative defense) as well as quasi contract, implied contract and quantum meruit (seventh cause of action) assert affirmative claims for which relief is sought by the plaintiffs. These claims do not represent cognizable defenses to a breach of contract claim; rather, any establishment of such a cause of action coupled with a showing of damages would allow for an offset against any recovery by the defendants against plaintiff SMC based upon breach of contract. See 34 New York Jurisprudence 2d Pleading § 177 (November 2002) (counterclaim, as opposed to an affirmative defense, can stand on its own as a separate action)…As such, those claims are not appropriately asserted as affirmative defenses, and I deny plaintiffs' motion to add those claims on the basis of futility.

235 F.Supp.2d 130, 151-152 (N.D.N.Y. 2002)[20]

Here, Johnson's claim must be a counterclaim in order for the Defendant Johnson to have had standing (see preceding argument) to appeal the arbitration award as a trial de novo in the first place![21] If it was simply an affirmative defense, Johnson would not have been an aggrieved party because she would not have had an independent ground to continue the appeal (i.e. continue to have a claim for attorney's fees and a basis to argue that she did not engage in bad faith and should be entitled to a $10,000 statutory penalty).

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[20] Where a state procedural rule parallels a federal rule, we may look to the analysis of the federal rule for guidance where an issue has not been squarely addressed by the state. *Farmers Ins. Exch. v. Dietz*, 87 P.3d 769, 771, 121 Wn.App. 97 (Div. 1 2004)

[21] *See Snohomish County v. Anderson*, 124 Wn.2d 834, 837, 881 P.2d 240 (1994) (discussing what constitutes an affirmative defense)

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And, under CR 8(a), Claims for Relief, the counterclaim must be contained in a pleading.

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." (emphasis added)

In addition to CR 8(a) requiring Johnson to plead her counterclaim, her attempted (but failed) counterclaim was also a compulsory one under CR 13, as arising from the same transaction or occurrence as the claim brought by Plaintiff. This is because Johnson alleges that her activity – the reporting of the alleged mutual restraining order violation and instigation of the prosecution (which is also the same conduct and occurrence upon which Filion's malicious prosecution claim was based) – was a protected activity under RCW 4.24.500 et seq. Compulsory counterclaims must be set forth in the responsive pleading. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 863, 726 P.2d 1 (1986) (emphasis added)

And, the fact that Johnson's claim depended on the outcome of the main action also does not transform it from being a compulsory counterclaim. *Chew v. Lorde*, 143 Wn.App. 807, 814-815, 181 P.3d 25. (Wash.App. Div. 1 2008). Thus, in *Lane v. Skamania County*, the court

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found that the defendant's statutory counterclaim (under RCW 4.28.328[22]) came into existence at the time that the plaintiffs had wrongfully filed a *lis pendens* claim. 265 P.3d 156, 164 Wn.App. 490, 499-501 (Wash.App. Div. 2 2011) Like in *Chew*, *supra* the court found that the defendant's right to recover on their counterclaim, i.e., their status as the prevailing party, only awaited the main action's outcome. *Id.* Thus, the defendant's counterclaim matured at the time of plaintiff's filing of the *lis pendens* (or shortly thereafter) and not when the *lis pendens* claim is extinguished or found to have been wrongfully filed. *Id.* Thus, to preserve the defendant's claim for a wrongful filing, that claim had to be included in an answer or upon a timely motion.[23]

Prior to the 2010 amendment[24], the anti-SLAPP defense (like the Lis Pendens wrongfully filed defense and attorney fees award), was a counterclaim – as both arise from the same activity complained of in the

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[22] **RCW 4.28.328 Lis pendens — Liability of claimants — Damages, costs, attorneys' fees.**

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

[23] And although Johnson never filed a Motion to Amend her answer, prejudice to Filion would be grounds for denial of leave to supplement pleadings under CR 15(d). *Herron v. Tribune Pub. Co., Inc.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987) As undue delay is one chief factor the Court may consider in determining prejudice. *Herron,* 108 Wash.2d at 165-66, 736 P.2d 249.

[24] RCW 4.24.525

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Plaintiff's complaint and both set forth independent claims for the Defendants that would continue even if the Plaintiffs lost the case-in-chief.

