NO. 90507-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 69830-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ESTATE OF GARY FILION, by and through
Lester Filion as personal representative,

Respondent,

v.

JULIE JOHNSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Julie Johnson asks this court to accept review of the Court of Appeals decisions terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Johnson asks this court to review the following parts of the decision filed May 12, 2014:

(1) The conclusion that "The trial court properly denied Johnson's motion for summary judgment and prevented her from raising her ant-SLAPP [RCW 4.24.510, *not* RCW 4.24.525] defense at trial-denovo.

(2) The conclusion that Johnson waived her defense of absolute immunity under RCW 4.24.510 by failing to assert the defense in a document labelled "answer";

(3) The conclusion that Johnson's assertion of the RCW 4.24.510 immunity defense was dilatory;

(4) The implied conclusion that Filion was surprised or prejudiced by Johnson's assertion of the RCW 4.24.510 immunity defense;

(5) The denial of Johnson's timely motion for reconsideration.

A copy of the decision is in the Appendix at pages A-1 through A-8. A copy of the June 6, 2014, order denying Johnson's motion for reconsideration is in the Appendix at page A-9.

C. ISSUES PRESENTED FOR REVIEW

(1) Where a complaint for civil damages seeks to impose civil liability for money damages based upon the defendant's communication to law enforcement (call to 911 and report to responding officer) stating that plaintiff committed a restraining order violation, does the complaint fail to state a claim upon which relief can be granted?

(2) Where a pro se defendant's answer pleads the defense that *"Plaintiff has failed to state a claim against defendant on which relief may be granted"*, has the answer sufficiently informed plaintiff of the nature of the defense of immunity under RCW 4.24.510?

(3) Where defendant raised the RCW 4.24.510 immunity defense as a CR 12(b)(6) motion to dismiss which is heard and fully addressed by both parties as a motion for summary judgment, and is denied by the trial court, must defendant amend her pleadings to state the defense in a document labelled "answer" in order to preserve the defense in the case?

(4) Where the RCW 4.24.510 immunity defense is actually tried in mandatory arbitration, and defendant prevails on the basis of that

defense in arbitration, is the defense preserved as having been "tried with the parties' express or implied consent". *Henderson v. Tyrrell,* 80 Wn. App. 592, 624, 910 P.2d 522 (1996)

(5) Where both parties have fully addressed the RCW 4.24.510 immunity defense multiple times on the record before trial, including at the mandatory arbitration hearing, and plaintiff is undeniably and admittedly fully informed of the factual and legal aspects of the defense, may the trial court none-the-less bar defendant from asserting and relying upon the defense at trial de-novo?

D. Statement 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 an order which restrains each party 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)

In addition to the restraining order, the decree provided that Filion was to retrieve certain personal property items from Johnson's residence within 30 days of entry of the Decree. (CP 28 & 29; CP 212 & 213)

Johnson's residence had been sold. The buyers were to have

possession by 9:00 p.m. on August 1, 2006. (CP 200 – 201) Johnson's packing to move took longer than anticipated. The parties' realtor spoke with Johnson that morning and was informed that would not be moved out before 9:00 p.m. that evening. (CP 198, l. 6 – 8)

The realtor visited Johnson's residence at 1:00 p.m. on August 1 to see how things were going and 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)

The realtor phoned Filion and told him that Johnson would not be out of the house until 9:00 p.m. that evening. Filion told the realtor that he was going to the house at 4:00 pm with a truck to pick up furniture & personal belongings. (CP 198, l. 14 – 17)

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

Filion called the realtor again and asked if she had told Johnson he was coming over. Ms. Dornay told him, "Yes, I did". Filion asked, "What did she say?" The realtor told him Johnson had 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)

Despite the restraining order, and despite having been informed that Johnson and her children would still be at the residence until 9:00 p.m., Filion came to the door of Johnson's home at 4:00 p.m. August 1, 2006. Through the kitchen window, Johnson saw him approach. She saw a moving truck come up her driveway. It stopped near the garage door. She saw Filion get out of the truck. Johnson had a panic attack and took a Xanax. Filion came to the front door, knocked, and rang the doorbell. Johnson called 911. Filion was told by one of Johnson's helpers that he should not be there and the police are on their way. (CP 102 – 107, at ¶¶ 5 – 6) (CP 185) Filion left the premises and was gone before the police arrived. (CP 190 -191, at ¶ 4).

