

No. 68711-5-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CHANCE GOODMAN,

Appellant,

vs.

WAYNE OLSEN,

Respondent.

STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION I  
CLERK OF COURT  
68711-5-1  
1/17/09  
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BRIEF OF RESPONDENT

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ORIGINAL

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## I. INTRODUCTION

Chance Goodman (Goodman) filed a third-party complaint against Wayne Olsen (Olsen) alleging Olsen made defamatory statements about Goodman during the course of Olsen's involvement in a judicial proceeding. Olsen filed an answer to Goodman's third-party complaint denying he defamed Goodman in any way and he affirmatively alleged the protections of RCW 4.24.510, commonly referred to as the "anti-SLAPP" statute. After a protracted course of discovery Goodman eventually produced the statements he was relying on to prove his defamation claims. Olsen then filed a motion for summary judgment asking the trial court to dismiss the third-party complaint. In addition, he asked the trial court to find the provisions of RCW 4.24.510 applied to the allegedly defamatory statements. Assuming the trial court found RCW 4.24.510 to be applicable he also asked the trial court to award him \$10,000 in damages and requested the trial court order Goodman to pay him his costs and reasonable attorney fees to be determined at a subsequent hearing. The motion for summary judgment was essentially unopposed and on March 29, 2012, the trial court granted the motion. On April 19, 2012, following a hearing before the trial court, judgment was entered in favor of Olsen in the amount of \$15,500.00. Goodman then filed a notice of appeal alleging a variety of errors were committed by the trial court as to the summary

judgment order only. Goodman failed to appeal the April 19, 2012 judgment.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Did Goodman preserve for appellate review any of his alleged errors when he failed to respond to Olsen's motion for summary judgment with admissible evidence, case law or argument?

Did the trial court err in granting summary judgment in favor of Olsen when Goodman failed to raise any genuine issue of material fact in his responsive pleadings?

Did the trial court err when it entered judgment in favor of Olsen in the amount of \$15,500.00 when the trial court had already entered an order on summary judgment awarding judgment to Olsen and there was sufficient evidence supporting the trial court's imposition of costs and reasonable attorney fees and no admissible evidence of bad faith on the part of Olsen?

If Olsen prevails in responding to Goodman's appeal, is he entitled to his reasonable attorney fees and costs pursuant to RCW 4.24.510?

## **III. STATEMENT OF THE CASE**

Appellant Goodman, who was a defendant in a cause of action filed by his aunt and uncle, Edward and Bernice Goodman, filed a third party complaint against Respondent Olsen alleging Olsen had defamed

him. Although discovery was protracted<sup>1</sup> Goodman eventually designated the alleged defamatory statements as statements made by Olsen to Skagit County Sheriffs, a declaration of service signed by Olsen in the original cause of action involving Goodman and his aunt and uncle, testimony by Olsen during the course of an assault trial where Goodman was the defendant and any statements made by Olsen that Goodman had assaulted or injured Olsen.<sup>2</sup> (CP 15-27)

Based on the designated statements forming Goodman's claim for defamation Olsen filed a motion for summary judgment dismissal of the claims Goodman brought against him. (CP15-26, 85-133) Goodman filed a "response" to Olsen's motion on March 5, 2012. (CP 28) His response stated "Third Party Defendant Wayne Olsen's motion for Summary Judgment under CR 56 fails to meet its burden." Third Party Plaintiff Chance Goodman waives oral argument." (CP 28) On March 29, 2012, counsel for Olsen appeared before the Honorable Susan Cook, the trial judge, for the Olsen motion for summary judgment and Judge Cook granted Olsen's motion and entered an order dismissing all of Goodman's claims against Olsen with prejudice. (CP 49-52) The trial court also

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<sup>1</sup> Goodman initially took the position he did not have to respond to discovery issued by Olsen and pleaded his Fifth Amendment privilege in response to Olsen's request he identify what statements by Olsen he claimed were defamatory.

