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SUPREME COURT
OF THE STATE OF WASHINGTON

JULIE JOHNSON, Petitioner, v. ESTATE OF GARY FILION, et al. Respondent.	**CASE # 90507-0** **REPLY** ON THE: MOTION TO SUBSTITUTE "ANSWER TO PETITION FOR REVIEW" WITH THE "AMENDED ANSWER TO THE PETITION FOR REVIEW" WITH PROOF OF SERVICE

TO CLERK OF THE SUPREME COURT

AND TO: HELMUT KAH, Attorney for Petitioner Johnson
6818 140th Ave NE
Woodinville WA 98072-9001

REPLY

It does not appear that there is any opposition to the "Motion to Substitute Answer" *per se*; however, the Petitioner asserts that the Amended Answer does not go far enough in that there is at least a second statement in the Answer that is still in need of amendment. The Respondent respectfully disagrees, and therefore this Reply addresses that second statement (that is in issue), as well as a third statement that is raised in the email objection

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attached to the Petitioner's Response – with the hope being that the Parties can put any remaining objections to rest and have the Court focus on the merits of the substantive arguments.[1]

The issue of the Anti-SLAPP Defense being "tried" in Arbitration

In Julie Johnson's Petition to the Supreme Court she asserts that the Anti-SLAPP defense was "tried in Arbitration" (Pet. Br. p. 20. First line; Pet. Br. p. 5. There is no citation to the record) Other than her argument that this occurred, there is no record that the issues were tried, fully or otherwise.

And, as the Court of Appeals found (and as the Arbitrator's record is clear), the arbitrator "did not indicate the legal or factual basis for the award." (Decision Filed May 12, 2014)[2] In line with what the arbitration award expressly reads (and what the Court of Appeals found), the Estate of Filon's Answer (and Amended Answer) to the Petition attempts (in Footnote 9, p. 11) to address what is deemed an overstatement of the record:

---

[1] Respondent's counsel is grateful to the Petitioner's counsel for identifying the unintentional misstatement so that it could be corrected – as the Parties are absolutely entitled to an accurate representation of the record.

[2] The Arbiter's decision reads as follows: "Finding for Defendant Johnson. No Statutory damages or attorney's fees awarded to defendant Johnson." [CP110-111 Arbitration Award, Attached as Exhibit A hereto]

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> In addition, Johnson states that her claim was tried in arbitration (Johnson Br. Pg. 5-6), but there is no such ruling by the Arbitrator and there is no record to support that finding. And Johnson's counsel acknowledged during argument before the Court of Appeals that the Arbitration Award makes no mention of such a claim.

That Johnson raised the purported Anti-SLAPP in her briefing to the arbitrator does not mean that that the defense was tried with the consent of Filion, or that it was decided by the arbiter or that it was the basis of the arbiter's ruling – all of which appear to be the argument advanced by the Petitioner. The point is that the Arbiter made no such express finding and thus there is no express record that establishes such a factual position.

The same (or more expansive) representation was made to the Court of Appeals during oral argument (and was included in the Petitioner's Reply Brief to the Court of Appeals)[3] which resulted in the following colloquy between Petitioner's counsel and the Court of Appeals:

> [MR KAH:] As the Court knows, this case was referred to mandatory arbitration. The parties had a mandatory arbitration hearing. The arbitrator decided in Ms. Johnson's favor based upon her claim of immunity under 4.24.510.
>
> THE COURT: How do you know that?
>
> MR. KAH: Pardon?
>
> THE COURT: How do you -- how do we know that?

[3] In her Reply Brief, Johnson asserted that "[t]he immunity defense is the basis on which the arbitrator denied Filion's claims." (Appellant's Reply Brief, p.17)

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MR. KAH: It is in the briefing and it is in the record.
THE COURT: Where is it in the record that that was the basis for the arbitrator's award?

MR. KAH: We included, as part of the clerk's papers, a copy of Johnson's brief that was submitted in arbitration; that brief is part of the trial court record, actually.

THE COURT: But what -- what reflects the arbitrator's decision -- was based on -- on the anti-SLAPP statute?

MR. KAH: The arbitrator's award itself –

THE COURT: It might have been argued, but I want to know what the basis for the award was?