A King County Deputy Sheriff arrived shortly, took a statement from Johnson, and completed an Incident Report dated August 1, 2006, (CP 226 – 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 seeks civil money damages from Johnson based on her call to 911 and her report to the responding deputy sheriff. CP 3 – 4)

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)

The trial court ordered that Johnson's motion be heard as a motion for summary judgment under CR 56. The hearing 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 73; CP 70; 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 and filed a MOTION TO DISMISS ALL CLAIMS on May 11, 2009. Johnson had responded. Filion had replied.

That motion was denied. (CP 120, l. 21 – 22) On May 19, 2009, Filion filed a 2nd CR 41(a) MOTION FOR DISMISSAL OF ALL CLAIMS BEFORE RESTING. (CP 124 – 128) That motion was granted. (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. The hearing on summary judgment was held November 2, 2012, before the Honorable Sharon S. Armstrong, Judge, King County Superior Court. (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)

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 couryt. (CP 449 -454)

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

Johson appealed on January 18, 2013. (CP 609 – 624)

The Court of Appeals unpublished decision was filed May 12, 2014.

Johnson timely filed a motion for reconsideration. The order denying reconsideration was filed June 6, 2014

Johnson's Motion for Summary Judgment (CP 162 – 172; and CP 173 – 185) i

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

Filion did not cross appeal.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because:

1. The Court of Appeals' decision is in conflict with other decisions of the Court of Appeals; and

2. The petition involves issues of substantial public interest that should be determined by the Supreme Court, i.e. whether a person protected by a restraining order loses the protection of RCW 4.24.510 immunity and the right to recover expenses and attorney fees under the circumstances of this case.

The purpose of the immunity granted by RCW 4.24.510 is to prevent the filing of a lawsuit in the first place. Our courts have 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).

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 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 Court of Appeals stated its basis for affirming the trial court to be that Johnson had not timely or properly asserted her RCW 4.24.510 immunity defense. However, the established case law on this issue is in

conflict with the Court of Appeals decision in this case.

Johnson is entitled to protection of immunity established by RCW 4.24.510 in this case.

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. 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.

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.

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 (Wash.App. Div. 2 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 (Wash.App. Div. 3 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 (Wash.App. Div. 3 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 should not be heard to 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, after

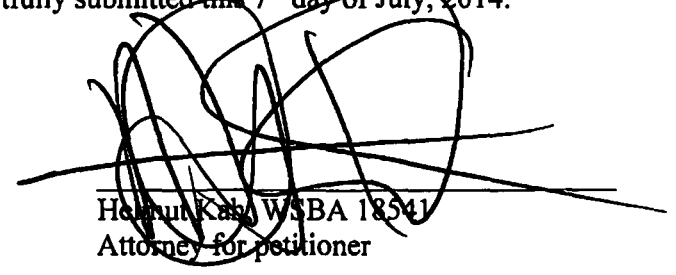
trying the issue on the merits in mandatory arbitration, and again addressing it on the merits in summary judgment proceedings 2012.

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).

F. CONCLUSION

This court should accept review for the reasons indicated above and hold that Johnson is entitled to the defense of immunity under RCW 4.24.510 in this case, reverse the Court of Appeals' decision affirming the trial court's orders precluding Johnson from asserting the defense, reverse the Court of Appeals and the trial court's award of costs and attorney fees to Filion, and award Johnson her expenses and reasonable attorney fees on review, on appeal, and in the trial court. .

