

No. 65399-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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LORA BRAWLEY,

Appellant,

v.

LEYLA ROUHFAR and REZA FIROUZBAKHT, husband and wife,  
and the marital community composed thereof,

Respondents.

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BRIEF OF APPELLANT LORA BRAWLEY

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## A. INTRODUCTION

This case is about concocted allegations of child abuse made by respondents Leyla Rouhfar and Reza Firouzbakht<sup>1</sup> against their nanny Lora Brawley (“Brawley”) to dodge Brawley’s claim that they failed to provide her with advance notice of her termination and to pay her severance benefits according to her employment contract. It is a straightforward case for unpaid wages, breach of contract, and slander *per se* that has been obscured by the Rouhfars’ mischaracterization of Brawley’s lawsuit as a “SLAPP” (Strategic Litigation Against Public Participation) suit.

Under the terms of Brawley’s employment contract, her employment could only be terminated without advance written notice if her termination was for “just cause.” Otherwise, it could only be terminated with 30-days written notice and a severance payment. Brawley’s employment was terminated with one week’s notice, ostensibly so that the child’s grandmother could begin caring for him. When Brawley demanded her unpaid wages and severance pay, the Rouhfars began claiming they could no longer trust her with their son. Soon

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<sup>1</sup> Leyla Rouhfar and Reza Firouzbakht will be referred to collectively as “the Rouhfars” unless the context requires them to be identified by their first names. No disrespect is intended when they are referred to by their first names.

thereafter, they began accusing her of child abuse. When the Rouhfars failed to pay Brawley her wages or to retract their claims, she sued.

The Rouhfars moved to summarily dismiss Brawley's slander *per se* claim. The trial court, the Honorable Mary Yu, granted the motion.

The trial court erred in summarily dismissing Brawley's slander *per se* claim where there is no evidence Brawley's complaint was brought in retaliation for the Rouhfars' reporting of her alleged abuse. Moreover, there is no evidence their reports involved a matter of *public* rather than private interest. Their efforts to paint her lawsuit as a SLAPP are misleading and factually incorrect.

The trial court also erred in dismissing Brawley's slander *per se* claim on the basis that the Rouhfars' statements were protected by the common interest privilege where she presented substantial clear and convincing evidence they abused, and therefore lost, that privilege and credibility became a decisive issue precluding summary judgment.

Dismissal of Brawley's slander *per se* claim pursuant to RCW 4.24.510 was improper. This Court should reverse and remand that claim to the trial court for a trial on the merits. Since RCW 4.24.510 does not apply, attorney fees, costs, and statutory damages awarded under that provision should be vacated.

B. ASSIGNMENTS OF ERROR<sup>2</sup>

(1) Assignments of Error

1. The trial court erred in entering an order on January 21, 2010 granting the Rouhfars' motion for partial summary judgment and dismissing Brawley's slander *per se* claim.

2. The trial court erred in granting the Rouhfars' motion for attorney fees and costs on February 12, 2010.

3. The trial court erred in entering an order on April 2, 2010 denying in part and granting in part Brawley's motion for attorney fees and costs.

4. The trial court erred in entering finding of fact number 6 in its April 2, 2010 order.

5. The trial court erred in entering a final judgment in favor of the Rouhfars on May 6, 2010.

(2) Issues Pertaining to the Assignments of Error

1. Whether the trial court erred in considering and then granting a summary judgment motion based solely on the affirmative defense of immunity where the moving party previously waived the defense by failing to properly plead it in the answer to the complaint and failing to amend that answer, and the nonmoving party objected to

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<sup>2</sup> Copies of the orders under review are included in the Appendix.

consideration of the motion on that basis. (Assignments of Error Nos. 1-2, 5)

2. Whether the trial court erred in ruling a nanny was a public official and not a private individual for purposes of considering her defamation claim, thus requiring her to show the parents who defamed her abused the immunity privilege by acting with actual malice. (Assignments of Error Nos. 1, 5)

3. Whether the trial court erred in ruling the parents of a minor child were immune from civil liability for statements they made to the police and Child Protective Services alleging their nanny verbally and physically abused their son when there is no evidence the nanny's lawsuit was filed in retaliation for the parents' filing of those reports and the parents presented no evidence those reports involved a matter of *public* rather than private interest. (Assignments of Error Nos. 1, 5)

4. Whether the trial court erred in ruling the parents of a minor child were qualifiedly immune under the common interest privilege from civil liability for statements they made to family members, healthcare providers, and school personnel about their nanny's alleged abuse of their son where the nanny presented substantial clear and convincing evidence the parents abused, and therefore lost, that privilege

and credibility became a decisive issue precluding summary judgment.

(Assignments of Error Nos. 1, 5)

5. Whether this Court should reverse the trial court's award of attorney fees and costs and statutory damages to the parents who prevailed in a case brought by their former nanny and characterized as a SLAPP where the order granting summary judgment is reversed on appeal.

(Assignments of Errors Nos. 1, 2, 5)

6. Whether the trial court abused its discretion by limiting the attorney fees awarded to a nanny who successfully recovered unpaid wages from her employer because her fee request was disproportionate to the amount of unpaid wages she recovered. (Assignments of Error Nos.

3-5)

### C. STATEMENT OF THE CASE

#### (1) Background Facts

Brawley is a highly trained professional nanny with more than 22 years of experience. CP 39, 56-58, 479, 482-83. In addition to working as a nanny, she operates her own private consulting and nanny training service. CP 39, 57. She is a certified instructor offering communications classes through the Washington State Department of Early Learning to educators, school administrators, parent educators, child and daycare providers, and the staff of public childcare agencies. CP 58.

She is the founder and current president of the National Association for Nanny Care. CP 479. She founded the Delaware Valley Professional Nanny Association in 1989 and was the founder and president of Garden State Nannies from 1987-88. CP 56, 479.

Brawley was hired to care for the Rouhfars' young son on a temporary basis in April 2008.<sup>3</sup> CP 39, 59. At the time, the child was 2½ years old.<sup>4</sup> CP 39. The Rouhfars offered her a permanent part-time nanny position in May 2008. CP 59. While the parties negotiated some of the terms of Brawley's employment contract, the Rouhfars drafted the majority of them, including the termination provision. CP 4, 8-11, 67, 509-11. Under the terms of that contract, Brawley was to be paid on an hourly basis and was to receive certain additional benefits. CP 9. Her employment could only be terminated without written notice if the termination was "for just cause."<sup>5</sup> CP 11. Otherwise, the parties' contract

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<sup>3</sup> The child will not be referred to by name to protect his identity. See *In re Marriage of Wendy M.*, 92 Wn. App. 430, 432 n.1, 962 P.2d 130 (1998); *Linda D. v. Fritz C.*, 38 Wn. App. 288, 290 n.1, 687 P.2d 223 (1984).

<sup>4</sup> The child is extremely articulate and has above-average language skills. CP 59. He is fluent in English and Farsi. CP 59. He uses complex sentences, but often switches back and forth between the two languages during a conversation. CP 50. When Brawley was hired, the child was attending a private Montessori school. CP 60. According to his school, he communicated at the level of a five-year old and was very expressive. CP 61. Brawley communicated with the child's teachers on a daily basis. CP 60.

<sup>5</sup> The contract's termination provision specifically states:

could only be terminated with 30-days written notice. *Id.* All obligations ceased at the end of that 30-day period. CP 11.

Brawley's troubles with the Rouhfars began in August 2008. CP 61. On August 4, 2008, Brawley attempted to cash her paycheck for the previous pay period. CP 61, 488. But the bank refused to honor the check because there were insufficient funds in the Rouhfars' account. CP 61. Brawley left a message for the Rouhfars asking that her wages for that pay period be directly deposited into her bank account. CP 61. After Reza made the deposit, Brawley emailed to thank him for promptly correcting the problem. CP 61, 490. Thereafter, Brawley sensed the Rouhfars were uncomfortable with her assertiveness over her wages and the impression she may have gotten about their purported lack of funds. CP 61-62. In particular, she sensed that Leyla felt "put upon" by her demand for immediate payment and refusal to wait for the Rouhfars convenience to pay her. CP 62. Brawley accepted the Rouhfars' explanation for the dishonored check and put the matter behind her. She asked that it not happen again. CP 62.