MR. KAH: Oh, what in the record reflects what the basis for the award was? I think it is on the face of the arbitrator's decision. The arbitrator, although it is not crystal clear in terms of being a decision in her favor -- under RCW 4.24.510, coupled with the fact that -- that defense is the basis for her defense at the arbitration hearing –

THE COURT: If –

MR. KAH: -- the arbitrator's –

THE COURT: If that had been the basis for the decision, wouldn't she have had mandatorily received her attorney's fees and a $10,000 mandatory penalty?

MR. KAH: Well if it -- if the decision had been made by a -- by a Superior Court judge, yeah, that is the case; however, the arbitrator's award expressly denies her recovery of her expenses –

THE COURT: Right?

MR. KAH: -- and reasonable attorney's fees.

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> THE COURT: And that suggests that that wasn't the basis for the Court's -- the arbitrator's decision.
> MR. KAH: Well, we will never know because –
>
> THE COURT: Right.
>
> MR. KAH: We will never know for sure. However, that's not -- that's -- that really isn't germane to -- that really is not the primary basis for Ms. Johnson's position on this appeal, but she did file a request for trial de novo, and the case proceeded to a hearing on summary judgment. . .

[Transcript from Court of Appeals argument, pp. 5-7, Attached as Exhibit B and highlighted]

There is no reference to Anti-SLAPP as the (or a) basis for the arbitrator's award. Without an explicit record which supports the factual assertion that it was actually tried and decided, the Petitioner can only assert that the record reflects that her briefing to the arbitrator raised the Anti-SLAPP defense[4] -- as that would reflect the most accurate record.

Estate of Filion's assertion regarding the basis for the criminal charges being dismissed.

In Johnson's email objection, under "other misstatements", Johnson asserts that it was a misstatement for the Estate of Filion to assert:

[4] And the same argument can be made from the face of the Arbitration Award that the Arbiter addressed Johnson's Prayer for Relief, as found in her Answer which requested "4. For defendant's costs and disbursements incurred herein; 5. For defendant's reasonable and actual attorney's fees;" [CP 8-10 Answer]

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> "After being charged with violating the restraining order, Mr. Filion's criminal defense attorney was able to provide the omitted informano to the prosecutor and have the charge dismissed. (CP 5 – 6 First Amended Complaint; CP 236 Criminal Docket Report)"

[See Johnson Objection; see also Amended Petition, bottom of Page 4 to top of Page 5]

Johnson asserts that the Criminal Docket Report only states: "City Moves to Dismiss in the Interests of Justice – Granted", and that there is no support for the remaining assertion made above. However, the citation to the record is to the Amended Complaint (CP 5-6) which, at CP 6 lines 7-11 (emphasis added), reads:

> Mr. Filion was prosecuted in King County District Court for violation of the no contact order. The charge was dismissed on motion of the prosecuting attorney when advised of the letter authorizing the visit to the home written by Mr. Olsen.
>
> Defendant Johnson, by misrepresentation and false statements to police officers caused the false arrest and malicious prosecution of plaintiff.

Thus, the factual basis in the record was provided. And, additional factual bases are set forth in footnote 5 below.[5]

---

[5] See CP 300-304, Response to Motion to Dismiss filed by Tim McGarry, at CP 301, Lines 8-11 (emphasis added):

> Ms. Johnson told the police that Mr. Filion was violating a no contact order. Subsequently, Mr. Filion ws prosecuted. However the case was dismissed when the City Attorney learned that Mr. Filion had been instructed to go to the Johnson home to pick up his personal property. (See attachments).

See also (Second) Amended Complaint, CP 11-12; and see "Letter from Mark Olsen" at CP 305. See also: CP 140-147 at 146 which states that Filion was required to hire a criminal defense attorney to "advocate on his behalf".

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RESPECTFULLY SUBMITTED this 30th day of October 2014

s/Noah C. Davis
Noah C. Davis, WSBA#30939
Attorney for Respondent
Estate of Gary Filion
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104 Ph.206.709.8281

PROOF OF SERVICE

I, Noah Davis, certify that on 10/30/14, at the time that the foregoing Motion was filed with the Supreme Court by email, that I simultaneously served an electronic copy on Petitioner's counsel, Helmut Kah at the regular email address thereof (as a "cc" to the filing with the Supreme Court). Thereafter I mailed a copy of the foregoing to the regular mailing address thereof.

