67900-7

67900-7

NO. 67900-7-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ON APPEAL FROM
KING COUNTY SUPERIOR COURT NO. 11-2-20077-9 SEA

CAROLYN BILAL, an individual,

Appellant,

v.

BARBARA CASEY, an individual,

Respondent.

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 11 PM 2:56

Shannon M. Ragonesi, WSBA #31951
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
sragonesi@kbmlawyers.com

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Letter of Recommendation from Dr. Casey 4

B. Procedural History 5

ARGUMENT 6

A. RCW 4.24.510 and RCW 4.24.525 were both enacted prior to June 6, 2011, when Bilal filed her SLAPP lawsuit against Casey; therefore, they properly apply to this case 9

B. OSPI Is A State Agency Authorized By Law To Issue And Revoke Teaching Certifications 10

C. Dr. Casey's Statements To the District and Testimony At The OAH Hearing Were Public Statements Made For A Governmental Proceeding Authorized By Law And They Were Made In Connection To An Issue Of Public Concern. 116

D. The Mere Fact That Dr. Casey Was Called To Testify Is Proof That Her Communication Was Reasonably Of Concern To OSPI. 13

E. Bad Faith Is Only Relevant On The Issue Of Statutory Damages, And Was Not Proven In This Case 14

F. Bilal Has Failed To Prove By Clear And Convincing Evidence That She Will Prevail On Her Defamation Claim 16

G. Bilal Makes Assertions Unsupported By The Record And Offers Inadmissible Evidence Which Should Be Stricken. 18

1. ESD Findings are Excluded Pursuant to RCW 50.32.097.20 20

2. Bilal's Conclusory Statements of Fact and Law. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bailey v. State of Washington, et al., 147 Wn. App. 251, 191 P.3d 1285 (2008) 7, 14, 15

Barnes v. Washington Natural Gas Co., 22 Wn. App. 576, 591 P.2d 461 (1979) 18

Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994) 13

Gontmakher v. City of Bellevue, 120 Wn. App. 365, 85 P.3d 926 (2004) 7

Grimwood v. University of Puget Sound, 110 Wn.2d 355, 753 P.2d 517 (1988) 19, 21

Gunteroth v. Rodaway, 107 Wn.2d 170, 727 P.2d 982 (1986) 18

In re Marriage of Simpson, 57 Wn. App. 677, 790 P.2d 177 (1990) 18

Kauzlarich v. Yarbrough, 105 Wn. App. 632, 20 P.3d 946 (2001) 17

Lawson v. Boeing Company, 58 Wn. App. 261, 792 P.3d 545 (1990) 17, 18

Moe v. Wise, 97 Wn. App. 950, 989 P.2d 1148 (1999) 17

Mohr v. Grant, 153 Wn.2d 812, 108 P.3d 768 (2005) 16

Personal Restraint of Connick, 144 Wn.2d 442, 28 F.3d 729 (2001) 19

Segaline v. Labor & Indus., 144 Wn. App. 312, 182 P.3d 480 (2008) 15

Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980) 19

Ward v. Painters' Local Union No. 300, 41 Wn.2d 859, 272 P.2d 253 (1953) 17

STATUTES

181-86 WAC 10

181-87 WAC 10

Chapter 5.44 RCW 19

RCW 28A.300 10

RCW 28A.410 10

RCW 4.24.500 ..... 2, 7

RCW 4.24.510 ..... passim

RCW 4.24.520 7

RCW 4.24.525 ..... 6, 7, 9, 12

RCW 50.32 20

Title 50 RCW 20

RULES

CR 44 19

ER 901 19

ER 902 19

LAWS OF 2002, Ch. 232, § 2 15

RAP 10.3 ..... 18, 21

I. INTRODUCTION

Carolyn Bilal (hereinafter, "Bilal") is a former employee of the Seattle School District (hereinafter, "the District"). She was terminated from employment after the District discovered she had made false statements and submitted false information regarding her criminal history, education and work experience to the District. After the District terminated Bilal's employment, it notified the Washington Office of Public Instruction (OSPI) of Bilal's termination and misconduct. OSPI began its own investigation and the District gathered information for OSPI during the investigation at OSPI's request. Dr. Barbara Casey (hereinafter, "Dr. Casey"), a District employee who supervised and mentored Bilal in 2005, reported concerns about the authenticity of a letter of recommendation she provided for Bilal during this investigation. Dr. Casey believed part of the letter had been altered without her permission and was not authentic. OSPI concluded its investigation and revoked Bilal's teaching certification.