<sup>2</sup> This catchall appears to be referring to articles in local papers about the alleged assaults. None of these articles mention Olsen as the source of any information contained in the articles.

found Olsen had prevailed on the defense available to him pursuant to RCW 4.24.510 and therefore the order indicated he was entitled to statutory damages in the amount of \$10,000.00 and his expenses and reasonable attorney fees in an amount to be determined at a subsequent hearing. (CP 49-52) Goodman did not appear in court to argue the motion.<sup>3</sup>

Subsequent to entry of the order on summary judgment, Olsen filed a motion for reasonable attorney fees and costs pursuant to RCW 4.24.510. (CP 53-67) Goodman filed a response to Olsen's motion for attorney fees and costs and, for the first time, attempted to raise issues regarding the previously entered summary judgment order which found Olsen had prevailed on his defense to Goodman's claims pursuant to RCW 4.24.510. His response also objected to the entry of a judgment against him. (CP 29-47) Defendant Tyson Goodman joined in this motion even though he had no standing to contest the motion as the motion for entry of judgment was not directed against him. (CP 48) The issues Goodman raised in his response to Olsen's motion for entry of judgment were deemed untimely by the trial court as the trial court had already found, pursuant to Olsen's motion for summary judgment, that

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<sup>3</sup> Note: the order entered by the trial court granting Olsen's motion for summary judgment reflects "d.n.a." for the signature line for Goodman. "d.n.a." was interlined by Judge Cook and means "did not appear".

Olsen was entitled to an award of \$10,000 against Goodman and his reasonable attorney fees and costs in defending against Goodman's claims. Olsen filed a reply to Goodman's response and argued judicial orders may not be collaterally attacked in a subsequent proceeding to enforce the order. (CP 68-81). Finally, Olsen filed a declaration with attachments rebutting the claims of Goodman that the statements at issue were made in bad faith. The trial court agreed with Olsen and entered judgment in favor of Olsen and against Goodman on April 19, 2012 in the amount of \$15,500.00. (CP 82-84) Goodman subsequently filed this appeal.

#### **IV. SUMMARY OF THE ARGUMENT**

Goodman alleges three errors were committed by the trial court. The first error he alleges is that Olsen's summary judgment should not have been granted as there existed genuine issues of material fact regarding whether Olsen's communications were unprivileged. The second error he alleges was granting Olsen's summary judgment motion when there existed genuine issues of material fact as to whether Olsen reported false injuries. Finally, Goodman alleges the trial court erred by awarding Olsen \$10,000 pursuant to RCW 4.24.510 and attorney fees in the amount of \$5,500 as he claims the bad faith provisions of RCW 4.24.510 apply to the statements made by Olsen.

There is no merit to each of Goodman's claimed errors. Specifically, in response to the summary judgment motion, Goodman failed to provide the trial court with any admissible evidence establishing there was a genuine issue of material fact regarding whether the Olsen statements were not privileged. He failed to provide the trial court with any admissible evidence that Olsen reported false injuries. He additionally failed to provide the trial court with any argument, case law or analysis as to why statements made by Olsen during a court proceeding (declarations regarding service of process), to law enforcement officers (statements made to the Skagit County Sheriffs) and trial testimony by Olsen during the course of Goodman's assault trial, were not privileged thereby failing to preserve any of these issues for appellate review. Finally, Goodman failed to timely address whether the trial court should have found Olsen prevailed on his RCW 4.24.510 affirmative defense thereby resulting in entry of a judgment in the amount of \$15,500.00 against Goodman. Each of these failures are fatal to his appeal.