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Either party upon 30 days written notice may terminate this agreement and all obligations shall cease at the end of said 30 day period. Parents may terminate Nanny at any time for just cause without notice (see item #7, Expectations.)

CP 11.

The very next pay period, the bank refused to honor a paycheck written by Leyla on August 15, 2008. CP 62. Brawley was able to cash the check on August 16, 2008 before going to work that evening. She then informed the Rouhfars that she would no longer accept checks from them. CP 62. She worked her regular schedule that week. CP 62.

On August 22, 2008, Leyla called and asked to meet with Brawley to discuss the “check issue.” CP 62. They met at the end of Brawley’s workday, at which time Brawley reiterated that she could no longer accept payments by check because her own financial obligations were important to her and could not be delayed or ignored. CP 62, 64. She also reiterated her need to maintain a consistent work schedule. CP 63-64. Leyla became very agitated and angry during the meeting, insisting Brawley knew the Rouhfars had the money and the problem was not their fault. CP 62-63. She demanded an apology. CP 63.

Brawley felt strongly about the payment issue because, in her experience, strong boundaries are necessary in the nanny-parent relationship. CP 63. She believed it was important not to let the parameters of the contract “slide” until they no longer existed. CP 63. She refused to apologize for requiring clear boundaries and remaining steadfast in her refusal to accept payments by check. CP 63-64.

Brawley worked a full day for the Rouhfars on August 27, 2008. She also worked a full day on August 28, 2008, even though the couple was home with their ill son. CP 65. They sent her to Costco to get added to their Costco membership and to do some shopping. CP 66. When she returned from Costco, Reza terminated her employment effective in one week. CP 66. He explained that an emergency change in their family's situation meant the child's grandmother would be available to assume caring for him.<sup>6</sup> CP 66. Reza indicated the Rouhfars wanted Brawley to continue caring for their son on "date nights" and assured her that they would write a glowing letter of recommendation for her. CP 40, 66. Reza also stated his son loved Brawley and that her termination was not a reflection of her abilities. CP 66.

Reza's attitude toward Brawley changed as soon as she reminded him that the parties' contract required 30-days written notice of termination and that she would need severance pay. CP 66-67. He claimed the contract did not require such notice because he could "fire [her] at will" and 30-days notice was only required if she quit. CP 67.

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<sup>6</sup> But according to Reza's later declaration, the Rouhfars decided to terminate Brawley's employment two days *after* her August 22, 2008 meeting with Leyla. CP 65. His declaration and the timing of Brawley's termination confirm she was fired for insisting on prompt payment of her wages and clear nanny-parent boundaries.

Brawley reported to work as scheduled on August 29, 2008; Leyla asked her to take the child to a dinosaur exhibit at the Pacific Science Center. CP 67-68. They did not go, in part, because the child was still ill. CP 68. Although the child began to cry when he learned they would not be going to the dinosaur exhibit, he cheered up immediately upon learning they would go on a brief outing to a park near the house. CP 68. Before Leyla left the house for work, she reiterated that Brawley had been terminated because of the emergency change in the family's situation and that her son loved Brawley. CP 68. Leyla left Brawley at home alone with the child. CP 69.

Reza returned to the house approximately one hour after Brawley's arrival. CP 69. At no time did he accuse Brawley of verbally abusing his son or behaving inappropriately toward his wife. CP 69. Brawley eventually left, after being paid for the entire day. CP 69.

Later that day, Brawley received an email from Leyla stating she "owed" the Rouhfars hours. CP 40, 69, 513. Brawley confirmed her availability to watch the child and again reminded the Rouhfars that her employment contract required 30-days advance written notice and severance pay. CP 69, 513.

On September 1, 2008, Brawley confirmed she would be available to watch the child for the upcoming week and that any "banked" hours

could be applied to a future “date night” or deducted from her severance pay. CP 70, 521. Later that evening, Reza emailed and stated “the reasons surrounding the termination of [their] contract” must be copied to Carrie Morris (“Morris”), head of the nanny placement agency responsible for placing Brawley with the Rouhfars. CP 70, 523. This is the first time Brawley learned the Rouhfars were claiming they terminated her not because of their family emergency, but because of what they characterized as a disrespectful and unprofessional “emotional outburst directed at [them]” and her alleged abusive behavior toward their son. CP 40, 70. Reza claimed Leyla was so upset by Brawley’s behavior on August 29, 2008 that she asked him to return home and relieve Brawley immediately. CP 523. Yet he did not accuse Brawley of verbally abusing his son or behaving inappropriately toward his wife when he returned home that day. CP 69. Reza also maintained the Rouhfars could no longer trust their son in Brawley’s care. CP 523.

On September 2, 2008, Leyla called the police to report Brawley’s alleged child abuse. CP 534. Leyla reported to the police that she decided to replace Brawley because “she became too aggressive.” CP 534. Although the police asked Leyla for Brawley’s contact information, she did not provide it. CP 72, 534. The police did not talk to Brawley about the incident. CP 534. The police determined there was not enough

evidence to forward the incident to Child Protective Services (“CPS”) or for further investigation. CP 534, 537. Leyla later contacted CPS directly. CP 25.

On September 5, 2008, Leyla emailed one of Brawley’s prospective employers warning that “new information about Lora has been brought to our attention by our son since her termination . . . . I would strongly recommend we speak before you offer her a position.” CP 73.

(2) Procedural History

When the Rouhfars failed to pay Brawley her wages or to retract their claims, she sued in the King County Superior Court.<sup>7</sup> CP 1-7, 75, 122, 568. The case was eventually assigned to the Honorable Mary Yu. In addition to her claim for unpaid wages, Brawley alleged the Rouhfars breached the parties’ contract and committed slander *per se*. CP 1-7. The Rouhfars answered the complaint and counterclaimed, alleging Brawley had physically and verbally assaulted their son. CP 17-18. They also alleged Brawley breached the parties’ contract and her fiduciary duties by abusing him. CP 18-19. They raised several affirmative defenses, most of

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<sup>7</sup> The Rouhfars’ abuse claims are devastating to Brawley’s nanny career and her independent business. CP 83. She is afraid to apply for a job or a volunteer position because any application for meaningful or responsible work or volunteer commitment asks whether she has ever been *accused* of child abuse or *investigated* for child abuse. CP 74-75. In Brawley’s experience, the mere allegation of child abuse is enough to ruin a nanny’s career. CP 75. Her expert, Carolyn Stulberg, agreed. CP 83.

which related to Brawley's claim for her unpaid wages. CP 16-17. Only one, truth, related to Brawley's slander claim. CP 17.

The Rouhfars moved for partial summary judgment, seeking to dismiss Brawley's slander *per se* claim under RCW 4.24.510, Washington's anti-SLAPP statute. CP 28-35, 91-95. In essence, they claimed Brawley's lawsuit was brought in retaliation for their reporting of her alleged abuse of their son. More particularly, they contended for the first time that they were immune from civil liability for that reporting because their statements to the police, CPS, school personnel, and healthcare providers about Brawley's abuse of their son were absolutely and qualifiedly privileged. CP 28, 31, 123. They never claimed their statements were true. CP 32-34. They did, however, confirm that they did not learn of Brawley's alleged abuse of their son until *after* they had *already* terminated her employment because the child's grandmother would begin caring for him. CP 30, 41, 97.

Brawley opposed the motion, arguing summary judgment was inappropriate where factual disputes and credibility issues existed. CP 38-45. She also argued the Rouhfars' statements were not protected because they had abused, and thereby lost, the immunity privilege. CP 49-53.