DATED this 30th day of October, 2014.

s/Noah C. Davis
Noah C. Davis, WSBA#30939
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EXHIBIT A

ARBITRATION AWARD

ARBITRATION AWARD SEALED TO TRIAL JUDGE

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

FILION PLAINTIFF(S), vs. JOHNSON DEFENDANT(S).	NO. 07-2-06353-6 SEA ARBITRATION AWARD (Clerk's Action Required - ARBA)

The issues in arbitration have been heard on February 9, 2009, I make the following decision:

Finding for Defendant Johnson. No statutory damages or attorney's fees awarded to defendant Johnson.

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo under MAR 7.1, any party on notice to all parties may present a judgment on the Arbitration Award for entry as final judgment in this case to the Ex Parte Department.

Was any part of this award based on the failure of a party to participate at the hearing?
Yes_____ (PLEASE EXPLAIN) No: XX (MAR 5.4)

DATED: February 13, 2009

C. STEVEN FURY, WSBA 8896 Arbitrator

FILE THE ORIGINAL WITH THE CLERK'S OFFICE, KING COUNTY COURTHOUSE, TOGETHER WITH PROOF OF SERVICE ON THE PARTIES. SEND A COPY TO:

KING COUNTY SUPERIOR COURT
ARBITRATION DEPARTMENT
516 THIRD AVENUE - E219
SEATTLE WA 98104

NOTICE: If no Request for Trial De Novo has been filed and Judgment has not been entered within 45 days after this award is filed, the Clerk will notify the parties by mail that the case will be dismissed for want of prosecution.

ORIGINAL

11

EXHIBIT B

VERBATIM TRANSCRIPT OF PROCEEDINGS

OF COURT OF APPEALS ORAL ARGUMENT

(4-16-14)

69830-3-I

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

JULIE JOHNSON, Appellant, vs. ESTATE OF GARY FILLON, P.R. LESTER FILLON, Respondent.	No. 07-2-06353-6 SEA

VERBATIM TRANSCRIPT OF PROCEEDINGS

OF

AN ORAL ARGUMENT

BEFORE THE THREE JUDGE PANEL

HONS. MARTIN APPLEWICK, MICHAEL S. SPEARMAN & ANN SCHINDLER

4/16/2014

APPEARANCES

For Appellant Johnson: Helmut Kah

For Estate of Filion: Noah Christian Davis

Transcribed at the Request of In Pacta PLLC, Lawyers

Transcribed by Brian Killgore

(Proceedings of 4/16/2014)

THE COURT: This is Johnson v. Estate of Filion.

MR. KAH: Good morning, Your Honor.

May it please the Court, my name is Helmut Kah. I represent Julie Johnson, the appellant in this case, and Ms. Johnson is a defendant in the trial court below.

This case --

THE COURT: How much time would you like to reserve?

MR. KAH: Pardon?

THE COURT: How much time would you like to reserve?

MR. KAH: I would like to reserve four minutes.

THE COURT: All right.

MR. KAH: Thank you.

THE COURT: Proceed.

MR. KAH: As the Court knows, this case arises on Julie Johnson's August 1, 2006, phone call to 911 when Gary Filion came upon the grounds of her home, and also upon her report to the responding sheriff's deputy.

Mr. Filion was served with a summons and a notice

to appear for an arraignment on a charge of violation of a no contact order.

He appeared in King County District -- well actually in Shoreline Municipal Court at the Shoreline Courthouse -- entered a plea of not guilty.

Subsequently the criminal charge was dismissed, and on February 21, 2007, Mr. Filion filed the underlying lawsuit in this case against Johnson in which he seeks money damages from Johnson based on allegations that when Mr. Filion arrived at Johnson's residence on August 1, 2006, the police were called and he was placed under arrest for violation of a no contact order.

I would like to point out that the record shows that he was never arrested, but what happened was that he -- he left the scene, the police did not arrest him that day, and he subsequently received a notice to appear in the mail.

The parties' June 1, 2006, dissolution decree restrains Mr. Filion from going upon the grounds of or entering, and from coming within or remaining within 500 feet of the home of Johnson and her children.

