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NO. 65914-6-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

NORMAN WHERRETT & ANABELLA WHERRETT

Appellants/Cross-Respondents

v.

MARY WHITE & DAVID WHITE, LAVONNE EKREN, and MARLIS
CROSSON

Respondents/Cross-Appellants

RESPONDENT/CROSS APPELLANT EKREN'S REPLY BRIEF

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2011 JUN 14 AM 10:39
FILED
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

LaVonne Ekren communicated with government agencies about her neighbor Norm Wherrett parking dozens of cars in their residential cul-de-sac, and about incidents where Mr. Wherrett threatened Ms. Ekren. Wherretts brought suit against Ms. Ekren based upon those communications. Ms. Ekren is entitled to immunity for those protected communications under RCW 4.24.510. Unless Wherretts establish bad faith by clear and convincing evidence, Ekren is also entitled to statutory damages under RCW 4.24.510. Although the trial court correctly concluded that Wherrett's claims should be dismissed, Judge Hayden incorrectly denied statutory damages because the Wherretts did not, and cannot, establish bad faith.

Ekren respectfully requests that this Court affirm the dismissal of Wherretts' claims against Ms. Ekren and the award of attorneys fees, but reverse the trial court's refusal to award statutory damages under RCW 4.24.510.

II. RESPONSE TO STANDARD OF REVIEW

The Wherretts have incorrectly claimed that this matter is reviewed for abuse of discretion.¹ Ms. Ekren does not dispute that the authority the Wherretts cite stands for the proposition that fee/sanction decisions are usually reviewed for abuse of discretion. However, that standard simply does not apply here because this matter involves the application of a statute to the facts to determine whether bad faith has been established.² The appropriate standard of review is de novo for two reasons.

First, Washington Courts review summary judgment rulings de novo.³ As this Court is aware, Ekren sought the award of statutory damages as part of her summary judgment motion.⁴ The trial court reserved its ruling on that issue as well as required Ekren to bring a separate motion for her fees

¹ See, Appellant's Reply Brief and Response, at 1.

² See, e.g., *State v. Dearbone*, 125 Wn.2d 173, 178-79, 883 P.2d 303 (1994) (applying de novo review instead of abuse of discretion in determining whether good cause was shown under a statute because the issue presented a mixed question of law and fact centered around "...the meaning of the legal standard of good cause...").

³ *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d. 1 (2006).

⁴ See also, CP 112-20; 1121-35 (Ekren's motion for fees, costs, and damages).

and costs.⁵ The Wherretts have challenged the trial court's ruling on that summary judgment. As such, review of all issues in the summary judgment should be de novo. Second, and more importantly, de novo review applies to the application and interpretation of RCW 4.24.510.⁶

Even if this Court were to review this matter under an abuse of discretion standard, the ruling should still be reversed because RCW 4.24.510 mandates an award of statutory damages unless the Court find that Ms. Ekren's communications were made in bad faith.⁷ RCW 4.24.510 states that a prevailing dedendant "shall receive statutory damages

⁵ CP 1104-06. With respect to the statutory damages, the Court granted attorney fees and denied statutory damages and denied the motion for reconsideration, which effectively resolved its prior reserved ruling on summary judgment. *See*, CP 1188-89; CP 1205; CP 1257-60.

⁶ *See, Eugster v. City of Spokane*, 139 Wn. App. 21, 33, 156 P.3d 912 (2007) (citing, *Emmerson v. Weilep*, 126 Wn. App. 930, 935, 110 P.3d 214, *review denied*, 155 Wn.2d 1026, 126 P.3d 820 (2005)). *See also, Skimming v. Boxer*, 119 Wn. App. 748, 757, 82 P.3d 707 (2004), *review denied*, 119 Wn.2d 1016, 101 P.3d 108 (2004); *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697 (1994).

⁷ *See*, RCW 4.24.510. *See also, Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (stating that a trial court abuses its discretion when it takes a view that no reasonable person would take or when it applies the wrong legal standard to an issue)(citing, *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353(1997); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995) (citing, *Fraser v. Beutel*, 56 Wn. App. 725, 734, 785 P.2d 470 (1990)).

of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.”⁸ Here, the Court made no findings that Ms. Ekren’s complaints had been communicated in bad faith. Without those findings, there is no basis to deny Ms. Ekren the mandatory statutory damages of \$10,000.