The trial court requested, and the parties provided, supplemental briefing addressing whether "actual malice" was a question that could

properly be resolved on summary judgment. CP 99-102, 113-63, 213. The Rouhfars also withdrew their counterclaim that they witnessed Brawley's physical abuse of their son, claiming they failed to catch the drafting error when they reviewed and approved their counterclaims.<sup>8</sup> CP 102. During oral argument and again in her supplemental brief, Brawley also argued the Rouhfars waived the affirmative defense of immunity by failing to properly plead it. CP 118.

The trial court granted the Rouhfars' motion on January 21, 2010. CP 471-74. The trial court ruled that Brawley failed to meet her burden of proof and that the Rouhfars' statements were absolutely and qualifiedly privileged. CP 472. Although the trial court agreed with Brawley that factual disputes concerning an alleged abuse of a privilege and a showing of actual malice should be reserved for a jury, it concluded she failed to provide the court with the necessary evidence to survive the partial summary judgment motion. CP 473. The court awarded the Rouhfars attorney fees and statutory damages under RCW 4.24.510. CP 473.

The Rouhfars filed a motion for an award of attorney fees and costs and statutory damages in connection with their successful summary

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<sup>8</sup> The Rouhfars subsequently dismissed their verbal and physical assault claims. CP 219-20, 312-13.

judgment motion. CP 225-29, 234-76, 285-90. The trial court granted the motion on February 11, 2010, but reduced the award. CP 468-70.

On February 4, 2010, the Rouhfars formally offered to allow Brawley to enter a judgment against them on her unpaid wages and breach of contract claims and request for injunctive relief. CP 329-30. Their offer included the payment of the costs of suit and a reasonable sum for attorney fees. CP 330. Brawley accepted and filed a motion for an award of attorney fees and costs. CP 314-58. She requested \$25,500 in attorney fees and \$1,306.68 in costs. CP 314. The Rouhfars objected, arguing in part that her request was excessive where she recovered less than \$2,000 in wages. CP 359-68.

On April 6, 2010, the trial court granted Brawley's motion in part and denied it in part. CP 465-67. The court found the amount at issue in Brawley's wage claim was a relevant consideration in determining the reasonableness of her fee request. CP 466 (finding 6). The court also found the request was unreasonable where the amount of fees requested was disproportionate to the amount of wages recovered. CP 466 (finding 6). The court concluded Brawley was entitled to an award of \$5,000, but no costs. CP 467.

The trial court entered a final judgment pursuant to CR 54(b) on May 6, 2010. CP 461-64. This timely appeal followed. CP 459-60.

D. SUMMARY OF ARGUMENT

CR 8(c) requires affirmative defenses to be set forth in the answer. Affirmative defenses are waived if they are not affirmatively pleaded, asserted in a motion under CR 12(b), or (3) tried by the parties' express or implied consent. A waived affirmative defense may not thereafter be considered as a triable issue in the case.

The Rouhfars' claim that they are immune from civil liability under RCW 4.24.510 is an affirmative defense that must be properly pled to be preserved. The trial court erred in considering the Rouhfars' motion for partial summary judgment dismissal of Brawley's slander claim where they waived the defense by failing to properly plead it. Because summary judgment was inappropriate, this Court should reverse.

A defamation plaintiff must establish four essential elements to recover: (1) falsity; (2) an unprivileged communication; (3) fault; and (4) damages. The necessary degree of fault depends on whether the plaintiff is a private individual or a public figure or public official. As a private figure, Brawley need only show negligence.

Certain absolute or conditional privileges shield a declarant from liability for otherwise defamatory statements. But an otherwise applicable privilege offers no protection if the declarant's conduct abuses it. Whether a privilege has been abused is a factual question for the jury. Even a

private individual plaintiff must then show abuse of the privilege under the heightened clear and convincing standard.

RCW 4.24.510 provides immunity from civil liability to any person who communicates or complains to his or her government concerning issues of public interest or social significance, if the communication is to a public officer who is authorized to act upon it. The identifying characteristics of a SLAPP are: (1) a civil complaint or counterclaim; (2) filed against a target; (3) in response to the target's communications to government or media; (4) on a matter of some public interest. Brawley's lawsuit against the Rouhfars is no SLAPP; thus, RCW 4.24.510 does not apply as a matter of law.

Washington recognizes a qualified privilege for the protection of common interests. Here, the trial court improperly determined the Rouhfars were protected by the common interest privilege where they did not have an organizational or business relationship with the recipients of their communications. Even if they did, their statements far exceeded the scope of the privilege.

The trial court made an improper credibility determination at summary judgment. The Rouhfars contended they held a genuine belief that Brawley abused their son while Brawley steadfastly asserted her innocence. This conflicting testimony created a classic "he said, she said"

case in which credibility became decisive and summary judgment improper.

Where the trial court's grant of summary judgment is inappropriate and requires this Court to reverse, the Rouhfars have not prevailed upon their immunity defense under RCW 4.24.510. Accordingly, they are not entitled to attorney fees and costs or statutory damages. The trial court's award should therefore be reversed.

Washington courts have adopted the lodestar approach when assessing reasonable attorney fees. A lodestar award is arrived at by multiplying the number of hours reasonably worked by a reasonable hourly rate. The amount of fees the trial court awarded to Brawley for her successful wage claim was unreasonable where the court improperly limited the award based on the small amount of unpaid wages she recovered. The amount of the recovery, while a relevant consideration in determining the reasonableness of a fee award, is not dispositive. The courts will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.

Washington has long followed the American rule that a prevailing party does not recover attorney fees absent a contract, statute, or other recognized ground of equity allowing for the recovery. Brawley is entitled to her attorney fees and costs on appeal pursuant to RCW 49.48.030 and

49.52.070.as the prevailing party if this Court reverses the trial court's award of attorney fees and costs in her wage claim.

E. ARGUMENT

(1) Standards of Review

Different standards of review apply to the various issues in this case. For example, this Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The Court must consider the facts, and all inferences from them, in a light most favorable to the nonmoving party. *See Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186 (2002); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>9</sup> CR 56(c); *Ellis*, 142 Wn.2d at 458.

To successfully move for summary judgment, a party must demonstrate a complete lack of evidence or a material fact which cannot be rebutted. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 132, 822 P.2d

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<sup>9</sup> A material fact is one upon which the outcome of the litigation depends. *Kim v. O'Sullivan*, 133 Wn. App. 557, 559, 137 P.3d 61 (2006), *review denied*, 159 Wn.2d 1018, 157 P.3d 403 (2007). When determining whether an issue of material fact exists, all reasonable inferences are construed in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

1257 (1992). Even when evidentiary facts are not disputed, a motion for summary judgment fails if different inferences may be drawn from the evidence in the record as to ultimate facts. Philip A. Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash.L.Rev. 1, 4 (1970). Similarly, the motion must be denied if reasonable minds might draw different conclusions from the undisputed evidentiary facts. *Id.* Here, the Rouhfars moved for summary judgment so Brawley should receive the benefit of all factual inferences.

Similarly, this Court reviews the trial court's interpretation and application of the anti-SLAPP statute, RCW 4.24.510, *de novo*. *Emmerson v. Weilep*, 126 Wn. App. 930, 935, 110 P.3d 214, *review denied*, 155 Wn.2d 1026, 126 P.3d 820 (2005).

This Court reviews the legal question of whether a party is entitled to attorney fees *de novo*. *See Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). By contrast, it reviews the question of whether the amount of fees awarded was reasonable for an abuse of discretion.<sup>10</sup> *See, e.g., Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002) (citing *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

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<sup>10</sup> A trial court abuses its discretion only when the exercise of that discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Boeing*, 147 Wn.2d at 90.

(2) The Trial Court Erred in Considering the Rouhfars' Partial Summary Judgment Motion Because They Waived the Immunity Defense Upon Which it Was Based

The Rouhfars characterized Brawley's lawsuit as a "SLAPP" and claimed they were immune from civil liability for reporting their abuse allegations because their statements were privileged under RCW 4.24.510. CP 32-33. The trial court erred in considering the motion where the Rouhfars waived the affirmative defense of immunity by failing to properly plead it. CP 118.