The record shows that Mr. Filion's complaint seeks to establish civil liability against Johnson based upon her August 1, 2006, call to 911, and her report to the

responding deputy sheriff, and that --

THE COURT: And your claim with her -- her defense is what is known as the "anti-SLAPP statute"?

MR. KAH: Yes, and she raised -- she raised the immunity defense under --

THE COURT: Was that asserted in her complaint or her answer to the complaint?

MR. KAH: No, she filed her answer pro se in this way in 2007. Then she didn't hire counsel until 2008.

After she hired counsel, which was me, refiled a CR 12B6 motion to dismiss raising -- as a basis for dismissal of her immunity under RCW 4.24.510, and the CR 12B6 also requests an award of expenses and reasonable attorney's fees within that statute.

THE COURT: Do you think the anti-SLAPP statute eliminates the common-law cause of action for malicious prosecution?

MR. KAH: Well no, it doesn't, and I addressed that in our reply brief, and case law cited in the reply brief states that RCW 4.24.510 is actually a codification of the common law, which protects individuals from civil liability for reports to government agencies.

So the argument that -- that 4.24.510 is in

derogation of the common law has already been decided by a decision of the Court of Appeals, contrary to the position taken by the respondent on this appeal.

Ms. Johnson has consistently throughout this case asserted her defense of immunity under 4.24.510, together with her request for an award of expenses and reasonable attorney's fees.

As the Court knows, this case was referred to mandatory arbitration. The parties had a mandatory arbitration hearing.

The arbitrator decided in Ms. Johnson's favor based upon her claim of immunity under 4.24.510.

THE COURT: How do you know that?

MR. KAH: Pardon?

THE COURT: How do you -- how do we know that?

MR. KAH: It's in the briefings and it's in the record.

THE COURT: Where is it in the record that that was the basis for the arbitrator's award?

MR. KAH: We included as part of the clerk's papers a copy of Johnson's brief that was submitted to arbitration; that brief is part of the trial court record, actually.

THE COURT: But what is what reflects the

arbitrator's decision, it was based on -- I can't recall the SEATAC statute?

MR. KAHN: The arbitrator's award itself --

THE COURT: It might have been argued, but I want to know what the basis for the award was?

MR. KAHN: Oh, what the memorandum reflects what the basis for the award was? I think it is on the face of the arbitrator's decision?

The arbitrator, although it's not expressly clear from this, I believe, decision in the case -- under RCW 49.46.090 coupled with the ... that defense is the basis for her defense at the arbitration hearing.

THE COURT: If --

MR. KAHN: -- the arbitrator --

THE COURT: If that had been the basis for the decision, wouldn't she have had mandatorily received her attorney's fees and a $10,000 mandatory penalty?

MR. KAHN: Well, if it -- if the decision had been made by a -- by a superior court judge, yes, that is the case; however, the arbitrator's award expressly denies her recovery of her expenses --

THE COURT: Right.

MR. KAHN: -- and reasonable attorney's fees.

THE COURT: And that is the case here.

[redacted]

de novo, and the case proceeded to a hearing on summary judgment in November 2012, and at the -- as the Court knows, the trial court judge in the November 7, 2012, order for summary judgment denied Ms. Johnson's claim for immunity and for dismissal under RCW 4.24.510, stating primarily that -- in the trial court's view, her -- the facts don't establish the kind of anti-SLAPP defense that's defined under 4.24.525, and it is our position that --

THE COURT: Would you like to continue with your rebuttal time?

MR. KAH: I would like to continue. Sure. I just have a couple of more comments.

THE COURT: Okay.

MR. KAH: Ms. Johnson's defense is primarily based and governed by other decisions of the Court of Appeals in the cases of Dang v. Eric (phonetic) (1999);

Bailey v. State (2008), and in 2013, Lowe v. Rowe (phonetic), a more recent decision by Division III, and in Lowe v. Rowe, the Court of Appeals distinguishes RCW 4.24.510 and 4.24.525, and I think the distinction expressed in the case of Lowe v. Rowe applies to this case.

The Court stated that "the language of RCW 4.24.510 broadly grants immunity for civil liability for communications to an agency concerning a matter reasonably of concern to that agency."