Bilal challenged this decision, and Dr. Casey was called as a witness to testify regarding this letter during an OSPI revocation hearing held by the Office of Administrative Hearings (OAH). Bilal now brings

this lawsuit, *pro se*, against Dr. Casey, claiming her statements during the investigation and testimony at the hearing constitute defamation.

Bilal's lawsuit is a strategic lawsuit against public participation (SLAPP) and is designed to harass Dr. Casey for her involvement in the investigation against Bilal, and retaliate against her for providing testimony during the revocation hearing. RCW 4.24.500, *et seq.*, the Washington anti-SLAPP statute, was enacted to prevent plaintiffs from filing harassing and retaliatory lawsuits against witnesses who provide statements and testimony in connection with an issue of public concern. Dr. Casey's participation and testimony in the OSPI investigation and hearing is protected by RCW 4.24.510, and she is entitled to immunity from this civil suit. Dr. Casey's testimony was a public statement made during governmental proceedings authorized by law; was made in a place open to the public in connection with an issue of public concern; and was made as an exercise of her constitutional right of free speech in connection with an issue of public concern.

II. STATEMENT OF THE CASE

Bilal was issued a teaching certificate by OSPI on August 17, 1984. **CP 80**. She was hired that same month by the District and she taught at several elementary schools for the next four years. *Id.* She left

the District in 1988 for other employment. *Id.* In October 2000, Bilal was rehired by the District as a career center specialist. *Id.*

In August 2006, Bilal's union filed a grievance on her behalf. **CP 81.** Sue Means, a District human resources analyst, reviewed Bilal's file to prepare to respond to the grievance, and discovered different dates of birth on Bilal's Federal I-9 form and driver's license, as well as different dates of birth on her insurance enrollment forms. *Id.* The District then initiated an investigation to determine what other false information, if any, had been provided to the District by Bilal. This investigation revealed multiple acts of deception and false information.

On January 22, 2007, the District terminated Bilal's employment based on her actions in providing several different dates of birth to the District and the Department of Licensing, as well as giving false information to the District about her criminal history, employment history, educational history and dates of jury service. *Id.* By letter dated January 31, 2007, the District's superintendent notified the Office of the Superintendent of Public Instruction (hereinafter, "OSPI") that Bilal's employment had been terminated for unprofessional conduct, including extensive inconsistencies and deception. *Id.*

OSPI initiated its own investigation of Bilal, and on December 23, 2009, issued a Final Order of Revocation concerning Bilal's teaching

certificate. **CP 82**. Bilal appealed this decision, and a hearing was held by the Office of Administrative Hearings on April 13, 14, 15, 19 and 20, 2010. **CP 78**. Testimony was taken from multiple witnesses during the hearing, including testimony from Dr. Casey. *Id.* On June 28, 2010, the administrative law judge, Michelle Mentzer, affirmed the OSPI's decision to revoke Bilal's teaching certificate. **CP 118**.

A. Letter of Recommendation from Dr. Casey.

Dr. Casey was an assistant principal at SPS's Garfield High School when Bilal worked there as a career center specialist. **CP 14**. Bilal was aware that Dr. Casey had obtained her Ed.D. from Seattle University. Bilal informed Dr. Casey that she was attending post-graduate studies at Seattle University to become a school administrator, and asked Dr. Casey to serve as a mentor to her. Dr. Casey met with Dr. Michael Silver at Seattle University, who was Bilal's education advisor and supervisor, and Dr. Silver explained that Dr. Casey would be providing a mentorship role to Bilal. **CP 14-15**. Dr. Casey agreed to act as a mentor to Bilal but did not believe she was conducting an internship or practicum for her. *Id.*

In June 2006, after Bilal completed her mentorship with Dr. Casey and left Garfield High School, Bilal asked Dr. Casey to write a letter of recommendation for her. *Id.* Dr. Casey agreed to do so, and provided the letter and envelope to Bilal to deliver to Seattle University, as Bilal said

she needed the letter that day in order to complete her program. *Id.* Dr. Casey neglected to save a copy of the letter she wrote due to the last-minute request and time constraints of getting the letter for Bilal. *Id.*