CR 8(c)<sup>11</sup> requires affirmative defenses to be set forth in the answer. Affirmative defenses are thus 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. *See, e.g., Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976). *See also, Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 134, 144 P.3d 1185 (2006) (corporation waived affirmative defense of estoppel by failing to properly plead it). A waived affirmative defense may not thereafter be considered as a triable issue in the case. *Farmers*, 87 Wn.2d at 76. While the affirmative defense requirement is not to be construed

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<sup>11</sup> CR 8(c) states, in part:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, . . . , and any other matter constituting an avoidance or affirmative defense.

absolutely, it will not be abrogated where it affects the substantial rights of the parties. *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975).

Here, the Rouhfars' claim that they are immune from civil liability under RCW 4.24.510 is an affirmative defense that must be properly pled to be preserved. *See Doe v. Gonzaga Univ.*, 99 Wn. App. 338, 351, 992 P.2d 545 (2000), *aff'd in part, reversed in part on other grounds*, 143 Wn.2d 687 (2001), *cert. denied*, 534 U.S. 1103, *judgment reversed in part*, 536 U.S. 273 (2002). *See also, Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 435-36, 979 P.2d 917 (1999) (defendant pleaded affirmative defense of immunity under RCW 4.24.510). Yet they failed to properly preserve it.<sup>12</sup> They did not raise the immunity defense in their answer and did raise it in an amended answer. CP 16-17, 123. They failed to assert the defense in a CR 12(b) motion. Further, the defense was not tried by the parties' express or implied consent because Brawley objected to the court's consideration of summary judgment based on that defense where the Rouhfars failed to properly plead it. CP 118. But they

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<sup>12</sup> A defendant can raise two affirmative defenses to a claim for defamation: truth or privilege. *Mohr v. Grant*, 153 Wn.2d 812, 831, 108 P.3d 768 (2005) (Chambers, J., concurring in part and dissenting in part) (citing *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 458, 546 P.2d 81 (1976)). *See also, Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (noting matters of privilege continue to be affirmative defenses to be raised by the defendant). Although the Rouhfars pled truth as an affirmative defense, they failed to plead privilege. CP 16-17. Their partial summary judgment motion was based exclusively upon their claim of privilege.

made no effort to amend their answer in light of Brawley's objection. Accordingly, the Rouhfars waived the immunity defense.

Because the Rouhfars waived the immunity defense, they were not entitled to rely on it as a basis for summary judgment. *See Farmers*, 87 Wn.2d at 76 (noting a waived affirmative defense is not a triable issue). They were not entitled to judgment as a matter of law. Because summary judgment was inappropriate, this Court should reverse.

(3) The Trial Court Erred in Granting Partial Summary Judgment Dismissal to the Rouhfars on Brawley's Slander *Per Se* Claim

Even if the Rouhfars properly preserved their immunity defense, this Court should still reverse the trial court's partial summary judgment order dismissing Brawley's slander claim because their defense fails.

Brawley alleged in her complaint that the Rouhfars committed slander *per se* by falsely accusing her of child abuse and that their allegations constituted a claim that she had committed a crime. CP 6. A publication is libelous *per se* if it imputes to the plaintiff criminal conduct involving moral turpitude. *Ward v. Painters' Local Union No. 300*, 41 Wn.2d 859, 863, 252 P.2d 253 (1953).

A defamation plaintiff must establish four essential elements to recover: (1) falsity; (2) an unprivileged communication; (3) fault; and

(4) damages.<sup>13</sup> *See Mohr*, 153 Wn.2d at 822. The Court examines alleged defamation under one of two standards. The necessary degree of fault depends on whether the plaintiff is a private individual or a public figure or public official. *See Bender v. Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). When the defamed party is a public figure or official, he or she must establish actual malice. *See Demopolis v. Peoples Nat'l Bank*, 59 Wn. App. 105, 108 n.1, 796 P.2d 426 (1990). Actual malice is a heightened standard, and is “knowledge of the falsity or reckless disregard of the truth or falsity of the statement.” *Herron v. KING Broad. Co.*, 109 Wn.2d 514, 523, 746 P.2d 295 (1987); *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34, 108 P.3d 787 (2005) (citation omitted). But if the defamed party is a private figure, only negligence need be shown. *See Demopolis*, 59 Wn. App. at 108 n.1. The negligence standard is that the declarant knew, or in the exercise of reasonable care, should have known the statement was false or would create a false impression in some material respect. *Maison de France*, 126 Wn. App. at 34 (citation omitted).

The Rouhfars contended in a footnote and without evidence that Brawley was a public figure. CP 92. Although the record does not clearly

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<sup>13</sup> Slander is spoken defamation. *See Grein v. La Poma*, 54 Wn.2d 844, 847, 340 P.2d 766 (1959).

show where the trial court decided the issue, it apparently agreed Brawley was a public figure because it required her to show actual malice to defeat the Rouhfars' immunity defense. CP 217. The trial court erred in ruling Brawley was a public figure. She is a private figure, not a public one. CP 115-16.

A public figure is one who willingly enters the public sphere either by occupying positions of persuasive power and influence or by thrusting him or herself to the forefront of a particular controversy. *Momah v. Bharti*, 144 Wn. App. 731, 741 n.6, 182 P.3d 455 (2008) (citations omitted). To be considered a public figure, the Court usually requires the plaintiff to voluntarily seek to influence the resolution of public issues. *See Bender*, 99 Wn.2d at 600. The most important factor distinguishing public and private plaintiffs is the assumption of the risk of greater public scrutiny of public life. *Clawson v. Longview Publ'g Co.*, 91 Wn.2d 408, 413, 589 P.2d 1223 (1979). Of secondary importance is the public plaintiff's ease of access to the press. *Id.* at 414-15.

The Rouhfars presented no evidence Brawley is a public figure. She does not occupy a position of persuasive power and influence, nor has she thrust herself into the forefront of a particular controversy or sought to influence public issues. She did not become a public figure merely by engaging in litigation with the Rouhfars. *See Momah*, 144 Wn. App. at

741 n.6 (citations omitted). The trial court therefore erred by requiring her to show actual malice rather than negligence. CP 116.

Certain absolute or conditional privileges shield a declarant from liability for otherwise defamatory statements. *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 478, 564 P.2d 1131 (1977). But an otherwise applicable privilege offers no protection if the declarant's conduct abuses the privilege. *See Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.*, 114 Wn. App. 371, 382, 57 Wn.3d 1178 (2002). Once the existence of a privilege is established, the burden of proof to show abuse of that privilege shifts to the defamed party, who must show by clear and convincing evidence the declarant's knowledge of the falsity, or his or her reckless disregard as to the falsity of the statement. *Bender*, 99 Wn.2d at 601.

RCW 4.24.510<sup>14</sup> provides immunity from civil liability to any person who communicates or complains to his or her government

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<sup>14</sup> RCW 4.24.510 provides:

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.

concerning issues of public interest or social significance, if the communication is to a public officer who is authorized to act upon it. *Skimming v. Boxer*, 119 Wn. App. 748, 758, 82 P.3d 707 (2004). The primary purposes of the statute are to prevent SLAPP lawsuits and protect citizens who provide information to government agencies by providing a defense for retaliatory lawsuits. *Right-Price Rec., LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002); *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 167, 225 P.3d 339 (2010). An individual prevailing on the defense is entitled to attorney fees and a statutory penalty. *Eugster v. City of Spokane*, 139 Wn. App. 21, 26-27, 156 P.3d 912 (2007). The Rouhfars claimed this statutory immunity in response to Brawley's slander *per se* claim arising out of their reports of her alleged abuse of their son and characterized her lawsuit against them as a SLAPP.<sup>15</sup>

Relying on RCW 4.24.510, the trial court determined the Rouhfars were protected by an absolute privilege for their statements to the police and CPS, and their statements to family members, healthcare providers,

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Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

<sup>15</sup> The identifying characteristics of a SLAPP are: (1) a civil complaint or counterclaim; (2) filed against a target; (3) in response to the target's communications to government or media; (4) on a matter of some public interest. *Right-Price Recreation*, 146 Wn.2d at 382 (quoting George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, 8-9 (1996)).

and school personnel were qualifiedly privileged under the common interest privilege. CP 472. To survive summary judgment, the court thus required Brawley to prove the Rouhfars abused those privileges by clear and convincing evidence of malice. CP 472.