And also the Court stated that "there's no doubt that enforcement of state criminal laws is a matter of concern for law enforcement."

And that frankly aptly describes the circumstances of this case.

Ms. Johnson simply made a report to law enforcement. She was sued under a claim for damages for civil liability because she made a report to law enforcement.

That is the absence of this case, and that kind of claim is barred by 4.24.510.

Nothing under 4.24.525, which was first enacted in 2010, applies to this case.

THE COURT: So what if the trial court determined that she had filed that claim with the

officer maliciously? Bad faith?

MR. KAH: Why did the --

THE COURT: Knew it was wrong?

MR. KAH: Well --

THE COURT: Shouldn't the Court have the opportunity to look at that and determine whether or not it was a reasonable report to a government agency as opposed to trying to use the agency as a tool for her own private purposes?

MR. KAH: Well, the record in the case doesn't support a conclusion that Ms. Johnson used the law enforcement agency for her own purposes, and --

THE COURT: But as a general proposition, if you -- if you presume that you can never get past the facts, that so long as it is a law enforcement agency that receives the report, we would never know whether or not someone is lying and abusing someone through the reporting process, would we?

MR. KAH: But there are remedies for -- for making false reports to law enforcement agencies, and 4.24.510 eliminates the civil damages remedy for making such false reports, but it's -- I believe the record shows that Ms. Johnson's report was not made in good faith and was not made maliciously.

There was a Superior Court restraining order; that

restraining order precluded Mr. Filion from doing what he did on August 1, 2006.

Ms. Johnson had warned Mr. Filion through the realtor, the parties' realtor --

THE COURT: Let me ask, there is the -- the anti-SLAPP statute was amended, I think, in 2010?

MR. KAH: Yes.

THE COURT: And are the arguments that you're making based on the 2010 version or the prior version?

MR. KAH: No, it is based on the prior version -- 4.24.510.

THE COURT: Okay.

MR. KAH: The 2010 amendment simply established 4.24.525, which broadened the scope of the anti-SLAPP protection for the state of Washington.

But as to the Court's question regarding good faith, the case of Bailey v. State held that "there is no requirement that a report or communication to a government agency must be in good faith for the person who makes that report to be immune from civil liability under 4.24.510," and that "a finding of bad faith affects only the ability of statutory damages."

So it is our position that this case -- that under the facts of this case, Ms. Johnson clearly is entitled to the immunity under 4.24.510; that she consistently

asserted her defense throughout the case in the trial court.

She never waived the defense under 4.24.510, as asserted by the respondent, and frankly failure to include that defense in a document labeled "answer," is not a waiver of the defense as explained in our briefing.

THE COURT: Thank you.

MR. KAH: Thank you.

THE COURT: That did use up your full 10 minutes.

MR. KAH: Yes, I know.

THE COURT: All right, thank you.

Counsel?

MR. DAVIS: Good morning, Your Honor. My name is Noah Davis and I represent the estate of Gary Filion.

With me today is Mr. Filion's father, Les Filion.

I want to address a couple of comments that were raised in the petitioner's argument to the Court just a moment ago, and then I want to talk a little bit about the facts and the facts that weren't included in the argument.

First of all with respect to malicious prosecution action, I'm a little bit confused by the argument that

was just made to the Court, because on one hand the petitioner, Ms. Johnson, is arguing that malicious prosecutions haven't been abrogated by this statute; they haven't been taken away, but then at the and of this statute he said, "Well 4.24 does away with the remedy, the civil remedy that people have against those that file false police reports against them," and that's what a malicious prosecution action is.

It gives that civil remedy. It gives a correction for false police reports that are filed against that individual, and it is being taken away according to the application that is asserted by Ms. Johnson, and certainly the statute does not provide for that; it does not state that that is its intent.

And since Washington relies heavily on California law with respect to the anti-SLAPP, and that is recorded throughout the cases discussing anti-SLAPP in Washington, including the recent cases of this court -- Dylan v, Seattle Deposition Reporters, and also Davis v. Cox. Those are 2014 cases involving anti-SLAPP where the Court talks about the reliance on California law, and California law doesn't do away with malicious prosecutions; it ends up preserving those, but the argument made by Ms. Johnson is to do away with -- with those malicious prosecution actions.