III. LEGAL ARGUMENT

A. The Wherretts Presented No Evidence of Bad Faith. Therefore, They Did Not Meet Their Burden of Establishing Bad Faith By Clear and Convincing Evidence.

In order to prevent an award of statutory damages under RCW 4.24.510, the Wherretts bore the burden of proving bad faith by clear and convincing evidence.⁹ To meet this burden, the Wherretts were required to show that Ekren knew her communications to governmental agencies were false and/or that she acted with

⁸ RCW 4.24.510.

⁹ See, RCW 4.24.510; *Segaline v. State, Dept. of Labor and Industries*, 144 Wn. App. 312, 325, 182 P.3d 480 (2008), *rev'd on other grounds*, 169 Wn.2d 467, 238 P.3d 1107 (2010) (citing, *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 657-58, 717 P.2d 1371 (1986); *Bender v. City of Seattle*, 99 Wn.2d 582, 601, 664 P.2d 492 (1983); *Gilman v. MacDonald*, 74 Wn. App. 733, 738-39, 875 P.2d 697, *review denied*, 125 Wn.2d 1010, 889 P.2d 498 (1994)). See also, *Bailey v. State*, 147 Wn. App. 251, 263-64, 191 P.3d 1285 (2008), *review denied*, 166 Wn.2d 1004, 208 P.3d 1123 (2009)(awarding statutory damages under RCW 4.24.510 when plaintiff failed to present evidence that communications were in bad faith).

reckless disregard as to the falsity of the statements.¹⁰

The Wherretts did not meet their burden at the trial court level, and have not done so here. While the Wherretts cite to numerous exhibits in support of their position, a careful review of those materials establishes that they do not support the Wherretts' claims.

For example, the Wherretts cite to numerous police reports and claim that these reports are evidence that the calls to the police lacked factual basis or were frivolous.¹¹ However, the majority of the cited reports were not made by Ms. Ekren.¹² Whether reports made by others were made in good faith is irrelevant to Ms. Ekren's claim for statutory damages.

The Wherretts' reliance on e-mails and communications not involving governmental agencies is similarly misplaced. To avoid liability for statutory damages under RCW 4.24.510, the Wherretts had the burden of showing that communications

¹⁰ *Segaline*, 144 Wn. App. at 325 (citing, *Lilig*, 105 Wn.2d at 658; *Bender*, 99 Wn.2d at 601; *Gilman*, 74 Wn. App. at 738)).

¹¹ *See*, Appellant's Reply and Response, at 3; 3 n.4

¹² *Compare*, Appellant's Reply and Response, at 3; 3 n.4 with CP 850-91 (police reports not involving Ekren); CP 904-10 (police reports not involving Ekren); CP 914-25 (police reports not involving Ekren).

to governmental agencies were not in good faith.¹³ Whether Ekren's communications with her friends and neighbors were in good faith, which Ekren asserts they were, is irrelevant for the purposes of Ekren's cross appeal.¹⁴

Even where the Wherretts point to communications **with** government agencies, there is no evidence that Ekren's communications were in bad faith. For instance, Wherretts refer to Ekren's August 15, 2008 e-mail to neighbors and a City of Redmond representative regarding Mr. Wherrett growling at her as an example of a matter that was either not actionable or trivial.¹⁵ First, this communication was in direct response to the City representative's earlier e-mail advising, "[a]ny problems or concerns over the weekend do not hesitate to call dispatch."¹⁶ Second, and more importantly, the Wherretts do not deny that the information communicated was true. There can be no bad faith when Mr. Wherrett does not deny growling at Ms. Ekren.

The Wherretts have similarly failed to make the

¹³ See, RCW 4.24.510; *Segaline*, 144 Wn. App. at 325.

¹⁴ These communications are also not actionable for the reasons set forth in Brief of Respondent/Cross Appellant Ekren.

¹⁵ See, Appellant's Reply and Response, at 3-5. See also, CP 796-99.