Brawley's lawsuit is no SLAPP; thus, RCW 4.24.510 does not apply as a matter of law. Brawley brought her complaint based in part on allegations the Rouhfars made defamatory statements to a potential employer on September 5, 2008 and to Carrie Morris, head of the nanny placement agency responsible for placing her with the Rouhfars. CP 70, 73, 523, 539. She did not know the Rouhfars had reported their child abuse allegations to the police until *after* she had filed her complaint. CP 120, 122. She was *never* contacted by the police or a child protective agency and thus had no way to know the Rouhfars' reports had been made when she filed her complaint. CP 72. In fact, she was not informed of the police report and the potential criminal complaint until October 1, 2008, after the complaint was filed. CP 577. Importantly, the police determined the Rouhfars' abuse case did not have enough evidence to forward to CPS and that there was no basis for further investigation. CP 535, 537. She similarly had no knowledge the Rouhfars had contacted CPS until *after* they filed their summary judgment motion. CP 120. The Rouhfars presented no evidence that Brawley's complaint was brought in retaliation

for their reporting of her alleged abuse. Moreover, they presented no evidence their reports involved a matter of *public* rather than private interest. See *Right-Price Recreation*, 146 Wn.2d at 382. Their efforts to paint her lawsuit as a SLAPP are misleading and factually incorrect.

The Rouhfars also asserted their statements to school personnel, doctors, and family members were privileged because those statements were made to parties sharing the common interest of protecting their son. CP 33. The trial court agreed, contending Brawley failed to show by clear and convincing evidence that the Rouhfars had abused this privilege. CP 473. The trial court erred in making this determination because the evidence Brawley submitted raised questions of fact as to the abuse of the privilege sufficient to preclude summary dismissal of her claim. Whether the Rouhfars abused the privilege in accusing Brawley of child abuse should have been a factual question for the jury. *Demopolis*, 59 Wn. App. at 114.

Washington recognizes a qualified privilege for the protection of common interests where:

the publication is for the protection of the interest of the publisher; the recipient or a third person; persons sharing a common interest; family relationships; public interest. In connection with the last mentioned type of privilege the publication is privileged only when made to a public officer or a private citizen who is authorized

to act. The privilege does not extend to a publication to the entire public.

*Owens v. Scott Pub. Co.*, 46 Wn.2d 666, 674, 284 P.2d 296 (1955) (internal citations omitted); *see also, Twelker*, 88 Wn.2d at 478. “The common interest privilege applies when the declarant and the recipient have a common interest in the subject matter of the communication.” *Moe v. Wise*, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (1999). This privilege generally applies to organizations, partnerships and associations and “arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest.” *Id.* at 958-59. *See also, Momah*, 144 Wn. App. at 747-48.

If a declarant establishes that the privilege applies, the privilege may be lost if the plaintiff can show it was abused. *See Bender*, 99 Wn.2d at 600 (citation omitted). In that situation, even a private individual plaintiff must then show abuse of the privilege under the heightened clear and convincing standard. *Id.* at 601; *Moe*, 97 Wn. App. at 963.

Here, the trial court improperly determined the Rouhfars were protected by the common interest privilege where they did not have an organizational or business relationship with the recipients of their communications. Even if they did, their statements far exceeded the scope of the privilege.

Brawley met her limited burden of presenting specific facts creating a genuine issue of whether the Rouhfars' statements were made after a fair and impartial investigation or upon reasonable grounds for belief in their truth. For example, she presented convincing evidence the Rouhfars' allegations of child abuse surfaced only *after* she was terminated without proper notice and demanded her severance pay. CP 117. In addition, she presented testimony from Morris that the Rouhfars initially informed Morris that Brawley had been terminated because they intended to utilize their son's grandmother for his care. CP 117, 158. Morris also testified the Rouhfars subsequently contacted her to inquire what their responsibilities were under the contract. CP 117, 158. Morris informed them that the contract required them to give Brawley 30-days written notice and provide severance pay. CP 158. Only *after* Brawley insisted on her severance pay did the Rouhfars' child abuse allegations escalate. Even Morris testified she was not aware of the Rouhfars' child abuse allegations until she received a copy of the letter from their counsel, CP 159, which was dated October 1, 2008.

By their own admissions, the Rouhfars' allegations were not an accurate reporting of their son's alleged statements. CP 25, 119. In fact, the evidence shows they coached their son with respect to his statements about Brawley. CP 25, 37, 71. They did not simply repeat what their son

told them, which was that Brawley pushed him or hit him. CP 25, 71, 119. Instead, they specifically accused Brawley of committing child abuse. This allegation goes far beyond what their son allegedly said and implies that Brawley committed a serious crime. This alone is actionable per se. *Ward*, 41 Wn.2d at 863. Child abuse has a particularly insidious connotation of which the Rouhfars were well aware when they used it, given Leyla's medical background. Moreover, they communicated the alleged impact of the alleged abuse on their son. CP 26. This "impact" was never supported with competent evidence. CP 123.

Brawley presented evidence sufficient to raise factual questions about the fairness and impartiality of the Rouhfars' investigation as well as the existence of reasonable grounds for their expressed beliefs.

Moreover, the trial court made an improper credibility determination. At summary judgment, the Rouhfars contended they held a genuine belief that Brawley abused their son while Brawley steadfastly asserted her innocence. This conflicting testimony created a classic "he said, she said" case in which credibility became decisive and summary judgment improper. *See Margoles v. Hubbart*, 111 Wn.2d 195, 210, 760 P.2d 324 (1988) (Anderson, J., dissenting). The trial court erred in granting summary judgment dismissal to the Rouhfars because it made an impermissible credibility determination and failed to construe the evidence

in a light more favorable to Brawley. Accordingly, this Court should reverse and remand to the trial court for a trial on the merits.

Where the trial court's grant of summary judgment is inappropriate and requires this Court to reverse, the Rouhfars have not prevailed upon their immunity defense under RCW 4.24.510. Accordingly, they are not entitled to attorney fees and costs or statutory damages. *See Segaline v. Dep't of Labor & Indus.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010) (Slip op. at 7). *See also, Gausvik v. Perez*, 396 F.Supp.2d 1173, 1177 (E.D. Wash., 2005) (arrestee not entitled to award of attorney fees where he did not prevail on his immunity defense). The trial court's award should therefore be reversed.

(4) The Trial Court Erred in Calculating Brawley's Attorney Fees

The Rouhfars formally offered to allow Brawley to enter a judgment against them on her unpaid wages and breach of contract claims and request for injunctive relief. CP 329-30. Their offer included the payment of the costs of suit and a reasonable sum for attorney fees. CP 330. Brawley accepted the offer and filed a motion for an award of attorney fees and costs. CP 314-58.

The trial court granted Brawley's motion in part and denied it in part. CP 465-67. In particular, the court found:

the amount at issue is a relevant consideration in determining the reasonableness of the fee award. The wage dispute involved less than \$2,000 in back-owed pay. In light of this, Brawley's claim for 107.25 hours for a total of \$25,500 in fees is unreasonable.

CP 466 (finding 6). The court also found that "25 hours @ 200.00 per hour is reasonable given that the primary issue litigated was the defamation claim. CP 467. The court concluded Brawley was entitled to an award of \$5,000, but no costs. CP 467. The trial court abused its discretion by limiting Brawley's fee award on the basis that her request far exceeded the wages recovered.