Johnson's failure to plead this anti-SLAPP (including by a motion to amend a pleading) and pay the filing fee results in her being precluded from raising this claim.

ii. Alternatively, at the very least, Johnson's purported claim is an Affirmative Defense

If Johnson's Anti-SLAPP claim is not deemed to be a counterclaim then, it would have to be an affirmative defense (despite not falling under any of the affirmative defenses set forth in Civil Rule 8). This is the treatment that past Washington cases have given to a defendant's use of the anti-SLAPP statute. See *Doe. v. Gonzaga Univ.*, 99 Wn.App. 338, 351, 992 P.2d 545 (2000) (aff'd in part, reversed in part on other grounds by 143 Wn.2d 687 (2001); and *Port of Longview v. Int'l Raw Materials Ltd.*, 96 Wn.App. 431, 435-36, 979 P.2d 917 (1999)

Civil Rule 8(c) requires that a party:

> shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.[25]

[25] Similarly, CR 12(b) provides that "**every defense, in law or fact**, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, **shall be**

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The language of CR 8(c) and 12(b) are mandatory – requiring that a party plead their affirmative defense in the answer (or by motion prior to pleading). The general rule is that affirmative defenses are waived if not plead in a motion under CR 12(b) (prior to filing an Answer) or made in the Answer itself. See CR 8; *Lake Stevens Sewer Dist., Snohomish County v. Village Homes, Inc.*, 18 Wn.App. 165, 178, 566 P.2d 1256 (Div. 1 1977) ("The [defendant] did not raise the payment of $3,000 as an affirmative defense pursuant to CR 8(c), or move to amend its answer to assert a setoff. Under such circumstances, the defense has been abandoned.") And here, it is clear that Johnson did not raise an affirmative defense in her pleading or by CR 12 motion (prior to answering).

Despite the mandatory language of CR 8(c) and CR 12(b), however, Washington courts have developed a doctrine of harmless error coupled with a failure to object. "'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.'" *Henderson v. Tyrrell*, 80 Wn.App. 592, 624, 910 P.2d 522

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asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted and (7) failure to join a party under rule 19." (CR 12(b) emphasis added)

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(1996) (quoting *Bernsen v. Big Bend Elec. Coop.*, 68 Wn.App. 427, 433-34, 842 P.2d 1047 (1993) (emphasis added). More particularly, the court has permitted an affirmative defense to be made despite the failure to pleaded in an answer"'[w]here a failure to plead a defense affirmatively does not affect the substantial rights of the parties" and therefore the noncompliance is harmless. *Henderson*, 80 Wn.App. at 624 (*quoting Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975)).

Here, because the defense would affect a substantial right of the Plaintiff (if it was properly pleaded and if the defense was applicable to Plaintiff's claim), it is harmful to allow it. The substantial right is Plaintiff's ability to prosecute his claim without having to overcome the "clear and convincing" standard associated with the anti-SLAPP defense's 2010 amendment (asserted by Johnson) just to be able to move his claim forward and without the specter of a $10,000 automatic civil penalty and an award of attorney's fees simply for trying to vindicate his rights against a malicious and vindictive prosecution initiated by his ex-wife. The existence or non-existence of the Defendant's claim is the most substantial issue in the case, it is the reason for the appeal and is the barrier against Filion from being able to voluntarily dismiss his suit (because no other claims exist). If the anti-SLAPP claim/defense is permitted to be asserted, then Filion may lose his claim (that is as substantial as substantial can be!)

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Also, importantly, in this case there is no express or implied consent by Plaintiff to try that defense. Instead, the Plaintiff objects to this and has repeatedly objected to the attempted use of this defense by the Defendant Johnson. (CP 70-72 at CP 71, lns 19-22; CP 777, Plaintiff's 2nd CR 41(a) Motion to Dismiss, lns 1-2; and CP 328, Reply on Plaintiff's Motion for Summary Judgment).

In addition to the anti-SLAPP purported defense affecting a substantial right of Filion and being objected to, Washington Courts have concluded that a defendant waives an affirmative defense if "(1) assertion of the defense is inconsistent with defendant's prior behavior, or (2) the defendant has been dilatory in asserting the defense." *King v. Snohomish County,* 146 Wash.2d 420, 424, 47 P.3d 563 (2002) (emphasis added); *See also Lybbert v. Grant County, State of Wash.,* 141 Wash.2d at 29, 1 P.3d 1124 (2000); and *Blankenship v. Kaldor*, 114 Wn.App. 312, 318, 57 P.3d 295, (Wash.App. Div. 3 2002) Here, Johnson's failure to amend her pleading to include the affirmative defense (despite knowing the repeated objections of Plaintiff) show that she was knowingly dilatory in her lawful assertion of the defense. Prior to the 2010 amendments, if Johnson was going to assert the anti-SLAPP defense, then she had better seek to amend her Answer to have included.

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Thus, the fact that Johnson has not pleaded her claim within a document labeled Answer is absolutely pertinent to this case – as it means that, based on the nature of her claim, Johnson did not have standing to assert the Anti-SLAPP statute as a counterclaim nor as an affirmative defense.