Respectfully submitted this 7th day of July, 2014.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ESTATE OF GARY FILION, by and through Lester Filion as personal representative, Respondent, v. JULIE JOHNSON, Appellant.	No. 69830-3-I DIVISION ONE UNPUBLISHED OPINION FILED: May 12, 2014

APPELWICK, J. — Johnson appeals the dismissal of her anti-SLAPP defense against Filion's malicious prosecution suit. The trial court found that Johnson failed to affirmatively plead the defense and thus had waived it. Because Johnson was unable to assert the defense, she could not improve her position on trial de novo following arbitration. Accordingly, the trial court awarded Filion fees under MAR 7.3. We affirm.

FACTS

Julie Johnson and Gary Filion dissolved their marriage in 2006. Their divorce was contentious. Their dissolution decree contained a mutual restraining order preventing them from going onto the grounds of or entering the home, school, or workplace of the other.

The dissolution decree awarded Filion several items of personal property, which he was to pick up from Johnson's residence. The decree provided that "[s]aid items shall be picked up by the Husband at an agreed time at the Shoreline house within 30 days of entry of the Decree."

Johnson sold the Shoreline home. The closing date, including transfer of possession to the buyer, was August 1, 2006, at 9:00 p.m. Johnson and Filion agreed through their attorneys that Filion would pick up his belongings on the afternoon of August 1, any time after 2:00 p.m. Johnson's attorney indicated that Johnson would move her belongings out on July 31.

However, on the morning of August 1, Johnson's real estate agent discovered that Johnson was not finished packing and would not be done until the 9:00 p.m. deadline. The agent informed Filion, who responded that he would still be at the house at 4:00 p.m. to pick up his belongings. When Johnson learned that Filion intended to do so, she told the agent that "'[h]e better not or I'll call the cops!'" The agent called Filion back and either told him that Johnson said, "'[h]e better not'" or "'I hope he doesn't.'"

Filion arrived at the Shoreline house around 4:00 p.m. and knocked on the door. Johnson's son saw that it was Filion and did not open the door. Johnson also saw Filion arrive and began to have a panic attack. She was afraid of Filion, because they had an abusive relationship. She called 911. Johnson's friend, who was helping her pack, told Filion that the police were coming. Filion left, but was later arrested for violating the restraining order. His lawyer also later discovered that Filion's property was not at Johnson's home at the time, but was held at an undisclosed third-party location.

The charges against Filion were ultimately dismissed. Filion then sued Johnson for malicious prosecution, arguing that she made misrepresentations and false statements to the police. Johnson filed a pro se answer on May 16, 2007, asserting the following affirmative defenses: failure to mitigate damages; failure to state a claim upon

which relief can be granted[1]; comparative fault; apportionment; and severability. On October 26, 2008, now represented by counsel, she brought a CR 12(b)(6) motion to dismiss Filion's suit under RCW 4.24.510, Washington's Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. The court heard the motion as one for summary judgment. It denied the motion.

The parties went to mandatory arbitration on February 9, 2009. The arbitrator found in Johnson's favor, but did not indicate the legal or factual basis for the award. He declined to award her fees or damages under RCW 4.24.510. Johnson then sought trial de novo, which was set for July 2009.

At this point, Filion moved to voluntarily dismiss his claims. Johnson objected, arguing that Filion no longer had the ability to voluntarily dismiss the case. The trial court granted Filion's motion on July 9, 2009. Johnson appealed to this court, which reversed the trial court's order on November 11, 2010. Filion v. Johnson, noted at 158 Wn. App. 1045, 2010 WL 4812914. We found that, because the arbitrator had filed an award and Johnson had requested trial de novo, Filion could no longer voluntarily nonsuit. Id. at *2.

On October 8, 2012, Johnson moved for summary judgment on the basis of the anti-SLAPP law.[2] The court denied her motion. It concluded that Johnson's conduct was not within the scope of the statute and that she had waived it as an affirmative defense. It therefore disallowed her from asserting the defense at trial.