## **V. ARGUMENT**

### **A. GOODMAN FAILED TO PRESERVE ANY ISSUES FOR APPEAL.**

- 1. In order to preserve an issue for appellate review Goodman needed to raise those issues in the trial court.**

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). “Arguments or theories not presented in the trial court will generally not be considered on appeal.” *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). The purpose of RAP 2.5(a) is met “where the issue is advanced below and trial court has an opportunity to consider and rule on relevant authority.” *Washburn*, 120 Wn.2d at 291. Goodman did not preserve any of his allegations of error on the part of the trial court because he failed to make any of the arguments or provide any of the authority to the trial court he now wants this Court to review. Although he raised some of the issues he wishes this Court to review in response to Olsen’s motion for attorney fees, costs and entry of judgment this was too late as the order on granting summary judgment to Olsen had already been entered. Furthermore, he has not appealed the entry of the judgment against him. His failure to raise any of the arguments or provide any of the evidence he is now asking this Court to consider at the time of the summary judgment motion prevented the trial court from considering these arguments and evidence, thereby depriving the trial court of the opportunity to consider his arguments. As Goodman failed to preserve any of the errors he alleges the trial court committed, his appeal should be denied.

**B. GOODMAN FAILED TO APPEAL THE JUDGMENT IN FAVOR OF OLSEN ENTERED ON APRIL 19, 2012 AND THEREFORE ANY APPEAL OF THIS JUDGMENT HAS BEEN WAIVED.**

“A party seeking review of a trial court decision reviewable as a matter of right must file a notice of appeal.” RAP 5.1(a). The entry of a judgment is a trial court decision that is reviewable as a matter of right. RAP 2.2(a)(1). Goodman had thirty (30) days from the date of entry of the judgment to file his notice of appeal. RAP 5.2(a). Goodman failed to file a notice of appeal of the judgment entered on April 19, 2012 and therefore he has waived any objection to the judgment. When an appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP 18.8(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978). RAP 18.8(b) states:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

As Goodman failed to file a notice of appeal of the judgment entered by the trial court on April 19, 2012, the judgment entered in this case is not properly before this Court.

**C. STANDARD OF REVIEW ON SUMMARY JUDGMENT.**

- 1. A de novo standard of review applies to a trial court’s order granting summary judgment.**

A trial court's decision to grant summary judgment is reviewed de novo on appeal. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 45 P.3d 1068 (2002). When reviewing an order for summary judgment, this court engages in the same inquiry as the trial court. *Marthaller v. King Co. Hospital Dist. No. 2*, 94 Wn. App 911, 915, 973 P.2d 1098 (1999). This court should affirm summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Marthaller*, 94 Wn. App. at 915. This court considers all facts and reasonable inferences in a light most favorable to the nonmoving party, and it reviews all questions of law de novo. *Marthaller*, 94 Wn. App at 915.

When bringing a summary judgment motion the moving party bears the initial burden of showing there is an absence of a genuine issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party meets this initial burden of showing there is an absence of a genuine issue of material fact the inquiry then shifts to the non-moving party (in this case, Goodman) to come forward with sufficient evidence to establish the existence of the elements that are essential to the plaintiff's case and upon which the plaintiff will bear the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the plaintiff fails to come forward with evidence sufficient to establish the existence of the elements that are essential to his case, then summary judgment is proper and the trial court should grant the defendant's motion. *Id.* Most importantly, the nonmoving party cannot

rely on the allegations made in his pleadings. Instead, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. CR 56(e); *Id.* CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 225-26.

Summary judgment is properly granted when the nonmoving party fails to offer any evidence opposing the motion. *Turner v. Kohler*, 54 Wn. App. 688, 692, 775 P.2d 474 (1989). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. Issues of material fact cannot be raised by merely claiming contrary facts. (Citations omitted.) *Meyer v. University of Washington*, 105 Wash.2d 847, 852, 719 P.2d 98 (1986). The purpose behind this rule is to "examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147 (1977).