2. The Trial Court's Authority to preclude or strike an invalid and inapplicable Defense is within its Right

Next, Johnson appears to argue that the Court somehow did not have the authority to enter the Order Denying Johnson's second Motion for Summary Judgment and precluding her attempted use of Anti-SLAPP. That is not correct.

In deciding the two pending Motions, the Court entered two orders (CP 338-340, CP 341-348), which, read together, deny the Motions for Summary Judgment which also preclude the anti-SLAPP defense. In essence then, the Orders grant, in part, the Plaintiff's motion to strike an inapplicable and non-pleaded defense or claim (which Plaintiff made in its opening Motion for Summary Judgment by asserting that nothing prevented the Court from entering Summary Judgment, and then expressly in Plaintiff's Reply which requested that the anti-SLAPP purported defense be stricken CP 326-329 at 328). In rendering its decision, not only was the Court deciding both Motions for Summary Judgment

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pursuant to Rule 56, but the Court also exercised its inherent authority under Civil Rule 1 (securing the just, speedy and inexpensive determination of every action) to decide what issues remained for trial and what issues were precluded as a matter of law. Thus, the Court was entirely within its authority and province to find that Johnson could not raise the defense of the Anti-SLAPP statute.[26]

3. The Defense of Absolute Immunity Afforded by RCW Chapter 4.24.500, the anti-SLAPP statute, does not apply.

Washington's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, RCW 4.24.510 grants immunity from civil liability to a person who communicates a complaint or information to any branch or agency of federal, state, or local government. Such immunity extends to "claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization." RCW 4.24.510[27] In enacting this statute, the legislature

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[26] As for Johnson's argument that the Court denied Johnson's second motion for summary judgment (based on the Anti-SLAPP claim/argument) because Johnson had already asserted this motion, that argument fails because the court did in fact hear Johnson's second motion on the same argument and did in fact deny it on substantive (that the statute did not apply to the conduct engaged in by Johnson) and procedural grounds (the failure to plead this counterclaim or affirmative defense). (CP 341-348, Order) Thus, the reference that the Court makes to KCLR 7(b)(7) (CP 341-348 at 342) was not the sole, if any basis, to deny Johnson's motion and any reference to KCLR is harmless if in error at all.

[27] RCW 4.24.510 provides in pertinent part:

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recognized that "[i]information provided by citizens concerning potential wrongdoing is vital to effective law enforcement" and that "the threat of a civil action for damages can act as a deterrent to citizens who wish to report" such information. RCW 4.24.500. "The legislature enacted RCW 4.24.510 to encourage the reporting of potential wrongdoing to governmental entities." *Gontmakher v. The City of Bellevue*, 120 Wn.App. 365, 366, 85 P.3d 926 (2004). However, the anti-SLAPP statute is not without limitations.

i. RCW 4.24.500-510 applies only in situations involving a substantive issue of public concern

Instead of a boundless statute, the anti-SLAPP act was:

> intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress. The legislature found that it is in the public interest for citizens to participate in matters of public concern, and to provide information on public issues that affect them without fear of reprisal through abuse of the judicial process. RCW 4.24.525; Senate Bill 6395, Laws of 2010, Ch. 118 § 1.

Fielder v. Sterling Park Homeowners Association, C11-1688RSM., W.D. WA (December 10, 2012. Order On Motion To Dismiss and Motion For Attorney Fees, Costs, And Statutory Penalty) (Ricardo S. Martinez, District Judge) (emphasis added)

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 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.

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Thus, in *Right-Price Recreation v. Connells Prairie,* the Washington State Supreme Court made clear that the Anti-SLAPP statute only "applies when a communication to influence a governmental action results 'in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations . . . or **(c) a substantive issue of some public interest or social significance**.'" 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (*citation omitted but emphasis added*) The Supreme Court's decision in *Right-Price* is in line with the legislature's intent that there be a "public interest" and "social significance". *See Laws of 2002*, Ch. 232, §1.[28]

In addition, the Washington statute was modeled after the California anti-SLAPP statute and for the most part, mirrors that statue. California has developed a more substantial body of law behind the anti-SLAPP statute and also requires a public interest or social significance. *See Weinberg v. Feisel*, 110 Cal.App.4th 1122, 2 Cal.Rptr.3d 385 (2003) ("the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest.")

Then what is a matter of public interest? There does not appear to be a hard and fast line. However, a matter of public interest should be something of concern to a substantial number of people. *Dun & Bradstreet*

[28] Thus, in *Bailey v. State*, 191 P.3d 1285, 147 Wn.App. 251, 263 (Div. 3 2008) the court was incorrect in its assertion that matters of purely private concern, unrelated to any matter of political, social, or other concern to the community are still protected by the anti-SLAPP statute.