In August 2008, after the District had terminated Bilal's employment and OSPI began its investigation of Bilal, Ms. Means contacted Dr. Casey and asked her to review a copy of the letter of recommendation she had written for Bilal in 2006 to see if it was authentic. *Id.* Dr. Casey believes portions of the letter were not authentic based on some of the language used in the letter. *Id.* For example, the letter describes the mentorship as a "practicum" when Dr. Casey did not believe that she was providing a practicum to Bilal under this program. She does not believe she would have used that terminology. *Id.* In addition, the letter stated Bilal had been a supervisor at Garfield High School when Bilal had never held a supervisory position at the school. *Id.* Dr. Casey informed Ms. Means that she believed these portions of the letter were not written by her. *Id.* This information was conveyed by Ms. Means to OSPI, and Dr. Casey was later called to testify at the OSPI hearing held by the OAH in April 2010. *Id.*

B. <u>Procedural History</u>.

On January 27, 2010, Bilal filed a lawsuit against the District alleging wrongful termination and defamation. **CP 121-124**. On April 22,

2011, Judge Laura Inveen granted summary judgment dismissal of all of Bilal's claims against the District with prejudice. **CP 126-127**. Bilal did not appeal this decision.

On June 6, 2011, Bilal filed a lawsuit against Dr. Casey, alleging defamation based on her statements during the OSPI investigation and hearing. On June 23, 2011, Defendant's counsel provided Bilal a letter explaining that Bilal's claims would not be successful based in part on RCW 4.24.510, and offering Bilal an opportunity to review her case and dismiss her lawsuit before she incurred any litigation costs or attorney fees or statutory damages under the statute. **CP 138-39**. Dr. Casey provided this opportunity as a courtesy to Bilal, who is *pro se*. Bilal declined to voluntarily dismiss her lawsuit. Therefore, Casey brought this motion to strike pursuant to RCW 4.24.525.

III. ARGUMENT

Bilal is suing Dr. Casey simply because she reported potential misconduct and provided testimony against her during an administrative hearing held by the State to revoke Bilal's teaching certification for misconduct. This form of lawsuit is well-recognized as a Strategic Lawsuit Against Public Participation, or SLAPP, as it is designed to intimidate or dissuade witnesses from making complaints or providing information to government entities about matters of concern to the

government. Our state government has enacted legislation in an effort to put a stop to SLAPP litigation. The purpose of Washington's anti-SLAPP legislation is set out in RCW 4.24.500.

> Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

RCW 4.24.510 reads in pertinent part:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government...is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

The legislature enacted RCW 4.24.510 to encourage the reporting of potential wrongdoing to governmental entities. Bailey v. State of Washington, et al., 147 Wn. App. 251, 260, 191 P.3d 1285 (2008), *review denied*, 166 Wn.2d 1004 (2009), citing Gontmakher v. City of Bellevue, 120 Wn. App. 365, 366, 85 P.3d 926 (2004).

RCW 4.24.525 provides for a special motion to strike anti-SLAPP claims. It provides in relevant parts:

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(4)(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of

showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.

(6)(a) The court **shall** award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

A. RCW 4.24.510 and RCW 4.24.525 were both enacted prior to June 6, 2011, when Bilal filed her SLAPP lawsuit against Casey; therefore, they properly apply to this case.

Bilal filed her complaint against Dr. Casey on June 6, 2011. RCW 4.24.510, providing for immunity from civil liability for communicating to a government agency, was enacted in 1989. RCW 4.24.525, creating a procedure for a special motion to strike a claim, was

enacted in 2010.[1] Both of these statutes were enacted *prior* to the date Bilal filed her SLAPP lawsuit against Dr. Casey. Therefore, they are applicable to her claims, and the trial court properly applied them to dismiss Bilal's claims against Dr. Casey.

B. OSPI Is A State Agency Authorized By Law To Issue And Revoke Teaching Certifications.

The OSPI is the primary agency charged with overseeing K-12 public education in Washington State. RCW 28A.300 establishes the OSPI, and RCW 28A.300.040 sets forth the powers and duties of the superintendent. These include supervision over all matters pertaining to the public schools of the state, and issuing teaching certificates as provided by law. RCW 28A.300.040 (1) and (9). RCW 28A.410.090 sets forth the authorization and process to investigate misconduct and revoke teaching certificates. 181-87 WAC and 181-86 WAC also set forth standards and procedures regarding teaching certifications. Finally, RCW 28A.300.120 provides authority for the OSPI to conduct administrative hearings, or to contract with OAH to conduct such hearings.

[1] Even without this procedure, defendants had authority to file motions to dismiss claims under the anti-SLAPP statute. This section merely codified a special procedure that could be followed.