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[1] Johnson did not specify the basis for Filion's failure to state a claim.

[2] At this point, Filion had passed away. His role in the litigation continued by and through his estate.

The parties proceeded by way of stipulated trial. The court found that, regardless of whether Filion prevailed on his claim, Johnson was unable to improve her position on trial de novo without the aid of her anti-SLAPP defense. As a result, it also found that Filion was entitled to fees and costs under MAR 7.3.

Johnson appeals.

DISCUSSION

Johnson challenges the trial court's denial of her motion for summary judgment seeking to dismiss Filion's suit under RCW 4.24.510. She further contends that she should have been allowed to assert her anti-SLAPP defense at trial de novo. Accordingly, she argues that the trial court improperly awarded fees to Filion under MAR 7.3.

I. Waiver of Defense

Johnson contends that the trial court erred in denying her 2012 motion seeking summary judgment under RCW 4.24.510 and preventing her from raising her anti-SLAPP defense at trial de novo.[3] The trial court concluded that Johnson had not pleaded the defense and had thus waived it.[4]

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[3] Filion argues that Johnson was not an aggrieved party and thus had no standing to appeal the arbitration award. He raises this argument as an alternative basis for relief, but does not do so in a cross-appeal. Because we affirm on the basis of waiver, we need not address his argument.

[4] The trial court provided two additional reasons for denying Johnson's motion. First, the court found that Johnson's 2012 motion merely renewed her 2008 motion without presenting new facts or circumstances as required by King County Local Rule (KCLR) 7(b)(7). The court further concluded that Johnson's conduct did not fall within the scope of RCW 4.24.525, a 2010 amendment to the anti-SLAPP statute. LAWS OF 2010, ch. 118, § 2. We note that Johnson's conduct occurred in 2006, before the amendment was enacted. But, because we affirm on waiver, we do not address the propriety of the trial court's other bases for denying the motion.

CR 8(c) establishes that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively [any matter] constituting an avoidance or affirmative defense." Generally, affirmative defenses are waived unless (1) affirmatively pleaded; (2) asserted in a CR 12(b) motion; or (3) tried with the parties' express or implied consent. Henderson v. Tyrrell, 80 Wn. App. 592, 624, 910 P.2d 522 (1996). The policy behind this rule is to avoid surprise. Id. Accordingly, a defense may be waived if a defendant's assertion of the defense is inconsistent with the defendant's previous behavior or if the defendant's counsel is dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

In French v. Gabriel, 116 Wn.2d 584, 587, 593-94, 806 P.2d 1234 (1991), the court found that the defendant preserved his affirmative defense by raising it in his answer, even though his answer was several months late. While the court expressed displeasure at his tardiness, it reasoned that the defendant's conduct was neither inconsistent with the intent to bring his defense nor resistant to efforts by the plaintiff to move the case along. Id. at 593. By contrast, in Raymond v. Fleming, 24 Wn. App. 112, 114, 600 P.2d 614 (1979), the defendant repeatedly asked for continuances in response to the plaintiff's requests for an answer and attempts to resolve the case. The defendant ultimately delayed the case for almost a year before bringing a CR 12(b) motion asserting insufficient service as an affirmative defense. Id. at 115. The court found the defense waived due to dilatory conduct. Id. Likewise, in Lybbert, the court found that the defendant waived its insufficient service defense by acting for nine months as if it were

preparing to litigate on the merits and then raising the defense in its answer filed only after the statute of limitations had run. 141 Wn.2d at 32, 44-45.

Johnson's initial answer did not assert the anti-SLAPP statute as an affirmative defense. Johnson was pro se at the time. But, a pro se litigant is held to the same standard as an attorney. Batten v. Abrams, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981). On the record before us, it appears that Johnson did not raise the defense for seventeen months, in her CR 12(b) motion on October 26, 2008. In the meantime, the parties had demonstrated the ability and intent to litigate. Johnson filed a joint confirmation of trial readiness on July 14, 2008. Filion filed a jury demand on July 17. The trial date was set for August 4. Then, the parties stipulated to strike the trial date and transfer the case to mandatory arbitration. The order transferring the case was signed July 24. The parties then waited until August 21, nearly a month later, to file the order. Two months after that, Johnson raised her affirmative defense.