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v. Greenmoss Builders, 472 U.S. 749, 762, 105 S.Ct. 2939, 86 L.Ed.2d 593, 53 USLW 4866 (1985) Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. *Hutchinson v. Proxmire*, 443 U.S. 111, 135, 61 L.Ed.2d 411, 431 (1979) And, the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy...." *Connick v. Myers,* 461 U.S. 138, 148, 75 L.Ed.2d 708, 721 (1983).

In *Briscoe v. Reader's Digest Association, Inc.,* 4 Cal.3d 529, 536-537, 483 P.2d 34 (1971), the California Supreme Court concluded that the identification of adults currently charged with the commission of crimes is a matter of public interest, but the court declined to hold that, in other circumstances, an assertion that a person has engaged in criminal activity automatically falls within the public interest. The United States Supreme Court also has rejected the claim that assertions of criminal conduct automatically fall within the public interest. *Wolston v. Reader's Digest Assn., Inc*. 443 U.S. 157, 168-169, 61 L.Ed.2d 450, 461 (1979).

Similarly, the District Court for the Western District of WA wrote:

> The Washington legislature has observed that strategic lawsuits against public participation (SLAPP suits) are "'filed against individuals or organizations on a substantive issue of some public interest or social significance,'" and "'are designed to intimidate the exercise of First Amendment rights.'"

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Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104, 1109 (W.D. Wash. 2010) (quoting Laws of 2002, ch. 232, § 1) (emphasis added); *see also Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 480, 238 P.3d 1107 (2010) (Madsen, C.J., concurring); & *Skimming v. Boxer*, 119 Wash.App. 748, 758, 82 P.3d 707 (2004) (The statute grants immunity from civil liability for those who complain to their government regarding issues of public interest or social significance.) (emphasis added)[29]

Here, Johnson's attempted anti-SLAPP claim fails to satisfy prong three of the required three part test as the facts here do not involve "a substantive issue of some public interest or social significance." The anti-SLAPP statute was never intended to apply to a private, acrimonious marital dispute involving a mutual restraining order, a contemporaneous order to pick up property, an agreement between counsel and where it was used as a sword for fees and as a shield to protect a vindictive and intentionally misleading (and therefore false) police report. In fact, divorces themselves are intended to be very private matters (except that they have to be filed with the court, and still even then, are not accessible through online records by the public as the courts also realize the private nature of these proceedings.)

The ongoing dispute between Johnson and Filion was purely private. Johnson had agreed through counsel to have Filion come to her home, a home that was being sold in accordance with the divorce decree and in

[29] Thus, the *Bailey, supra,* court did not correctly align the Washington anti-SLAPP statute with United States' Constitutional authority, and instead, broadened the anti-SLAPP statute beyond the Legislative intent.

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which she was no longer supposed to be occupying at the time that Filion was to arrive to pick up the last of his personal belongings in accordance the Order of the Court contained in the divorced decree. Johnson's 911 call to the police was malicious and vindictive and was done without reporting any of the exculpatory information to the police that would have kept Filion from being charged with criminal prosecution. It was just one part of a series of malicious claims between the parties.

If Appellant Johnson is permitted to raise the anti-SLAPP statute as a claim or affirmative defense in a case like this, then all divorce litigants would be emboldened to use it at every step of the family law litigation (even if it meant fabricating stories to create an anti-SLAPP defense, since there would be absolutely no check against that conduct). The allegations of future private domestic parties would range from reporting false restraining order violations, to falsely reporting parenting plan violations to Family Court Services, to falsely reporting alleged child endangerment issues to Child Protective Services. The anti-Slapp statute would be converted from a shield to a sword – just as Johnson is wielding in this case.

And, even here, if anti-SLAPP was to be applicable, then in hindsight, Filion should have pre-empted Johnson's call to the police by his own call to the police when Johnson refused to allow him access to his personal

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property in violation of the court order and agreement of the Parties' counsel. Would the rule then be the first person to call the police is the person afforded anti-SLAPP immunity? And, in every case, the stakes would be high because of the statute's call for an award of attorney fees and a statutory penalty.

Holding that anti-SLAPP immunity applies to actions relating to contentious divorce decrees (under these particular facts and in this situation) takes all purely private matters and converts them to public ones and will escalate the application of anti-SLAPP in private vendettas in other areas of law as well, such as disputes between neighbors and landlord/tenants. Other state courts have answered this call in the negative. In *Hoffman v. Davenport-Metcalf*, for example, the Rhode Island Supreme Court stated that it was not convinced that the provisions of its anti-SLAPP statute should apply to a private matter between tenants against their property manager and property management company. 851 A.2d 1083, 1088 (2004). ("[We are not] persuaded that these are the types of activities that the Legislature intended to protect in enacting the law, and we decline to extend the purview of the anti-SLAPP statute to encompass these private causes of action and criminal complaints.").