C. Dr. Casey's Statements To the District and Testimony At The OAH Hearing Were Public Statements Made For A Governmental Proceeding Authorized By Law And They Were Made In Connection To An Issue Of Public Concern.

The qualifications and trustworthiness of teachers in public schools who have direct contact with students is a matter of the highest public concern. The state legislature has recognized this by forming an agency to oversee teacher certifications and qualifications, and providing a process to revoke certifications when a teacher fails to maintain professional standards and engages in misconduct.

Bilal was a career counselor with the District, who had contact with students in the public schools on a regular basis. She held a teaching certification which enabled her to work directly with public school students on a daily basis if she pursued a teaching position. Bilal falsified numerous documents in violation of law, and provided false information to the District regarding her criminal background and prior education and work experience. She was ultimately terminated for this misconduct.

The OSPI then began its own investigation regarding Bilal's state teaching certification. The statements and testimony solicited from Dr. Casey regarding the recommendation letter were submitted in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law

(RCW 4.24.525 (2)(b)), and in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern (RCW 4.24.525 (2)(e)). To this day, Dr. Casey believes part of the letter of recommendation she wrote for Bilal was altered as the terminology used does not match her understanding of the mentorship she provided or Bilal's position at Garfield High School. She testified regarding what she believes was misconduct on the part of Bilal at the OSPI hearing. Bilal may disagree with Dr. Casey's opinion and testimony, but that does not change the nature of Dr. Casey's participation in this issue of public concern. She was therefore entitled to statutory immunity from civil suit under RCW 4.24.510 for reporting her suspicions of misconduct during the OSPI investigation and hearing.

The OSPI decided to revoke Bilal's state certification based on her misconduct, and a legitimate concern about allowing Bilal to continue to work in direct contact with students in public schools. This revocation decision was upheld by an administrative law judge in a 42-page decision after a full hearing and opportunity for Bilal to submit evidence and testimony on her own behalf. **CP 78-119**.

In her brief, Bilal argues that RCW 4.24.510 does not apply because this was a case of one agency (Seattle Public Schools) reporting misconduct to another agency (OSPI). *See,* Appellant's Brief, p. 9.

However, Bilal is suing Dr. Casey as an individual in this lawsuit, not the Seattle Public Schools.[2] It is Dr. Casey's statements to OSPI via Sue Means, and her testimony at the OSPI hearing, that are at issue in this matter. Therefore, RCW 4.24.510 does apply.

Bilal also cites Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994) for the proposition that her alteration of the letter of recommendation was not a matter of public concern. However, the Foretich case addressed the issue of whether plaintiffs were public or private figures, and involved allegations that a television docudrama falsely portrayed the plaintiffs as abusers of their grandchildren. This case has no bearing on whether a school counselor's truthfulness in completing and providing documentation – and resulting eligibility for state licensing – is a matter of public concern.

D. The Mere Fact That Dr. Casey Was Called To Testify Is Proof That Her Communication Was Reasonably Of Concern To OSPI.

Bilal offers no evidence to rebut the fact that the state legislature specifically created OSPI to administer teaching certifications. She offers no evidence to dispute the fact that Dr. Casey's testimony was offered during an investigation and subsequent hearing regarding whether Bilal's certification should be revoked or returned.

[2] Her prior lawsuit against the District was dismissed with prejudice and the decision was not appealed.

Dr. Casey provided statements and testimony to the OSPI regarding Bilal's potential misconduct in altering a letter of recommendation. The statements were provided initially to Sue Means during the OSPI investigation, and later to the administrative law judge during the OSPI hearing. As OSPI was determining whether to revoke Bilal's teaching certification, information regarding her potential misconduct was "of concern" to OSPI. Bilal offers no evidence to dispute this fact. Rather, she merely provides her personal opinions and conclusory assertions that this was not a matter of public concern. This is insufficient.

E. Bad Faith Is Only Relevant On The Issue Of Statutory Damages, And Was Not Proven In This Case.

Bilal argues that the trial court erred in finding that Dr. Casey was entitled to immunity because Bilal believes Casey acted in bad faith. *See,* Appellant's Brief, p.7. However, to be entitled to immunity from civil liability under the statute, Dr. Casey needed only to establish that (1) she communicated information to a local government agency, (2) that was of reasonable concern to that agency. Bailey v. State, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008), *rev. denied*, 166 Wn.2d 1004 (2009); RCW 4.24.510. There is no good faith requirement to establish immunity. *Id.* Former RCW 4.24.510 (1999) contained a good faith requirement, but this

phrase was deleted by the 2002 amendment. Bailey, at 261, citing LAWS OF 2002, Ch. 232, § 2; and Segaline v. Labor & Indus., 144 Wn. App. 312, 325, 182 P.3d 480 (2008), overruled on other grounds, 169 Wn.2d 467 (2010).