**D. JUDGE COOK CORRECTLY GRANTED OLSEN'S MOTION FOR SUMMARY JUDGMENT BASED ON THE RECORD BEFORE HER.**

Goodman filed a third-party complaint against Olsen alleging Olsen made “false statements and allegations against Chance Goodman causing defamation and mental anguish injuries”. (CP 16) He further alleged that as a result of these statements he suffered “injury and damages, that the amount of injury and damages he will suffer is \$1,000,000 million dollars”. (CP 16) Olsen alleged in his answer to Goodman’s amended third party complaint the protections afforded him pursuant to RCW 4.24.510 from the frivolous claims made by Goodman. (CP 58) Included in this statutory defense is a provision for damages in the amount of \$10,000 should the defendant prevail against the plaintiff’s claims, along with the defendant’s reasonable attorney fees and costs. RCW 4.24.510.

After a significant struggle by Olsen to learn specifically what statements Goodman alleges were defamatory, Goodman eventually answered the interrogatories propounded on him and identified the alleged defamatory statements he attributed to Olsen. (CP 87-88) Once these statements were disclosed it was abundantly clear each of the statements attributed to Olsen were either privileged or were never uttered so Olsen filed a summary judgment motion for dismissal relying, in part, on RCW 4.24.510. (CP 15-26, 85-133)

Goodman filed a “response” to Olsen’s motion for summary judgment. (CP 28) His response was simply that Olsen’s motion failed to “meet its burden” and he waived oral argument. He failed to file any declarations, he failed to produce any evidence to counter Olsen’s motion and declarations and he failed to cite the trial court to any case law or provide the trial court with any analysis as to why the evidence submitted by Olsen created a genuine issue of material fact and he failed to provide the trial court with any analysis why Olsen had failed to meet his burden of proof. On the day of the motion for summary judgment, he also failed to appear to argue the motion. (CP 52)

On March 28, 2012, the trial court signed the order granting summary judgment in favor of Olsen. (CP 52) On March 29, 2012, the order granting summary judgment was filed. (CP 49-52) The order not only granted summary judgment dismissal of Goodman’s complaint against Olsen but also provided Olsen had prevailed on his defense pursuant to RCW 4.24.510 and further provided he was therefore entitled to recover his expenses and reasonable attorney fees in an amount to be determined at a subsequent hearing. The order also provided as Olsen was the prevailing party he was entitled to statutory damages in the amount of \$10,000.00. (CP 51)

Once Olsen, as a defendant, showed there was an absence of an issue of material fact the inquiry then shifted to Goodman as he had the burden of proof on his claims at the time of trial. Olsen established the “statements” attributed to him were either privileged or were never uttered by him. When Goodman failed to “make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial”<sup>4</sup> the trial court had no choice but to grant Olsen’s motion for summary judgment. Presumably the issue before this Court is whether Olsen established there was an absence of an issue of material fact. Based on the record before this Court (and the trial court) Olsen clearly established there was an absence of an issue of material fact. As he did, the burden then shifted to Goodman to come forward with some admissible evidence at the time of the summary judgment hearing establishing there was a genuine issue of material fact precluding the trial court from granting Olsen summary judgment. As he failed to provide the trial court with any evidence whatsoever, the trial court was correct in granting Olsen summary judgment. Frankly, the review should end here. However, in the event this Court disagrees with Olsen’s assessment of the status of the review at this point, Olsen will analyze the evidence before

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<sup>4</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.3d.2d 265 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass’n.*, 809 F.2d 626, 630-32 (9<sup>th</sup> Cir. 1987).

the trial court (and this Court as a de novo reviewer) in the context of both common law immunity and statutory immunity.

**1. The elements of defamation.**

The elements of defamation are (1) falsity; (2) an unprivileged communication; (3) fault; and (4) damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 233, 580 P.2d 642 (1978); Restatement (Second) of Torts § 558 (1977). To defeat a summary judgment motion in a defamation claim, the plaintiff must demonstrate the existence of all four elements. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). To avoid summary judgment, the plaintiff must raise a material issue of fact for each element. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1018 (1981). An absolute privilege or immunity absolves a defendant of all liability for defamatory statements. *Bender v. City of Seattle*, 99 Wn.2d 582, 600, 664 P.2d 492 (1983) citing to *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 420 P.2d 698 (1966).