The facts. The facts are so important. They -- both the substantive facts and the procedural facts, because they -- it is what the anti-SLAPP claim is premised upon, and it is what the legal application is premised on. It is the facts.

The facts that are missing from what Ms. Johnson's attorney asserted to the Court were that this was an acrimonious divorce. This was really contentious. The case was held in Snohomish County; approximately seven witnesses testified; it was a long trial.

Ultimately a divorce decree is issued by the Court. It has that restraining order, and it also has that competing provision that says that Mr. Filion, who has been trying to get his stuff back, is able to get his stuff. It orders for him to get his stuff back.

So you have a mutual restraining order preventing both parties from coming -- from disturbing the peace of the other or coming onto the property of the other.

But then you have this competing order or competing linkage in the same order that says Mr. Filion is to go pick up his personal belongings from Ms. Johnson.

So after the divorce, the attorneys write letters to each other, and there is a long history of that; that is over a couple of weeks if not a couple of

months.

They arrange a time for Mr. Filion to pick up his things from the residence.

There's a couple of important things about this arrangement. Number 1 is that it is the last day that the house is there before it sells. I mean the house remains but the title to --

THE COURT: And if he stayed, the deputy could have supervised him picking it up?

MR. DAVIS: Well when the police -- when the police do come -- but the keys turned over at 9 o'clock to the --

THE COURT: I understand all of that.

MR. DAVIS: Yes, so the property is there.

So Mr. Filion believes that that's it. If he has got to pick it up before 9 o'clock, they arrange for 4 o'clock -- only five hours.

She is not supposed to be there. So that was the agreement that the attorneys worked out. She's not supposed to be there.

Mr. Filion is on the way over there. He arranges a --

THE COURT: And clearly knew she was there?

MR. DAVIS: Yeah.

The real estate agent calls over and says, "She is

still there. She doesn't want you to come over."

He says, "I have got movers; I have arranged for people to come over. I am going to come pick up my things."

THE COURT: A little self-help?

MR. DAVIS: The self-help movers, correct.

(Laughter)

MR. DAVIS: So he's going to pick up his things, and so she was delayed in moving out, and that is of course in the record.

One thing that's in the record that wasn't discussed in the argument, and I don't think is really that clear in either briefing is the property wasn't even there. His stuff wasn't even there at the time. She never told him, "Don't come over. Not only am I here, but your stuff is not even here."

Talk about maliciousness. Talk about calling the cops and reporting him for coming over there to pick up his stuff that wasn't even there.

It sounds like a setup. It sounds like it is maliciousness on the part of Ms. Johnson, and that goes to the nature --

THE COURT: Well if that is such an important fact, why isn't it emphasized in your briefing?

MR. DAVIS: It should have been.

When I was reviewing for the argument -- it is in Pete Jorgenson's declaration -- I believe it appears in other parts of the record.

In preparing for today's argument, I realized that a fact came back to me, and I said, "That is the maliciousness. That shows her intent, her ill will," but when she reports Mr. Filion to the police when he does arrive, there's other people present on the property. She is not the only one there.

A gentleman comes out and says Ms. Johnson is calling the police, so he leaves. He goes out, grabs his parents, grabs the moving van, and they -- they leave the scene at that time.

She then calls the police -- she had called 911. The police officer comes over. She gives them a copy of the restraining order. She doesn't say, "Oh, by the way, there was an agreement between the lawyers with all these letters, this history of letters where we arrange for him to come over and pick up his stuff today. I didn't tell him that the stuff is not here."

She also doesn't mention to the police officer that there is this competing language that says that "Gary Filion shall come pick up his personal property."

So the police officer doesn't have that information, is not aware of any of that information.

Charges are filed for violating the restraining order, which results in a malicious prosecution action.

After the filing of the case, and these are the procedural facts that are so important, after the filing of the case, Ms. Johnson -- admittedly pro se, initially -- filed an answer. There is no affirmative defense.

She then gets counsel. There is no motion to amend that answer. There is no counterclaim -- paid for or filed; there is no affirmative defense that is made in some later answer or amended answer or in a motion to amend the answer. So it's not there.

THE COURT: When you defended against the motion, was that argument made?

MR. DAVIS: Before Judge Armstrong it certainly was.