To counter the private nature of Johnson's "reporting" against Filion, Johnson relies on *Dang v. Ehredt*. 95 Wn. App. 670, 977 P.3d 29, *review*

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denied. 139 Wn.2d 1012 (1999). In *Dang*, the bank employees contacted the police to report that Ms. Dang was attempting to pass a counterfeit check. Dang, alleging that the bank made a mistake, sued the bank under a number of different theories (of which malicious prosecution did not appear to be one of them). The Bank then raised the Anti-SLAPP statute in its defense and the court proceeded to allow it. While that decision was upheld on appeal, the *Dang* case is distinguishable because the communication there was in regards to a substantive issue of public interest or social significance (i.e. calling the police to report an attempt to pass a counterfeit check at a bank). The passing of counterfeit checks is of public interest and social significance since the passing of the counterfeit check involves more than two parties, and in fact, involves the draftee/drawer bank, the accepting bank, the merchant or third party accepting the check and potentially the original account holder whose checks were stolen. Counterfeit checks also affect the stream of commerce as businesses and people rely on checks to do business and conduct everyday matters. And, perhaps most importantly, the federal government has deemed check writing and honoring a matter of interstate commerce such that bank drafts/checks and banking rules for honoring them are congressionally regulated. If there was no penalty for passing counterfeit checks, then (until recently at least), the entire American

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economy would be affected because merchants and people could not trust payments made by check. With the reporting of suspicious counterfeit checks to the police, banks fulfill their regulatory and public interest mandate by ensuring that penalties follow the illegal attempts to undermine the U.S. commercial banking system.

Here, however, it is quite another matter to hold that a substantive issue of public interest is at issue where there exists an entirely private matter involving a post-divorce phone call from the ex-wife to the police to report an alleged violation of a restraining order (particularly when there are letters from the Parties' agents, their lawyers, setting a time and date for the property exchange and when the same court order containing the mutual restraining order also requires one of the Parties to obtain his property from the home. Thus, the present case involves a private matter of retribution between the Parties and is based on malicious prosecution by the ex-wife for her having provided incomplete and misleading statements to the police to use the police to get back at the husband.

Reporting to the police may generally be of public concern, but not when it is part of a broader private campaign between the parties. *See Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132 (3d Distr. 2003)

There has to be some limit to what is a matter of public concern and that limit is this case, where we have these facts, and a private matter

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between two contentious divorce litigants with one seeking retribution against the other. This is the conclusion reached by the trial court in its well-reasoned opinion. (CP 341-348)

ii. RCW Chapter 4.24.500-510 does not immunize unprotected speech, it only insulates protected speech

RCW 4.24.510 immunizes persons who communicate a complaint or information to a branch or agency of federal, state, or local government that is reasonably of concern to the agency. It was enacted in response to legislative concern that lawsuits were being used to intimidate citizens from exercising their rights under the First Amendment and article I, section 5 of the Washington State Constitution to report potential wrongdoing to government agencies. *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010) (emphasis added)

Instead of a boundless statute, the anti-SLAPP act was:

> intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress.

RCW 4.24.525; Senate Bill 6395, Laws of 2010, Ch. 118 § 1 (emphasis added).

Originally, the stated legislative purpose of RCW 4.24.500 et seq was to protect individuals who make good-faith reports to appropriate governmental bodies. RCW 4.24.500 Thus, Former RCW 4.24.510

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(1989) expressly required that the protected communications be made in good faith. But, the legislature eliminated the good faith language in a 2002 amendment. Laws of 202, ch. 232, § 2 (modifying the provision that the statutory damages be awarded unless the court finds bad faith. *Id.*

However, regardless of "motive" (i.e. to get someone back), false police reports are not protected speech nor are they of reasonable concern to a branch of government.[30] Thus, in *Weinberg v. Feisel*, 110 Cal.App.4th 1122,1136 2 Cal.Rptr.3d 385, the California Court of Appeals made clear that false allegations are not protected activity:

> Simply stated, causes of action arising out of false allegations of criminal conduct, made under circumstances like those alleged in this case, are not subject to the anti-SLAPP statute. Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law, without regard to the circumstances in which they were made—a result that would be inconsistent with the purpose of the anti-SLAPP statute and would unduly undermine the protection accorded by paragraph 1 of Civil Code section 46, which includes as slander any false and unprivileged communication charging a person with a crime, and the California rule that false accusations of crime are libel per se (citation omitted).[31]

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[30] The statute protects solely communications of reasonable concern to the agency. *Gontmakher v. The City of Bellevue*, 120 Wash.App. 365, 372, 85 P.3d 926 (2004)

