

FILED
COURT OF APPEALS
DIVISION II

2015 AUG 10 PM 1:07

STATE OF WASHINGTON

BY 
DEPUTY

No. 46095-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DOUGLAS VERDIER and TODD VERDIER,

Appellants,

vs.

GREGORY BOST AND LAURIE BOST,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS BOST

HEURLIN, POTTER, JAHN, LEATHAM,
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Respondents/defendants Gregory and Laurie Bost submit this supplemental brief pursuant to the July 9, 2015, ruling by Commissioner Schmidt. The parties were directed to address the effect of *Davis v. Cox*, No. 90233-0, 2015 WL 3413375 (May 28, 2015) on the issues presented in this appeal. As will be explained below, given the procedural posture of this litigation, *Davis* compels the affirmance of the trial court's denial of plaintiff's¹ special motion to strike.

I. PROCEDURAL HISTORY

On or about February 14, 2014, third party defendant filed a special motion to strike. CP 19-21. With his motion, Todd Verdier asked the trial court to strike or dismiss defendants' emotional distress claims, relying upon the defense set forth in RCW 4.24.510. CP 19. In addition, Verdier requested an award of statutory damages and attorney fees under RCW 4.24.525. *Id.*

On or about February 21, 2014, plaintiff Douglas Verdier filed a joinder in the motion to strike. CP 22-26. He also requested that the trial court strike allegations set forth in defendants' counterclaim under RCW 4.24.525, and to award statutory damages and attorney fees under RCW 4.24.525. CP 24-25.

¹ "Plaintiff" referring to both Douglas Verdier and third party defendant Todd Verdier.

Thus, both Verdiers sought a monetary award under RCW 4.24.525. Their special motion to strike was necessarily brought under that statute as well, for there is no special motion to strike procedure set forth in RCW 4.24.510.

The trial court entered an order denying the motion to strike as moot. CP 43-44. That ruling should be affirmed for the reasons set forth in defendants' responsive brief on appeal.

Alternatively, the order denying the motion to strike should be affirmed because the motion to strike and the only affirmative relief sought by the Verdiers was pursuant RCW 4.24.525. Now that that statute has been declared unconstitutional in *Davis v. Cox, supra*, there is no statutory basis for plaintiff to be granted any relief. Accordingly, the order denying the motion to strike should alternatively be affirmed in light of the *Davis v. Cox* ruling that the statute on which plaintiff relies, RCW 4.24.525, is unconstitutional.

II. DISCUSSION

This matter is on appeal from the trial court's order denying plaintiff's special motion to strike. Such a motion can only be brought under RCW 4.24.525. The statute setting forth the procedure by which the court is to decide a special motion to strike was declared unconstitutional

in *Davis v. Cox, supra*. Accordingly, there is no basis to grant plaintiff any relief on this appeal.

Even if this Court were to decide that the trial court erred in denying the motion to strike as moot, it would then be in the position of remanding the case to the trial court for a decision on the special motion to strike on the merits. But now that the statute has been declared unconstitutional, there is no statutory basis for the motion to strike and nothing on which the trial court could rule.

If the Court were to interpret RCW 4.24.510 as somehow providing a vehicle for a special motion to strike, then the trial court's order should still be affirmed because defendants' amendment to their counterclaims rendered the pending motion to strike moot. Plaintiff argues that a motion procedure under RCW 4.24.510 would simply go forward under the general summary judgment rules. Plaintiff's Reply Brief, at 2. If the motion to strike that was pending in the trial court is treated as a summary judgment motion, it is clear that defendants would have had the right to respond to the summary judgment motion by filing an amended counterclaim before the motion had been ruled upon. *See, e.g., Tagliani v. Colwell*, 10 Wn. App. 227 (1973) (holding that the trial court abused its discretion in denying plaintiff's request to file an amended complaint after the court had orally ruled on a motion for summary

judgment but before the written order had been entered). That amendment rendered the pending motion moot.

Either because plaintiff has no right to any affirmative relief under the special motion to strike authorized by the unconstitutional RCW 4.24.525, or because the motion to strike was rendered moot by defendants' amendment of their counterclaims, the trial court's order denying the special motion to strike should be affirmed.

III. CONCLUSION

For the reasons set forth in defendants' responsive brief on appeal, and for the reasons set forth above, the trial court's order should be affirmed.

DATED this 3 day of August, 2015.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



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Of Attorneys for Respondents

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CERTIFICATE OF SERVICE

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