This Court engages in a two-step process when reviewing an award of attorney fees. *See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). First, the Court must determine whether the prevailing party was entitled to attorney fees. *Id.* Then, the Court must decide whether the amount of fees awarded was reasonable. *Id.*

Washington courts have adopted the lodestar approach to calculate reasonable attorney fees. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 587-98, 675 P.2d 193 (1983). A lodestar award is arrived at by multiplying the number of hours reasonably worked by a reasonable hourly rate. *Id.* at 593. *See also, Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998) (expanding on the methodology established in

*Bowers*). The first step when calculating the lodestar amount is to determine whether the attorney spent a reasonable number of hours securing his or her client's successful recovery. *See Mahler*, 135 Wn.2d at 434. The second step is to determine the reasonableness of the attorney's hourly rate at the time he or she actually billed the client for the services. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 377, 798 P.2d 799 (1990).

Here, there is no question Brawley was entitled to her fees pursuant to the Rouhfars' offer of judgment, RCW 49.48.030<sup>16</sup> and RCW 49.52.070.<sup>17</sup> CP 360. But the amount of fees the trial court

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<sup>16</sup> RCW 49.48.030 states:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

<sup>17</sup> RCW 49.52.070 states:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

awarded was unreasonable where the court improperly limited the award based on the small amount of unpaid wages Brawley recovered. CP 466 (finding 6). RCW 49.48.030 is inapplicable only if the amount of the wage claimant's recovery is less than or equal to the amount admitted by the employer as being due. It does not limit the amount of fees to be awarded based on the wages recovered so long as the recovery is greater than the amount admitted by the employer. RCW 49.52.070 likewise provides no such limitation.

*Mahler* is not only instructive, but dispositive of the issue. There, an insurance company contended on appeal that the trial court's fee award to its insured was unreasonable in light of the small amount at stake in the case. 135 Wn.2d at 433. The Supreme Court specifically noted the amount of the recovery, while a relevant consideration in determining the reasonableness of the fee award, is not dispositive. *Id.* See also, *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993). It then emphatically stated "We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." *Id.*

This Court has consistently reiterated this principle. See, e.g., *Taliesen*, 135 Wn. App. at 144 (noting it is within the scope of the trial court's discretion to award fees in an amount greatly exceeding the

underlying judgment); *Mayer v. City of Seattle*, 102 Wn. App. 66, 83, 10 P.3d 408 (2000) (noting the trial court may award attorney fees in an amount disproportionate to the underlying judgment, provided it follows the lodestar method). Thus, the trial court abused its discretion by finding Brawley's claim for fees was unreasonable and had to be reduced based on the small amount of her recovery.

Moreover, the public policy behind the Legislative mandate to promptly pay wages is best served if employers who willfully withhold wages face the risk of substantial attorney fees. Where public policy is advanced through the fee award, the award itself may greatly exceed the recovery. *See Mahler*, 135 Wn.2d at 433.

(5) Brawley Is Entitled to Her Attorney Fees and Costs On Appeal

Washington has long followed the American rule that a prevailing party does not recover attorney fees absent a contract, statute, or other recognized ground of equity allowing for the recovery. *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994). RAP 18.1 authorizes the award of fees on appeal where "applicable law grants a party the right to recover reasonable attorney fees." RAP 18.1(a). Brawley is entitled to an award of fees on appeal under RCW 49.48.030 and 49.52.070.

RCW 49.52.070 authorizes the recovery of attorney fees on appeal to the prevailing party on an unpaid wages claim. *See Brandt v. Impero*, 1 Wn. App. 678, 682, 463 P.2d 197 (1969) (noting that if the recovery of fees under the statute were limited to trial court fees, this might discourage a wage earner from seeking the statutory remedy to recover what was rightfully his). RCW 49.48.030 similarly provides for the recovery of attorney fees on appeal. *See Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 850 P.2d 517 (1993) (holding breach of employment contract plaintiff, who successfully defended judgment in her favor on appeal was entitled to attorney fees on appeal only to the extent they were incurred in defending the contract claim judgment). Here, Brawley is entitled to her reasonable attorney fees and costs as the prevailing party on appeal once this Court reverses the trial court order granting in part and denying in part her motion for attorney fees and costs on her wage claim.

#### F. CONCLUSION

Dismissal of Brawley's slander *per se* claim via RCW 4.24.510 was improper. This Court should reverse and remand that claim to the trial court for a trial on the merits. Since RCW 4.24.510 does not apply here, attorney fees, costs, and statutory damages awarded to the Rouhfars under that provision should be vacated.

Reducing Brawley's fee award based in part on the small amount of her recovery was likewise improper. This Court should reverse and remand the fee award to the trial court for recalculation.

This Court should award Brawley her reasonable attorney fees and costs on appeal.

DATED this 20<sup>th</sup> day of August, 2010.

Respectfully submitted,



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# APPENDIX

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**ORIGINAL**

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN KING COUNTY - AT SEATTLE**

LORA BRAWLEY,  
Plaintiff,

vs.

LEYLA ROUHFAR and REZA  
FIROUZBAKHT, Husband and Wife, AND  
THE MARITAL COMMUNITY THEREOF,  
Defendants.

Case No.: 08-2-34697-8 SEA  
~~(PROPOSED)~~ *PH*  
FINAL JUDGMENT - CR 54

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled court, and the court being fully advised in the premises, now makes the following judgment:

I. JUDGMENT SUMMARY

Judgment Creditor:	Lora Brawley
Judgment Debtors:	Leyla Rouhfar and Reza Firouzbakht, Husband And Wife, And The Marital Community Thereof
Principal Judgment Amount:	\$3,780.00
Late Charges:	-0-
Interest to Date of Judgment:	\$ 649.95 as of February 3, 2010 (Date of Acceptance of Offer of Judgment)
Interest Rate after Judgment:	12.0%
Attorney's Fees:	\$5,000.00
Costs:	-0-

Judgment summary- 1

Amer & Young, PLLC  
222 East Main Street, Suite M  
Auburn, WA 98002  
Telephone: (253) 833-3004  
Fax: (253) 833-0899

1 Other Recovery Amounts: \$85.56 Additional prejudgment interest from February 3,  
2010 to April 13, 2010 (69 days x 1.24/day @ 12.0% upon  
2 And ~~\$250.00 as Discovery Sanctions~~ *AY*  
3 Attorney for Judgment Creditor: Saphronia Young  
4 Attorney for Judgment Debtor: Bruce E. Johnson/ Sarah K. Duran

## 5 II. JUDGMENT SUMMARY:

6 Judgment Creditor: Leyla Rouhfar and Reza Firouzbakht, Husband And Wife,  
And The Marital Community Thereof - Defendants  
7 Judgment Debtor: Lora Brawley - Plaintiff  
8 Principal Judgment Amount: \$10,000  
9 Late Charges: -0-  
10 Interest to Date of Judgment: -0-  
11 Interest Rate after Judgment: 12.0%  
12 Attorney's Fees: \$10,369.34  
13 Costs: \$360.30  
14 Other Recovery Amounts: -0-  
15 Attorney for Judgment Creditor: Bruce E. Johnson/Sarah K. Duran  
16 Attorney for Judgment Debtor: Saphronia Young  
17 Other Recovery Amounts: ~~\$1,000.00 in discovery sanctions against Plaintiff's counsel~~

## 14 II. HEARING AND PROCEDURAL HISTORY OF CASE

15 2.1 Date. The Court (Honorable Mary Yu, Department 15) heard oral argument on  
16 Defendants' Motion for Partial Summary Judgment on December 18, 2009. Defendants' motion  
17 sought to dismiss Plaintiff's defamation claim on the basis of privilege, and for statutory  
18 penalties under RCW 4.24.510. The court took supplemental briefing by the parties, and granted  
19 the motion to dismiss Plaintiff's defamation claim and for statutory penalties and attorney fees  
20 on January 22, 2010. The court granted Plaintiff's Motion to Compel Discovery on January 27,  
21 2010 and awarded sanctions against Defendants. On February 11, 2010, the Court granted  
22 Defendants' motion to voluntarily dismiss its counterclaims without oral argument. The Court  
23 considered two additional motions without oral argument on February 11, 2010; first, an Order  
24 granting Defendants' Motion to Seal Medical Records and for sanctions, and second, an Order  
25 granting Defendants' Motion for an award of attorney fees. Defendants' Offer of Judgment on

1 Plaintiff's remaining claims was accepted by Plaintiff on February 12, 2010, and the court  
 2 granted in part Plaintiff's application for attorney fees on April 2, 2010. This case is now ripe  
 3 for final judgment entry, as all claims between all parties have been adjudicated or resolved.