¹⁶ CP 799.

required showing with respect to Ms. Ekren's e-mail to the City of Redmond Code Compliance Officer regarding the apparent addition of a new driveway.¹⁷ In fact, Mr. Wherrett has acknowledged that he was attempting to change his driveway to a circular driveway.¹⁸

Nor have they presented any evidence that Ms. Ekren communicated a falsehood or was acted with reckless disregard to the truth with respect to her e-mail to the city liason for the CERT program.¹⁹ To the contrary, a review of Ekren's email establishes that Ekren carefully chose her words, expressed her opinions based upon her experiences with Mr. Wherrett, and specifically asked to be informed if her information was not correct.²⁰ Contrary to Wherretts' argument, Ekren never stated that Wherrett had a criminal background. Instead, she wrote that she heard that criminal records existed.²¹ She was not asserting it as fact. Moreover, the Wherretts have not presented any evidence that Ekren knew the statement was false. In fact, they have not

¹⁷ *See*, Appellant's Reply and Response, at 3 n.4; CP 802-03

¹⁸ CP 1083-85.

¹⁹ *See*, CP 829-33

²⁰ *Id.*

²¹ *See*, CP 832

presented evidence to establish that her statements were in fact false.

Wherretts citation to the June 21, 2008 police report made by Ms. Ekren is also unavailing.²² That police report was about the incident where Mr. Wherrett screamed at Ms. Ekren and threatened to put a lien on her house.²³ Wherretts do not dispute that this occurred.²⁴ Moreover, this incident was one of the reasons Ms. Ekren sought (and obtained) an Order for Protection—Harassment against Mr. Wherrett.²⁵ Instead of evidencing bad faith, this report and the related evidence lead to only one conclusion: LaVonne Ekren's communications were made in good faith.

The Wherretts were required to show that Ekren's communications to governmental agencies were knowingly false and/or made with reckless disregard as to their falsity.²⁶ They have not and cannot meet this burden. Judge Hayden

²² *See e.g.*, Appellant's Reply and Response, at 3n.4. *See also*, CP 794-95.

²³ *See*, CP 793-95; *See also*, CP 427, at ¶3.

²⁴ CP 459, at p. 32, ln. 15- p. 33, ln.10.

²⁵ *See*, CP 428-29, a ¶9; CP 438-40. *See also*, CP 441-45 (Honorable Judge Pro Tem Leopold's King County District Court contempt order and referencing the June 2008 incident).

²⁶ *Segaline*, 144 Wn. App. at 325 (citing, *Lilig*, 105 Wn.2d at 658; *Bender*, 99 Wn.2d at 601; *Gilman*, 74 Wn. App. at 738)).

denied statutory damages without making any finding that Ms. Ekren had acted in bad faith. There was no evidence presented, let alone evidence that would prove by clear and convincing evidence, that LaVonne Ekren reported falsehoods and/or acted with reckless disregard as to the falsity of her communications to governmental authorities. The trial court's denial of statutory damages under RCW 4.24.510 should be reversed.

IV. CONCLUSION

While the trial court correctly granted summary judgment and attorney fees to Ms. Ekren, its denial of statutory damages under RCW 4.24.510 was in error. While statutory damages can be denied if the trial court finds the communications were made in bad faith, it is the Wherretts' burden to prove bad faith by clear and convincing evidence. Here, the Wherretts have provided no evidence that any of Ms. Ekren's communications to government agencies were false and/or communicated with reckless disregard as to their falsity.

The evidence they cite to support the alleged bad faith is insufficient because: 1) police reports made by others do

not pertain to Ms. Ekren; 2) there is no evidence that any communication was knowingly false or made with reckless disregard to falsity; and 3) the totality of the evidence establishes that the communications were made in good faith. Accordingly, the trial court erred when it denied statutory damages. Ekren is entitled to an award of statutory damages under RCW 4.24.510.

Ms. Ekren asks this Court to affirm the trial court's dismissal of Wherretts' claims against her, reverse the trial court's denial of statutory damages, and award Ms. Ekren her reasonable attorneys' fees and costs on appeal, as authorized by RCW 4.24.510.

Respectfully submitted this 13th day of June, 2011

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Declaration of Service

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy the forgoing Respondent/Cross Appellant Ekren's Reply Brief to be served on this ____ day of June, 2011 on the following counsel of record:

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