THE COURT: But --

MR. DAVIS: Before Judge --

THE COURT: -- initially?

MR. DAVIS: Initially I was not counsel of record. I don't know if that argument was made at that stage.

So but Mr. Kah admittedly did raise that in this motion after the answer had already been filed, and according to the civil rules, you have the choice; you

either can file a motion to dismiss, which includes affirmative defense, or file an answer, which includes affirmative defense, but you don't file an answer and not include the affirmative defenses and still have the ability to file the motion. That is not how those affirmative defenses work.

And Judge Armstrong got it right when she said, "Look, you have waived that. You have had this whole opportunity to raise this affirmative defense by answer and you didn't do that."

We go back to the arbitration --

THE COURT: Unless the claim is litigated with the consent of the parties?

MR. DAVIS: Correct, and certainly it's not. Certainly it is not.

I know that --

THE COURT: Litigated at the arbitration?

MR. DAVIS: At the arbitration proceeding, which again I was not -- I was not involved in, and the arbitration award certainly doesn't make any mention of the anti-SLAPP statute; it just denies Mr. Filion's claim for malicious prosecution. It denies --

THE COURT: But they said it was raised, though, right?

MR. DAVIS: They do say that it's raised, and

I would assert that it was also defended that it doesn't apply, but I can only make the same assertion that Mr. Kah is making when he says, "Well, it was raised."

Well it certainly was objected to. I would be certain of that.

And so it's never been --

THE COURT: That makes it sound like it was tried with the consent of the parties, though, doesn't it?

MR. DAVIS: But Your Honor, I guess -- tried with the consent of the party is a little bit tricky for me to respond to because in the sense that is it objected to? Does it apply? Is the argument being made that this statute doesn't apply to these facts?

Well then that's not tried with the consent of the parties. That would be my personal opinion.

Tried with the consent of the parties would mean to say, "Okay, it applies, or it was raised, or it is part of this proceeding; let's -- let's really argue the substance of it.

And I don't think that that was the case, so I think it has been objected to throughout the history of this case, so without -- it has not been allowed with the consent of the parties.

And that was Judge Armstrong's ruling at the end, too. "It has been objected to continuously through this case."

But the not agreed part -- there's two things that I need to address before my time is up, and one is the not being agreed, and then the second is the substantive, most important issue of whether or not anti-SLAPP is a public or private concern as used in this case.

The agreed party argument, just briefly -- after the arbitration we assert that Mr. -- Mr. Kah's client, Ms. Johnson, is not an agreed party because there is no affirmative defense, no counterclaim pled.

There is nothing to appeal from from the arbitration.

She wins the arbitration because Mr. Johnson -- Mr. Filion has denied the malicious prosecution claim. The case is over. No longer agreed party.

This court at that point can end this case. There is no judgment because there is no standing. There is no de novo appeal; nothing emanates from that, which is the position that the estate has tried to articulate for a long time -- by dismissing the complaint; also offering to dismiss the complaint without fees, over and over again, and the record is replete with those

opportunities.

The estate just wanted to get out of this case without paying, either side paying any fees, and Ms. Johnson won't let that go.

On the issue of anti-SLAPP, whether it applies to this case, an acrimonious divorce between two private people, the answer is absolutely not, and a report to a police officer about an alleged violation of a restraining order that's not without -- including all of the material facts, not only is a false police report that's not constitutionally protected, but it is not a matter of public concern.

This is not a domestic violence issue. This is an acrimonious, private dispute between the parties, and there's so many examples that I could give of false police reporting that there would be no remedy if we allow this situation to continue and the Court to rule in Ms. Johnson's favor.

THE COURT: Thank you, Counsel, your time is up.

(End of proceedings for 4/16/2014)

(End of transcript)

C E R T I F I C A T E

I, Brian Killgore, do hereby certify:

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Dated October 30, 2014.

_____

Brian J. Killgore
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Court of Appeals case no.: 69830-3-I
Supreme Court case no.: 90507-0
This email and attachments submitted by:

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For Respondent: Estate of Filion
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Attached is Respondent (Estate of Filion's) REPLY on the MOTION TO SUBSTITUTE ANSWER TO PETITION FOR REVIEW WITH THE AMENDED ANSWER TO THE PETITION FOR REVIEW

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