4 2.2 Appearances. No oral argument on this Final Judgment is requested, pursuant to  
 5 CR 54.

6 2.3 Purpose. To rule on defendants' Motion for Partial Summary Judgment to  
 7 Dismiss Plaintiff's Claim for Defamation on the Basis of Privilege.

### 8 III. OTHER ORDERS

9 3.1 1/27/10 Order granting discovery sanctions to Plaintiff and against Defendants in  
 10 the amount of \$250.00; 02/11/10 Order granting sanctions to Defendants and against Plaintiff's  
 11 counsel; 02/11/10 Order granting Defendants' Motion for Calculation of Attorney Fees; 02/19/10  
 12 Order on Trial Readiness; 04/02/10 Order denying in part/granting in part Plaintiff's Motion for  
 13 Attorney Fees.

### 14 IV. ADJUDICATION

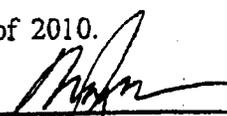
15 ON THE BASIS OF THE FOREGOING, IT IS ORDERED, ADJUDGED, AND  
 16 DECREED that this case is now finally resolved as to all issues between all parties. This Final  
 17 Judgment entry is made pursuant to CR 54(b), (e) and (f). *\* see p. 4*

18 4.1 Judgment. Plaintiff is hereby awarded judgment against the Defendants  
 19 individually and against their marital community in the amount of \$9,429.95; \$85.56 for  
 20 additional prejudgment interest from February 3, 2010 to the date of judgment at a rate of 12.0%,  
 21 pursuant to RCW 19.52.020(1); \$5,000 for attorney's fees; and \$0.00 for legal costs. Post  
 22 judgment interest shall accrue at a rate of 12.0% pursuant to RCW 19.52.020(1). Plaintiff is also *was*  
 23 awarded sanctions in the amount of \$250.00. *which has been paid. of*

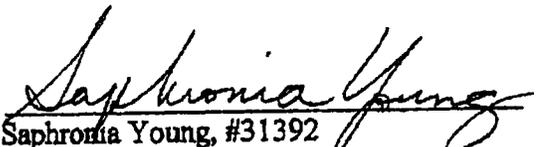
24 Defendants are hereby awarded judgment against the Plaintiff in the amount of  
 25 \$10,000.00 in statutory damages; with post-judgment interest from the date of judgment at a rate

1 of 12.0%, pursuant to RCW 19.52.020(1); \$10,369.34 for attorney's fees; and \$360.30 for legal  
2 costs. Defendants were also awarded sanctions against Plaintiff's counsel in the amount of  
3 \$1,000.00 *which has been paid*

4 DONE IN OPEN COURT this 6 day of 2010.

5   
6 COURT COMMISSIONER/ SUPERIOR  
7 COURT/JUDGE

8 Presented by:

9   
10 Saphronia Young, #31392  
11 Amer & Young, PLLC  
12 Attorney for Plaintiff, Lora Brawley

*Pl's claim for slander is  
Dismissed with prejudice.  
We have accepted judgment  
against them on Pl's claims  
for unpaid wages, breach of  
contract, and injunctive  
relief. Defendants' counterclaims are  
Dismissed without prejudice*

13 Notice of Presentation Waived/or Form of Judgment Approved:

14  
15 Sarah Duran, #38954 / Bruce E. Johnson, #7667  
16 Davis Wright Tremaine, LLP  
17 Attorneys for Defendants

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY

LORA BRAWLEY,  
  
Plaintiff,  
  
v.  
  
LEYLA ROUHFAR and REZA  
FIROUZBAKHT, Husband and Wife, and the  
marital community thereof,  
  
Defendants.

No. 08-2-22635-2 SEA

~~[PROPOSED]~~ ORDER DENYING  
PLAINTIFF'S MOTION FOR  
AWARD OF FEES UPON  
ACCEPTANCE OF JUDGMENT  
- CR 68 - ON COMPLAINT FOR  
UNPAID WAGES, BREACH OF  
CONTRACT, AND FOR  
INJUNCTIVE RELIEF

*in part +  
quoting  
Ch*

THIS MATTER comes before the Court on Plaintiff's Motion for Award of Fees on  
Acceptance of Judgment - CR 68 - On Complaint for Unpaid Wages, Breach of Contract, and  
For Injunctive Relief. The parties herein are represented by and through their counsel of record.  
The Court has reviewed the following documents submitted in support of and in opposition to  
the motion, specifically:

1. Plaintiff's Motion for Award of Fees on Acceptance of Judgment - CR 68 - On  
Complaint for Unpaid Wages, Breach of Contract;
2. Declaration of Saphronia Young in Support of Plaintiff's Motion for Award of  
Fees and attached exhibits;
3. Plaintiff's Proposed Order;

1 4. Defendants' Opposition to Plaintiff's Motion for Award of Fees on Acceptance of  
2 Judgment – CR 68 – On Complaint for Unpaid Wages, Breach of Contract, and For  
3 Injunctive Relief;

4 5. Defendants' Proposed Order; and

5 6. Any filings previously or subsequently filed herein.

6 NOW, THEREFORE, the Court hereby makes the following FINDINGS OF FACT:

7 1. Plaintiff has failed to provide evidentiary support for her fee request;

8 2. The established rate for billing clients will likely be a reasonable rate. Because  
9 Ms. Young states that she regularly bills at a rate of \$200, the reasonable hourly rate for  
10 calculating the Lodestar is \$200;

11 3. Plaintiff Brawley has failed to support for her claim of 107.25 hours by providing  
12 a total number of hours that she and others spent on the case, but failing to give an  
13 explanation for how those hours were spent. This is insufficient to support the number of  
14 hours claimed;

15 4. Because Brawley was not the prevailing party, she should not be awarded fees for  
16 her defamation claim, her breach of contract claim and time spent defending the Parent's  
17 counterclaim. These claims are sufficiently distinct from her wage claim that time spent  
18 on these matters must be segregated from any attorneys fees award;

19 5. Brawley is entitled to only reasonable fees related to her wage claims pursuant to  
20 RCW 49.48.030 and 49.52.070;

21 6. The amount at issue is a relevant consideration in determining the reasonableness  
22 of the fee award. The wage dispute involved less than \$2,000 in back-owed pay. In light  
23 of this, Brawley's claim for 107.25 hours for a total of \$25,500 in fees is unreasonable;

24 7. Brawley has asked for a multiplier of 1.5. An adjustment based on these factors  
25 may be made in rare instances. The Court finds there is no justification for such a  
26 multiplier because the issues relating to wage dispute were fairly straightforward and her  
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hourly rate adequately compensates for any risk factor to Ms. Young for working with a client who may be unable to pay all of her attorneys fees; and

8. Brawley has failed to provide evidentiary support for her claim of costs related to the present litigation.

Accordingly, the Court hereby GRANTS IN PART AND DENIES IN PART Plaintiff Brawley's motion. Defendants are ordered to pay \$ 5,000.00 in attorneys fees. The portion of Brawley's motion seeking costs is DENIED.

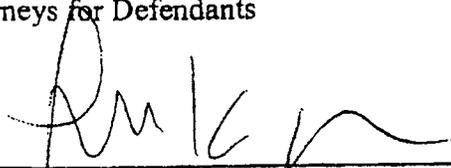
It is so ORDERED.

DATED this 2 day of April, 2010.