Unlike the defendant in French, Johnson did not preserve her defense by raising it in her answer. See 116 Wn.2d at 593. Instead, like the defendant in Lybbert, she engaged in trial preparation without demonstrating any intent to pursue the defense. See 141 Wn.2d at 32. Her assertion of the defense was thus inconsistent with her conduct over the previous seventeen months. This delay was even longer than in Lybbert and Raymond. See id.; Raymond, 24 Wn. App. at 114. With the trial date set and the case transferred to arbitration, Johnson was at a further point in the trial progression than in either of those cases. See Lybbert, 141 Wn.2d at 33; Raymond, 24 Wn. App. at 114; CP

632, 634. It was dilatory to wait until that point to assert the defense.[5] This constituted waiver of Johnson's anti-SLAPP defense. Nothing that happened in the ensuing years of litigation changed that fact.

The trial court properly denied Johnson's motion for summary judgment and prevented her from raising her anti-SLAPP defense at trial de novo.

II. Attorney Fees

Johnson contends that the trial court improperly awarded fees to Filion under MAR 7.3. MAR 7.3 mandates a fee award against a party who appeals an arbitration award and fails to improve his or her position on trial de novo. Johnson appealed the arbitration award, but could not raise her anti-SLAPP defense. She thus could not improve her position on trial de novo. The trial court properly awarded fees against her under MAR 7.3.

Johnson requests attorney fees and costs both at the trial level and on appeal. Under RCW 4.24.510, a party who prevails on the anti-SLAPP defense is entitled to recover reasonable attorney fees and costs. Johnson does not prevail on her defense. We deny her request.

Filion requests fees on appeal under MAR 7.3. A party who is entitled to fees under MAR 7.3 at the trial court level is also entitled to fees on appeal if the appealing party again fails to improve its position. Arment v. Kmart Corp., 79 Wn. App. 694, 700,

[5] Johnson further assigns error to the trial court's denial of her 2008 motion to dismiss. We know that the basis of Johnson's 2008 motion was also her anti-SLAPP defense under RCW 4.24.510. The record does not show the trial court's reasoning for denying her motion. However, based on the facts before us, we conclude that the trial court's decision would have been properly supported by waiver.

902 P.2d 1254 (1995). The trial court awarded Filion fees under MAR 7.3. Johnson, the appealing party, again failed to improve her position. We award Filion fees on appeal.[6]

We affirm.

Coppelwick, J.

WE CONCUR:

Spearman, C.J.

Schindler, J.

[6] Filion maintains that his ultimate goal is to see this case dismissed and he is willing to forfeit his right to attorney fees in order to do so. While the court lacks the authority to fashion this arrangement, the parties have the ability to do so.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ESTATE OF GARY FILION, by and through Lester Filion as personal representative, Respondent, v. JULIE JOHNSON, Appellant.	)	No. 69830-3-I ORDER DENYING MOTION FOR RECONSIDERATION

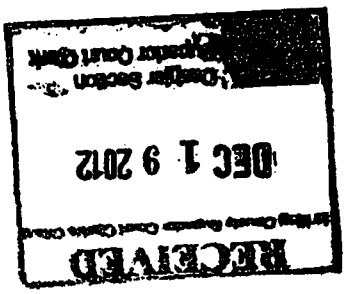
The appellant, Julie Johnson, having filed her motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 6th day of June, 2014.

Judge



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

#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) This 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 RCW 4.24.510 (immunity/anti-SLAPP).

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Hon. Sharon S. Armstrong

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

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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

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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

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(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).

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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

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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 S. Armstrong

Honorable Sharon S. Armstrong

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§ 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.]