**2. Common law immunity.**

At common law a witness in a judicial proceeding was entitled to absolute immunity thereby negating the element of unprivileged communication. “The defense of absolute privilege generally applies to

statements made in the course of judicial proceedings and acts as a bar to any civil liability.” *Twelker v. Shannon & Wilson*, 88 Wn.2d 473, 475, 564 P.2d 1131 (1977). The absolute privilege of witness immunity is well stated by the Restatement (Second) of Torts § 588 (1977): “A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.” “As a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony.” *Bruce v. Byrne-Stevens & Assocs. Engineers, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). The purpose of witness immunity is to ensure frank and honest testimony before the trial court. *Bruce*, 113 Wn.2d at 126.

“The privilege of immunity is a judicially created privilege founded upon the belief that the administration of justice requires witnesses in legal proceedings be able to discuss their views without fear of a defamation lawsuit. *Twelker*, 88 Wn.2d at 476.” *Deatherage v. State*, 134 Wn.2d 131, 136, 948 P.2d 828 (1997). This rule is provided as an “encouragement to make a full disclosure of all pertinent information within their knowledge.” 2 Fowler V. Harper et al., *The Law of Torts* § 5.22, at 187 (2d ed. 1986). Clearly any testimony provided by Olsen in the criminal proceedings against Goodman was absolutely privileged. He

was a witness in a judicial proceeding and was entitled to absolute immunity regarding his testimony. The trial court was correct in finding any testimony by Olsen during Goodman's criminal trial could not be the basis for a defamation claim by Goodman.

Goodman also alleged statements made by Olsen to Prosecutor Anna Gigliotti defamed him. The court in *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 113 Wn.2d 123, 136, 776 P.2d 666 (1989) held that the privilege or immunity was not limited to statements under oath but also included statements made in connection with a judicial proceeding. The court quoted with approval from the holding of *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n.*, 68 N.J.Super. 85, 172 A.2d 22 (1961) "[t]he privilege or immunity is not limited to what a person may say under oath while on the witness stand. It extends to statements or communications in connection with a judicial proceeding . . . ." The court in *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980) held that "[a]llegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief." Once again the trial court was correct in finding any statements made by Olsen to Prosecutor Gigliotti were absolutely privileged and these

statements could not form the basis of a claim of defamation by Goodman.

Goodman also alleged the statements made by Olsen to Skagit County Sheriff's Deputy Esskew and Detective Kay Walker constitute actionable defamation. However, the Washington State Supreme court has held that “. . . liability will not be imposed when the defendant does nothing more than detail his version of the facts to a policeman and ask for his assistance, leaving it to the officer to determine what is the appropriate response, at least where his representation of the facts does not prevent the intelligent exercise of the officer's discretion.” *McCord v. Teilsch*, 14 Wn. App. 564, 566, 544 P.2d 56 (1975) citing to *Parker v. Murphy*, 47 Wash. 558, 92 P. 371 (1907).<sup>5</sup> Furthermore, statements Olsen made to sheriff deputies and/or detectives were absolutely privileged in the common law as they were made “preliminary to a proposed judicial proceeding . . .” Restatement (Second) of Torts § 588 (1977). Once again, the trial court was correct in finding statements made by Olsen to sheriff deputies and/or detective could not be the basis for any claimed defamation of Goodman on the part of Olsen.

### **3. Statutory immunity.**

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<sup>5</sup> Note: both of these cases were decided well before the legislature passed RCW 4.24.510. Clearly the common law protections have been further codified and strengthened by the passage of RCW 4.24.510.