The Honorable Mary Yu  
King County Superior Court Judge

Presented by:  
Davis Wright Tremaine LLP  
Attorneys for Defendants

By   
Bruce E.H. Johnson, WSBA #7667  
Sarah K. Duran, WSBA #38954  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
Tel: (206) 622-3150  
Fax: (206) 757-7700  
sarahduran@dwt.com

\* 25 hours @ 200 " per hour is reasonable given that the primary issue litigated was the defamation claim.

the ct. also strikes the Defendants' "sur reply" - there is no authority for filing such a pleading without permission from the ct. (2)

**FILED**  
KING COUNTY, WASHINGTON

**FEB 12 2010**

Honorable Mary Yu  
Note for Hearing: February 11, 2009

SUPERIOR COURT OF THE STATE OF WASHINGTON  
**ANGIE VILLALOVUS**  
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY

LORA BRAWLEY,	)
	)
Plaintiff,	)
	)
v.	)
	)
LEYLA ROUH FAR and REZA	)
FIROUZBAKHT, Husband and Wife, and the	)
marital community thereof,	)
	)
Defendants.	)

No. 08-2-34697-8 SEA

ORDER GRANTING  
DEFENDANTS' MOTION FOR  
CALCULATION OF  
ATTORNEYS' FEES UNDER  
RCW 4.24.510  
~~PROPOSED~~

THIS MATTER comes before the Court on Defendants' Motion for Calculation of Attorneys' Fees Under RCW 4.24.510. The parties herein are represented by and through their counsel of record. The Court has reviewed the following documents submitted in support of and in opposition to the motion, specifically:

1. Defendants' Motion for Calculation of Attorneys' Fees Under RCW 4.24.510.
2. Declaration of Sarah K. Duran in Support of Defendants' Motion for Calculation of Attorneys' Fees Under RCW 4.24.510.

ORDER GRANTING DEFENDANTS' MOTION FOR  
CALCULATION OF ATTORNEYS' FEES UNDER  
RCW 4.24.510 [PROPOSED] - 1 9 3  
DWT 13940649v1.0090084-000001

1 3. Declaration of L. Keith Gorder in Support of Defendants' Motion for  
2 Calculation of Attorneys' Fees Under RCW 4.24.510;

3 4. Declaration of Reza Firouzbakht in Support of Defendants' Motion for  
4 Calculation of Attorneys' Fees Under RCW 4.24.510; and

5 5. Any filings previously or subsequently filed herein.

6 NOW, THEREFORE, the Court hereby GRANTS Defendants' Motion and ORDERS  
7 Plaintiff Lara Brawley to pay the following to Defendants:

8 a. \$10,000 in statutory fines (already awarded in the Court's January 22,  
9 2010 order);

10 b. Defendants' attorneys fees in the amount of ~~\$13,369.34~~ <sup>10,369.34 \* see</sup> plus the ~~reasonable attorneys fees associated with filing the present motion in the amount of~~ <sup>attached</sup>

11 ~~reasonable attorneys fees associated with filing the present motion in the amount of~~  
12 ~~\_\_\_\_\_~~ *J*  
13 c. Defendants' expenses in the amount of \$360.30.

14 IT IS SO ORDERED.

15 DATED this 11 day of February, 2010.

16 *Mary Yu*  
17 \_\_\_\_\_  
18 The Honorable Mary Yu  
King County Superior Court Judge

19 Presented by:  
20 Davis Wright Tremaine LLP  
Attorneys for Defendants

21 By *Bruce E. H. Johnson*  
22 \_\_\_\_\_  
Bruce E. H. Johnson, WSBA #7667  
Sarah K. Duran, WSBA #38954

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\* The court does find that the rate set forth by counsel is customary, reasonable, and in accordance with billing rates for comparable attorneys in this area of practice in the Puget Sound area. Due to the difficulty involved with segregation, the court also accepts the one third reduction as a proper method for determining the time and fees. However, the court is further reducing the fee amount because there are concerns regarding the amount of time spent on the matter as well as billing for internal conferences, the time associated with a younger associate having to learn this area of law, and the amount of time spent on the last motion which was relatively straightforward.

By separate order, the court awards sanctions against Plaintiff's counsel for filing the medical records.

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

LORA BRAWLEY,

Plaintiff,

v.

LEYLA ROUHFAR and REZA  
FIROUZBAKHT, Husband and Wife, and the  
marital community thereof,

Defendants.

No. 08-2-34697-8 SEA

ORDER GRANTING DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

**[CLERK'S ACTION REQUIRED]**

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THIS MATTER came before the undersigned on Defendants' Motion for Partial Summary Judgment. The court heard oral argument and reviewed the following documents submitted in support of and in opposition to the motion, specifically:

1. Defendants' Motion for Partial Summary Judgment;
2. Declaration of Reza Firouzbakht with attached Exhibits;

3. Declaration of Leyla Rouhfar, D.M.D.;
4. Brawley's Motion to Partially Strike the Declarations of Rouhfar and Firouzbakht, Together With Exhibits A and B, Filed In Support of Defendants' Motion for Partial Summary Judgment;
5. Brawley's Opposition to Defendants' Motion for Partial Summary Judgment on Defamation;
6. Declaration of Lora Brawley with attached Exhibits;
7. Declaration of Saphronia Young with attached Exhibits;
8. Declaration of Carolyn Stulberg with attached Exhibit;
9. Defendants' Reply brief;
10. Brawley's Motion to Strike
11. Defendants' Supplemental Briefing Regarding Actual Malice (and cases attached thereto); and
12. Brawley's Supplemental Briefing (and materials and case attached thereto).

Having been duly advised, IT IS HEREBY ORDERED that the Motion for Partial Summary Judgment IS GRANTED and Plaintiff's Motions to Strike ARE DENIED.

Plaintiff Brawley has failed to meet her burden of showing she can prove the four *prima facie* elements of her defamation claim and that Defendants made an unprivileged claim. Specifically, the court grants the motion on the basis that the statements made to the police and Child Protective Services are privileged and absolutely immune from liability under RCW 4.24.510. The statements made to family members, health care providers, and school personnel are privileged under a qualified common interest privilege. A qualified privilege may be lost if it can be shown that the privilege was abused. It is Plaintiff's burden

to demonstrate abuse of that privilege and a showing of actual malice will defeat a conditional or qualified privilege which must be shown by clear and convincing proof of knowledge or reckless disregard as to the falsity of the statement. While the court agrees with Plaintiff that factual disputes regarding such should be reserved for the jury, there is no evidence in the record that would allow the court to conclude that there is a genuine issue of fact on this question. Plaintiff has not provided the court with the necessary evidence to survive partial summary judgment. In accordance with RCW 4.24.510 Defendants are entitled to fees and statutory damages.

IT IS FURTHER ORDERED that Plaintiff Brawley's request for CR 11 sanctions or fines IS DENIED.

IT IS SO ORDERED this 21<sup>st</sup> day of January, 2010

  
\_\_\_\_\_  
Judge Mary Yu

King County Superior Court  
Judicial Electronic Signature Page

Case Number: 08-2-34697-8  
Case Title: BRAWLEY VS ROUHFAR ET ANP

Document Title: ORDER

Signed by Judge: Mary Yu  
Date: 1/22/2010 12:17:35 PM

**digitally signed**

---

Judge Mary Yu

This document is signed in accordance with the provisions in GR 30.  
Certificate Hash: 43FB31DD51CE9601413A8780C0326931030FD939  
Certificate effective date: 6/30/2008 8:13:53 AM  
Certificate expiry date: 7/19/2010 8:13:53 AM  
Certificate Issued by: CN=Washington State CA B1, OU=State of Washington  
CA, O=State of Washington PKI, C=US

Page 4 of 4

DECLARATION OF SERVICE

On said day below I emailed and deposited with the US Postal Service a true and accurate copy of the following document: Brief of Appellant Lora Brawley in Court of Appeals Cause No. 65399-7-I to the following:

Saphronia Young  
Amer & Young, PLLC  
222 E. Main Street, Suite M  
Auburn, WA 98002

Bruce Johnson  
Sarah Duran  
Davis Wright Tremaine  
1201 3<sup>rd</sup> Avenue, Suite 2200  
Seattle, WA 98101-3045

Original sent by ABC Legal Messenger for filing with:  
Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 20, 2010, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 AUG 20 PM 3:57