[31] The right of citizens to contact the government to seek help must be qualified with a good faith requirement and without it, cannot be granted an absolute immunity. If an absolute immunity applies without the requirement of good faith, then the right to free speech is made superior to the right to petition, despite neither constitutional right being pre-eminent over the other. See *McDonald v. Smith,* 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed.2d 384 (1985) (the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment); *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and

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Filion does not dispute that courts must construe the anti-SLAPP statute broadly, but instead contends that the broad construction is to effect the statute's purpose which is the valid exercise of the constitutional rights of freedom of speech and petition for the regress of grievances. Thus, the United States District Court's discussion of the inapplicability of anti-SLAPP to certain activity and reporting is instructive:

> '[C]ourts evaluating a special motion to strike... must carefully consider whether the moving party's conduct falls within the 'heartland' of First Amendment activities.' *Jones v. City of Yakima Police Dept.,* 12-CV-3005-TOR, 2012 WL 1899228 (E.D. Wash. May 24, 2012). The conduct alleged in the complaint predominately describes unprotected activity. The First Amendment does not protect neighbors from acting badly to each other. Assuming for the moment that Shoemaker's comments to the board were protected speech, the complaint as a whole targets Shoemaker's actions more broadly. 'When the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' *Martinez v. Metabolife Internat. Inc.,* 113 Cal.App.4th 181, 187, 6 Cal.Rptr.3d 494 (2003). Defendants contend that Shoemaker's actions were investigative activities and liken Shoemaker's conduct to a person who does 'nothing more than detail his version of the facts to a police agency and asks the agency for assistance....' Dkt. # 14, p. 14. However, such a construction of the facts is improper. Taking Plaintiff's allegation in the light most favorable to her, as the Court must, the claims only tangentially implicate Mr. Shoemaker's comments to the Board and the complaint does not target protected activity as intended by the statute.

Fielder v. Sterling Park Homeowners Association, No. C11-1688, W.D. WA (Seattle, December 10, 2012) (Order On Motion To Dismiss And

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press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights ... and therefore are united in the First Article's assurance.")

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Motion For Attorney Fees, Costs, And Statutory Penalty, Ricardo S. Martinez, District Judge)[32],[33]

Thus, false statements to third parties have been found to invalidate the immunity of 4.24.500 et seq. *See Valdez-Zontek v. Eastmont School Dist.*, 225 P.3d 339, 154 Wn.App. 147, 167 (Div. 3 2010) ("[T]fact that district officials "broadcast" false statements to numerous individuals deprived district of immunity under RCW 4.24.510")

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[32] The Court went on to state:

> Second, Defendants also fail to demonstrate that Shoemaker's comments to the SPHA fall under the protection of the anti-SLAPP statute as acts of public participation. Under subsections (a), (d), and (e), an act of public participation includes "[a]ny oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law"; "[a]ny 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 "[a]ny 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." RCW 4.24.525. Thus, Defendants must show that the Board meeting was either a governmental proceeding, or a public forum and that Shoemaker and Van Bramer's complaint about excessive noise and traffic in their cul-de-sac is a matter of public concern. Defendants point to no authority stretching the governmental proceeding, public forum, or public concern elements to reach the dispute illustrated here. Sterling Park contains roughly 120 residents. Dkt. # 10, p. 1. The SPHA meetings were held in neighbor's private homes. *See id.* at ¶ 4.2.3. The recorded minutes from one Board meeting suggest that only a handful of residents attended the meeting where the neighbors' complaint was first addressed. *See id.* Moreover, Ms. Fielder lives in a cul-de-sac within the private community of Sterling Park. *Id.* at 4.1.11. Defendants' bald assertions that the SPHA is a government-like entity with official proceedings, that a small meeting in private home is a public forum, and that traffic congestion and daycares are matters of public concern do not satisfy the requirements imposed by the statute. In light of the multiple deficiencies in Defendants' motion, Defendants failed to meet their threshold burden. For this reason, the Court need not address whether Plaintiff can show a likelihood of success on the merits.

[33] *See also Segaline v. State, Dept. of Labor and Industries*, 238 P.3d 1107, 169 Wn.2d 467, 474 (Wash. 2010) ("The State's assertion that our decision there opened the floodgates for any entity to claim immunity under RCW 4.24.510 ignores the intent of the statute, which is to protect free speech rights.")

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The Court of Appeals decision in *Reid v. Dalton*, also appears to be in line with this position (and at odds with *Bailey*, *supra*),

> Federal courts interpret the analogous statute the same way. The purpose of anti-SLAPP statutes is to protect the First Amendment right of citizens to petition the government for redress of grievances. Litigation that does not involve a bona fide grievance does not come within the First Amendment right to petition.