Common law immunity was codified by the legislature in RCW

4.24.510. RCW 4.24.510 provides, in relevant part, that

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. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in established the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

Immunity applies under RCW 4.24.510 when a person (1) “communicates a complaint or information to any branch of federal, state, or local government, or to any self-regulatory organization, “that is (2) based on any matter “reasonably of concern to that agency.” *Bailey v. State of Washington*, 147 Wn. App. 251, 191 P.3d 1285 (2008). RCW 4.24.500, which outlines the legislative findings reached by the legislature in passing RCW 4.24.510, reads as follows:

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.

Essentially, when a citizen, such as Olsen, makes a complaint to a law enforcement agency, including a prosecuting attorney's office, he does so without fear of the very type of retaliatory lawsuit filed by Goodman. The reason for this is obvious. If every complaining witness were subject to potential civil liability and the incumbent costs associated with defending against such suits, many potential witnesses to criminal activity and/or actual victims of criminal activity would be hesitant to step forward and file complaints with law enforcement agencies.

The statements Olsen made to the Skagit County Sheriff's Office cannot form the basis of an action for defamation by Goodman based on the protections of RCW 4.24.510. The information provided to the Skagit County Sheriff's Office was of "[a] matter reasonably of concern to that agency or organization." This is particularly true in light of the legislature's statement of the purpose behind RCW 4.24.510. The legislature made it clear that individuals who make statements to law enforcement agencies, such as Olsen's statements to the Skagit County Sheriff's Office, were to be protected and since this type of information was so vital to effective law enforcement someone like Olsen is protected from retaliatory, baseless defamation actions as a matter of law. *See* RCW 4.24.500.

Likewise, any statements Olsen made to Prosecutor Gigliotti could not form the basis of a defamation claim. Any communications between Olsen and Prosecutor Gigliotti fell squarely within the purview of the anti-

SLAPP statute, RCW 4.24.510.<sup>6</sup> Prosecutor Gigliotti, as a prosecuting attorney for Whatcom County, was clearly a member of a branch of local government, the Whatcom County Prosecutor's Office, and allegations of assault by another citizen are reasonably of concern to that governmental agency. "The purpose of the statute [RCW 4.24.510] is to protect citizens who provide information to government agencies by providing a defense for retaliatory lawsuits." *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 167, 225 P.3d 339 (2010). Any statements made by Olsen to Prosecutor Gigliotti also could not form the basis for a defamation claim.

The only "statements" left to be analyzed by the trial court were the articles in the Skagit Valley Herald and the Anacortes American. Goodman provided the trial court with no evidence Olsen ever talked to anyone from either newspaper. There was no mention of or reference to Olsen in either article as being the source of the information published in the articles. (CP 131-133) Secondly, the articles specifically quoted from a magistrate's warrant filed in the criminal action against Goodman and/or an affidavit filed by the Skagit County Sheriff's Office, which are public documents and which were made in the course and scope of a judicial proceeding. (CP 131-133) Third, Olsen was never mentioned by name in any of the articles. (CP 131-133) Fourth, Olsen denied ever speaking with either reporter. (CP 128-130) Goodman had no evidence to support

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<sup>6</sup> Goodman failed to identify what statements he alleged Olsen made to Prosecutor Gigliotti that he believed were defamatory. Regardless, Olsen's position was *any* statement he made to Prosecutor Gigliotti was absolutely privileged under the purview of RCW 4.24.510.

a defamation action based upon any information published by either the Anacortes American or the Skagit Valley Herald and the trial court was correct in granting summary judgment to Olsen in regards to these “statements” as well.

**E. THE TRIAL COURT DID NOT ERR WHEN IT AWARDED OLSEN \$10,000.00 IN STATUTORY DAMAGES AND \$5,500.00 FOR HIS REASONABLE ATTORNEY FEES AND COSTS.**

Olsen prevailed on summary judgment and prevailed on his RCW 4.24.510 defense. Furthermore, the trial court, in its order granting Olsen summary judgment, ordered Goodman to pay statutory damages in the amount of \$10,000.00. RCW 4.24.510 provides, in part

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

(emphasis added).