RCW 4.24.510 provides, "Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." The statute places the burden on Bilal to prove the defendant made a statement in bad faith, or without an honest belief in the statement. Segaline, 144 Wn. App. at 325. To dispute the award of statutory damages, a plaintiff is required to prove bad faith by clear and convincing evidence, *i.e.*, that the defendant knew or recklessly disregarded the falsity of its communications. *Id.*

In Segaline, the plaintiff claimed the defendant knew he was not a safety threat. However, the court held that a party's self-serving statements of conclusions and opinions are insufficient to defeat a summary judgment motion, and the plaintiff had failed to make a sufficient showing that evidence was available to justify a trial on the issue of bad faith. *Id.*

The present case is similar to Segaline. Bilal offered no evidence that Dr. Casey did not honestly believe the letter of recommendation had been altered. To the contrary, Dr. Casey still believes that Bilal altered the

letter *prior* to submitting it to Seattle University, based on the incorrect information contained in the letter. Bilal's Exhibit 7 further supports this as, on June 12, 2006, Dr. Casey described her involvement with Bilal as a **MENTORSHIP** practicum, which is consistent with Dr. Casey's testimony in 2010 that she believed she was providing a mentorship to Bilal, not an official practicum. **CP 42**. Dr. Casey did not keep a copy of the letter before giving it to Bilal to deliver to Seattle University; thus, there is no way for Bilal to prove that it was not altered before Bilal delivered it to the school.

F. Bilal Has Failed To Prove By Clear And Convincing Evidence That She Will Prevail On Her Defamation Claim.

Pursuant to RCW 4.24.525(4)(b), once Dr. Casey has shown she was engaged in an action involving public participation (*i.e.*, her statements during the OSPI investigation and revocation hearing), Bilal must prove by clear and convincing evidence that she will prevail on her defamation claim. The elements of defamation are: (1) falsity, (2) unprivileged communication, (3) fault, and (4) damages. Mohr v. Grant, 153 Wn.2d 812, 108 P.3d 768 (2005). Here, Bilal focused on the first element of falsity, but did not present evidence on the remaining three elements. She certainly did not prove them by clear and convincing evidence. In fact, the evidence she submitted *disproves* the fault and

damages elements. Bilal submitted the decision of Judge Mentzer where she found Bilal did not alter the letter of recommendation. Judge Mentzer's affirmation of the revocation of Bilal's teaching certification was thus *not* based on Dr. Casey's testimony and not the cause of Bilal's alleged damages.

Bilal also failed to show the communication was unprivileged. To the extent she alleges Dr. Casey's statements to Sue Means at the District during the OSPI investigation were not public, these statements are still intra-corporate communications protected by the common law qualified privilege explained in Kauzlarich v. Yarbrough, 105 Wn. App. 632, 20 P.3d 946 (2001).

It is well established in Washington that all employees – public or private – are entitled to a common law qualified privilege for making an otherwise defamatory statement when the declarant and recipient have a common interest in the subject matter of the statement. Moe v. Wise, 97 Wn. App. 950, 957-8, 989 P.2d 1148 (1999), citing Ward v. Painters' Local Union No. 300, 41 Wn.2d 859, 865-66, 272 P.2d 253 (1953); Lawson v. Boeing Company, 58 Wn. App. 261, 266-67, 792 P.3d 545 (1990). The privilege arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest. This

certainly extends to complaints of unlawful co-worker misconduct such as in the present case.

A plaintiff must prove knowledge of falsity, or reckless disregard as to falsity of the statements, in order to establish an abuse of the privilege. Lawson, 58 Wn. App at 267, citing Gunteroth v. Rodaway, 107 Wn.2d 170, 176 n.2, 727 P.2d 982 (1986). Here, Bilal failed to prove knowledge of falsity or reckless disregard. Bilal's personal opinions and animosity toward Dr. Casey are not evidence. Therefore, Dr. Casey is also entitled to the common law, intra-corporate privilege for communications made to Sue Means during the OSPI investigation.