100 P.3d 349, 124 Wn.App. 113, 126 (Wash.App. Div. 3 2004) (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983))

Johnson's false reporting to the police (by intentionally omitting known facts) is not a protected activity under RCW 4.24.500 et seq.

4. Even if RCW Chapter 4.24.500 applied, Filion overcame his burden by proving a prima facie claim and defeating the application of the anti-SLAPP statute.

i. The anti-SLAPP statute <u>does not provide absolute immunity against malicious prosecution</u> actions.

In addition, the present case is based on the underlying claim of malicious prosecution relating to Johnson's efforts to have Filion charged with violation of a restraining order after he arrived at the marital home at a pre-arranged time and date to pick up his remaining personal property – (despite the fact that the date had been pre-arranged by the Parties' attorneys in accordance with the divorce decree and on the last day before the selling of the house).

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Malicious prosecutions are not precluded by RCW 4.24.500-510 because there is no such specific intent in the legislation and the statute was never intended to do away with this common law action. See *Lumberman's of Washington, Inc. v. Barnhardt,* 89 Wash.App. 283, 286, 949 P.2d 382 (1997) (Statutes enacted in derogation of the common law are to be strictly construed absent legislative intent to the contrary).

And, tying back into the last topic (matters of public concern), it is also currently the law in Washington that malicious prosecution cases are not matters of public concern. *Banks v. Nordstrom, Inc.,* 57 Wash.App. 251, 264, 787 P.2d 953, *review denied,* 115 Wash.2d 1008, 797 P.2d 511 (1990) (considering the fifth prong of the CPA and matters affecting the public interest, and **holding that malicious prosecutions themselves do not satisfy that fifth prong**).

In addition to the absence of a specific intent to do away with malicious prosecution actions (which would be the result Johnson seeks), the very case upon which Johnson relies (*Dang v. Ehredt*, 95 Wn. App. 670, 977 P.3d 29, *review denied.* 139 Wn.2d 1012 (1999)) in turn cites and relies on California law – law which specifically excludes malicious prosecution actions from broad anti-SLAPP immunity. Instead, if the malicious prosecution claim can be proven, the anti-SLAPP immunity does not apply.

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In reviewing RCW 4.24.510, the court of appeals in *Dang v. Ehredt* relied on *Devis v. Bank of America*, 65 Cal.App.4th 1002, 77 Cal.Rptr.2d 238 (1998) and *Hunsucker v. Sunnyvale Hilton Inn* 23 Cal.App.4th 1498, 28 Cal.Rptr.2d 722 (1994)[34]. Both *Hunsucker* and *Devis* in turn cite the California Supreme Court case, *Silberg v. Anderson.* 50 Cal.3d 205, 786 P.2d 365 (1990). In *Silberg*, the California Supreme Court made it clear that while the privilege afforded by the immunity statute is far reaching, barring tort actions based upon a protected communication, it does not bar malicious prosecution. *Id.* at 215-216. *Silberg* cited the reasoning of the California Supreme Court in *Albertson v.*

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[34] In *Devis v. Bank of America*, Appellant Devis, due to mistaken identity, was arrested and imprisoned after Bank of America (BofA) informed the police that he had stolen checks from his acquaintance Patrick McKinney. 65 Cal.App.4th at 1004. Devis sued BofA and McKinney for false imprisonment, slander and negligence in the investigation which led to the police report. At summary judgment, the trial court ruled that California's anti-SLAPP statute barred retaliatory actions and the case was dismissed. *Id.* On appeal, the California Court of Appeals explored the causes of action (which did not include one for malicious prosecution) to hold that the California anti-SLAPP statute protected against suits for negligence and false imprisonment. *Id.* at 1012.

In the second case, *Hunsucker*, a maid at the Sunnyvale Hilton Inn informed management that she had seen a woman in Appellate Hunsucker's room brandishing a gun. 23 Cal.App.4th at 1500. A manager at the Hilton reported this information to the police. *Id.* Prior to arriving at the hotel, the police conducted a routine check for outstanding warrants and background information on the name Don Hunsucker and the search revealed that Don Hunsucker had a felony warrant and weapons record, and the police concluded that the person registered at the Hilton was the same Don Hunsucker. *Id.* The police arrived at the hotel and detained Hunsucker while they searched the room. Hunsucker was detained for approximately 30 minutes before the police discovered that the Hunsucker was not the one with the outstanding warrant. *Id.* at 1501. The Hunsuckers sued the Hilton and the City of Sunnyvale for false imprisonment, assault and battery and deprivation of their civil rights (but not malicious prosecution). On appeal, the California court of appeals disagreed with the Plaintiff's contention that the acts of the Defendant hotel reporting to the police were not privileged. *Id.* at 1502. The Hunsucker court also disagreed with the Plaintiff's contention that false imprisonment and defamation should not be barred by the anti-SLAPP statute. *Id* at 1505.