The trial court also awarded Olsen \$5,500.00 for his reasonable attorney fees and costs. As he prevailed on his affirmative defense raised pursuant to RCW 4.24.510, he is entitled to the judgment entered by the trial court in the amount of \$15,500.00. *See Bailey v. State of Washington*, 147 Wn. App. 251, 264, 191 P.3d 1285 (2008) (petitioner entitled to an award of expenses, attorney fees and statutory damages as she prevailed

on the defense established in RCW 4.24.510); *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 85 P.3d 926 (2004) (the trial court did not err in awarding attorney fees under RCW 4.24.510); *Right-Price Rec. v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 46 P.3d 789 (2002) (remanded back to trial court for calculation of reasonable attorney fees under former RCW 4.24.510).

Goodman argues statutory damages under RCW 4.24.510 are only available to reports made to government bodies in good faith. However, he provided the trial court with no admissible evidence of bad faith on the part of Olsen when he made his reports to the authorities of the assault perpetrated by Goodman. In addition, in order to establish bad faith in the context of RCW 4.24.510, the burden is on Goodman to establish by clear and convincing evidence that Olsen did not act in good faith. *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697 (1994). The *Gilman* court went on to require that the “defamed party must show, by clear and convincing evidence, that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.” *Gilman*, 74 Wn. App. at 738-39. Although the *Gilman* case was decided when good faith was an element of communication of the complaint or information to the governmental agency, the court’s analysis is applicable to the bad faith requirement for refusing statutory damages and reasonable

attorney fees and costs.<sup>7</sup> The record before the trial court and before this Court does not contain clear and convincing evidence that Olsen acted with knowledge of the falsity of his statements or with reckless disregard as to their falsity. In fact, the record contains evidence the statements he made were more than likely true. The trial court did not err in entering judgment in favor of Olsen in the amount of \$15,500.00.

**F. OLSEN IS ENTITLED TO ATTORNEY FEES AS THE PREVAILING PARTY ON THIS APPEAL.**

Olsen requests this Court award him his fees and costs incurred in responding to the appeal of Goodman. This request is made pursuant to RAP 18.1(a) and RCW 4.24.510. Assuming this Court affirms the trial court's order on summary judgment in this matter, Olsen is entitled not only to the reasonable attorney fees the trial court ordered for prevailing on his RCW 4.24.510 defense at the trial court level but he is also entitled to his reasonable attorney fees for having to respond to Goodman's appeal. RCW 4.24.510; *Gilman v. MacDonald*, 74 Wn. App. 733, 740, 875 P.2d 697 (1984); *Bailey v. State of Washington*, 147 Wn. App. 251, 264, 191 P.3d 1285 (2008).

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<sup>7</sup> When *Gilman* was decided RCW 4.24.510 provided, in pertinent part, that the person who was communicating the complaint or information to a governmental agency must do so in good faith. Good faith is no longer required for RCW 4.24.510 but bad faith can be used to defeat a claim for statutory damages and/or reasonable attorney fees and costs. The analysis is the same and the Court's logic in *Gilman* in requiring evidence of knowledge of falsity or reckless disregard of whether the statement is false is still applicable.

**VI. CONCLUSION**

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 26 day of November, 2012.



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THOMAS L. SCHWANZ, WSBA #13842  
Attorney for Respondent Olsen



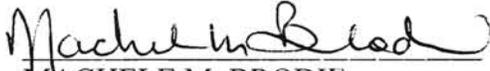
I, Machele Brodie, under penalty of perjury under the laws of the State of Washington, declare the following statement is true:

I am over the age of 18, competent to testify, not a party to this action, and employed by the firm of Wieck Schwanz, PLLC.

On the date November 23, 2012, I served Respondent Olsen's Brief of Respondent, in the manner noted, on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Chance Goodman PO Box 1801 Anacortes, WA 98221	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail

SIGNED at Bellevue, Washington, this 4<sup>th</sup> day of December, 2012.

  
MACHELE M. BRODIE

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