G. Bilal Makes Assertions Unsupported By The Record And Offers Inadmissible Evidence Which Should Be Stricken.

Bilal's brief is replete with self-serving, conclusory assertions of fact that are not supported by any citation to the record. Recitation of facts not supported by the record violates RAP 10.3(a)(4). Barnes v. Washington Natural Gas Co., 22 Wn. App. 576, 577 fn. 1, 591 P.2d 461 (1979). Failure to cite to the record for a statement of fact is a failure to comply with the Rules of Appellate Procedure and justifies the court ignoring any such statement of fact. See In re Marriage of Simpson, 57 Wn. App. 677, 681-82, 790 P.2d 177 (1990).

Conclusory statements of fact in a declaration will not suffice to defeat a summary judgment motion. Grimwood v. University of Puget Sound, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). In Grimwood, the court concluded the plaintiff's affidavit in opposition presented only his conclusions and opinions as to the significance of the facts set forth in defendant's affidavit. *Id.,* at 360. In finding the plaintiff's affidavit insufficient, the court held that statements claiming he was not uncooperative, and that his job performance was not substandard, were inadmissible conclusions, not facts. It is the perception of the decision-maker, not the plaintiff, which is relevant. Grimwood, at 360, quoting Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980).

In addition, all documents attached to affidavits must follow the rules relating to authentication of documents. Personal Restraint of Connick, 144 Wn.2d 442, 455, 28 F.3d 729 (2001). In Connick, the court noted that plaintiff's counsel attached multiple documents as exhibits to his declaration that did not meet the authentication test under ER 901 and 902, Chapter 5.44 RCW, or CR 44. "It is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will in future cases accept no less." Connick, at 458.

1. ESD Findings are Excluded Pursuant to RCW 50.32.097.

Defendant objects to the Court's consideration or admission of any evidence or documentation submitted by Bilal regarding her benefits with the Washington Employment Security Department. **CP 32-36, 43-44**. Pursuant to RCW 50.32.097:

> Any finding, determination, conclusion, declaration, or final order made by the commissioner, or his or her representative or delegate, or by an appeal tribunal, administrative law judge, reviewing officer, or other agent of the department for the purposes of Title 50 RCW, shall not be conclusive, nor binding, nor admissible as evidence in any separate action outside the scope of Title 50 RCW between an individual and the individual's present or prior employer before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts or was reviewed pursuant to RCW 50.32.120.

Bilal has submitted some findings by an administrative law judge regarding her claim for unemployment compensation, and requested the Court to consider those findings. This is specifically prohibited by RCW 50.32.097. Therefore, the unemployment compensation findings must be excluded and stricken from the record.

2. Bilal's Conclusory Statements of Fact and Law.

Bilal repeatedly makes factual assertions purporting to describe testimony at the OSPI hearing, and documents reviewed and received at the hearing. **CP 30-31, 41-42**. However, this is pure hearsay and

inadmissible. Bilal has not provided an authenticated transcript or authenticated exhibits from the hearing. She has not provided declarations from the persons she attributes testimony to. Bilal's conclusory assertions are not admissible and should be stricken.

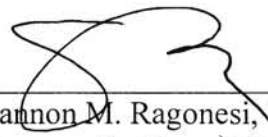
RAP 10.3(a)(5) requires a fair statement of the facts. In her Opening Brief, Bilal asserted multiple "facts" that lack any citation to the record as required by RAP 10.3(a)(5) or actual admissible evidence as required by Grimwood. The court should consider only those facts adequately cited to and supported by the admissible record in ruling on this appeal.

IV. CONCLUSION

For the foregoing reasons, Dr. Casey respectfully requests the Court to deny Bilal's appeal and affirm the decisions of the trial court in this matter.

DATED this 11th day of June, 2012.

KEATING, BUCKLIN & McCORMACK, INC., P.S.



Shannon M. Ragonesi, WSBA #31951
Attorneys for Respondent Barbara Casey

DECLARATION OF SERVICE

I, Joan Hadley, hereby declare under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action, and that on the 11th day of June, 2012, I caused a copy of the **Brief of Respondent** to be sent via the methods indicated to the following party of record, addressed as follows:

Carolyn Bilal, Bilal *pro se*
4137 Lexington Place S.
Seattle, WA 98118
cabilal@msn.com
Via Email and First-Class U.S. Mail, Postage Prepaid

DATED this 11th day of June, 2012, at Seattle, Washington.

Joan Hadley

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN 11 PM 2:56