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Raboff, 46 Cal.2d 375 (1956), as to why malicious prosecution actions are not barred by the anti-SLAPP act. In *Albertson*, the court distinguished between actions for defamation and those for malicious prosecution.

> [T]he fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.

46 Cal.2d at 382. The Albertson court went on to write that "allegations that the action was prosecuted with knowledge of the falsity of the claim are sufficient statement of lack of probable cause" in malicious prosecution actions. *Id.*[35]

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[35] Although no Washington appellate cases from Division One appear to directly address whether the immunity afforded by RCW 4.24.500 -.510 applies to malicious prosecution, the Court of Appeals, Division Two, has addressed this issue in the converse in dicta in *Segaline v. Dep't of Labor & Indus.* 182 P.3d 480, 487 (Div. 2, 2008). Division Two of the Court of Appeals, did not, however, provide any reasoning for this application (since the trial the claim of malicious prosecution was dismissed and the claim was mooted on appeal). See *Id.* at n.5. Most importantly, the Washington Supreme Court reversed Division Two in *Segaline v. Dep't of Labor & Industries*, 169 Wn.2d 467, 238 P.3d 1107 (Wash. 2010) (on the ground that governmental agencies were not persons under RCW 4.24.500). The Washington Supreme Court did not reach the issue of malicious prosecution claims being exempted from the anti-Slapp statute. See FN 6, Id. ("Because the immunity under RCW 4.24.510 does not apply to L & I, we need not address Segaline's arguments based upon good faith and the statute's relation to malicious prosecution. Furthermore, we decline to address for the first time the additional arguments left unaddressed by the lower courts concerning Segaline's intentional infliction of emotional distress, malicious prosecution, and negligent supervision claims.") And thus, because the malicious prosecution claim was not properly before Division Two, and because that Court was overturned by the Supreme Court in 169 Wn.2d 467, Division Two's dicta in *Segaline*, 182 P.3d 480 should be disregarded.

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The information that Defendant Johnson communicated to the police officers was made in bad faith when she neglected to tell the police that the reason for Filion's appearance at the house at the time was due to the representation that she herself had made to Filion (through the Parties' lawyers), and that she was not to be present. She also did not tell the police of the separate divorce decree provision requiring Filion to collect this personal property. Johnson knew of the incompleteness of her communication to the police and thus its falsity. The question of whether Defendant Johnson made the communication with malice is the only question that the Court found to remain. (CP 338-340)[36]

This requirement aligns itself well with the good faith requirement of RCW 4.24.500. In proving a want of probable cause, a Plaintiff in a malicious prosecution action would also disprove "good faith" by the Defendant under the anti-SLAPP statute.

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[36] And, based on the Verbatim Report and the record below, Filion made a prima facie case (and a clear and convincing one) that he would succeed on his malicious prosecution claim and that he was able to prove the following elements:

> (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

Cf. Clark v. Baines, 150 Wn.2d 905, 911, 84 P.3d 245 (2004); CP 140-147, CP 326-329 (Plaintiff's Motion for Summary Judgment and Reply and Declarations at CP 281-313, 314-325, 148-161, 186-237)

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V. ISSUE OF ATTORNEY'S FEES

Johnson is not entitled to fees regardless of whether she is successful on appeal since she would still not be a prevailing party. *See Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital v. Deanna D. Kraft,* 165 Wash.2d 481, 489, 200 P.3d 683 (2009) ([A] "prevailing party" means the party in whose favor final judgment is rendered). RCW 4.24.510 provides that an award of attorney fees and statutory damages is allowed only to a party who prevails on the particular defense. Johnson has not prevailed on this Defense and thus even if she was successful on appeal, she is not entitled to attorney's fees. As much as it would simply like the case dismissed, the Estate of Filion is entitled to attorney fees as a continuation of the successful defense of the Arbitration Award under MAR 7.3 and 18.1.

C. CONCLUSION

For these reasons, the King County Superior Court should be affirmed and Johnson's Appeal should be denied.

DATED this 26 day of September, 2013

By _____

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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

JULIE JOHNSON Appellant, v. LESTOR FILION Respondent.	CASE # 69533-9-I **PROOF OF SERVICE**

TO CLERK OF THE COURT OF APPEALS

AND TO: HELMUT KAH
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WOODENVILLE, WA 98072

I, Noah Davis, do hereby certify that a copy of the attached: Motion to Substitute, and Substitute Responsive Appellate Brief was filed with the Washington State Court of Appeals, Division One and served by first class mail on Helmut Kah at the above address on September 24th, 2013.

DATED this 24th day of September, 2013

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