

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 40588-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WILLIAM D. WEBSTER,

Appellant,

v.

SOMDET WEBSTER, SUE KUMLUE, and SAMUEL FLOWER,

Respondents.

BRIEF OF RESPONDENT SUE KUMLUE

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I. INTRODUCTION

This case arises from the abusive litigation tactics of a party unchecked by legal counsel or the civil rules. In the action below, Appellant William D. Webster (“Webster”) sought hundreds of thousands of dollars in civil damages from Respondent Sue Kumlue dba Original Thai Taste (“Ms. Kumlue”)¹ based solely on allegations that Webster’s ex-wife filled out restraining order paperwork at Ms. Kumlue’s restaurant and that a few telephone calls were made from the restaurant to 911 and the Webster residence.² Pierce County Superior Court Judge Frank Cuthbertson properly granted Ms. Kumlue’s motion for judgment on the pleadings, because the limited allegations in Webster’s Complaint are insufficient to state any cause of action against her.

Seeking to reverse this ruling, Webster contends that Ms. Kumlue, Ms. Webster, and Mr. Flower, in conjunction with their counsel and the trial court judge, have conspired to violate his civil rights. There is no basis for these outrageous accusations. To the contrary, it is Webster who filed a frivolous lawsuit (and initiated this meritless appeal) against Ms. Kumlue, a widowed Thai immigrant with limited English skills, who is guilty of nothing more than befriending Webster’s former spouse. Webster has repeatedly relied on his *pro se* status to insulate him from the

¹ The Complaint erroneously identifies Ms. Kumlue as “Sue Kumlee.”

² Webster also named his ex-wife, Respondent Somdet Webster (“Ms. Webster”), and her friend, Samuel Flower (“Mr. Flower”) in the suit.

consequences of his efforts to intimidate, bully, and abusively litigate against his former spouse and anyone who dares to assist her.

Ms. Kumlue requests that this Court affirm the trial court's rulings and grant her fees on appeal.

II. JOINDER IN BRIEF OF RESPONDENT WEBSTER

In order to avoid unnecessary and duplicative briefing before the Court, Ms. Kumlue's Brief addresses only Assignments of Error Nos. 4, 8, and 11-13. Ms. Kumlue hereby joins in Respondent Somdet Webster's Brief regarding Assignments of Error Nos. 1-3, 5, 6, 7, 9, and 10, and incorporates by reference the authority and argument set forth in Ms. Webster's Brief as if fully set forth herein.

III. COUNTERSTATEMENT OF ISSUES

1. Did the trial court properly dismiss Webster's claims of premeditated abuse of process, infliction of emotional/economic distress, false light, conspiracy, and malicious intent for failure to state a claim against Ms. Kumlue, where Webster's allegations were merely that Ms. Kumlue had employed Somdet Webster, that Ms. Webster filled out court paperwork while at Ms. Kumlue's restaurant, that Ms. Kumlue allowed Ms. Webster to use the restaurant's phone, and that Ms. Kumlue made a telephone call to Webster's residence? (Assignment of Error No. 4).

2. Did the trial court properly exercise its discretion in striking Webster's response brief and attached papers, when the response was untimely as to Ms. Webster and Mr. Flower's pending motions and irrelevant as to Ms. Kumlue's motion for judgment on the pleadings? (Assignment of Error No. 13).

3. Was the alleged time limit placed on Webster's oral argument proper where Webster failed to object to the time limit before the trial court, where the time allotted exceeded the time used by all other parties combined, and where Webster failed to direct his argument to the merits of his claim? (Assignment of Error No. 8).

4. Did the trial court properly exercise its discretion in denying a continuance to allow for the transcription of 911 tapes when Webster (1) represented in his Complaint that the tapes already were transcribed; (2) did not provide good cause for his delay in transcribing the tapes; (3) did not indicate what admissible evidence the tape transcripts would provide, and (4) where the tape transcripts would not raise a genuine issue of material fact regarding any of Webster's claims? (Assignment of Error No. 12).

IV. STATEMENT OF THE CASE

A. Webster's Complaint Alleged Numerous Claims Against Ms. Kumlue, Ms. Webster, and Mr. Flower.

On September 24, 2009, Webster filed a Complaint for Abuse of Process, Conspiracy to Abuse Process, Intentional and Malicious Infliction of Emotional and Economic Distress, Conspiracy to Inflict Emotional and Economic Distress, Outrage, False Light, Defamation of Character, Loss of Consortium, Violation of Civil Rights, and Conspiracy to Violate Civil Rights. Clerk's Papers ("CP") 1-15. Webster named as Defendants his former wife, Ms. Webster; her friend, Mr. Flower; and Ms. Webster's former employer, Ms. Kumlue. CP 1.

Webster's factual allegations against Ms. Kumlue were limited to the following:

1. Ms. Kumlue owns and operates the Original Thai Taste Restaurant in Port Orchard, Washington. CP 12, ¶ 29.
2. Ms. Kumlue employed Ms. Webster at Original Thai Taste during parts of 2006 and 2007. CP 12-13, ¶ 29 [misabeled as second ¶ 29].
3. Ms. Kumlue allowed Ms. Webster and Mr. Flower to use Original Thai Taste as a "headquarters" for filling out "seditious" restraining order paperwork against Webster. CP 13-15, ¶¶ 31, 34.
4. Ms. Kumlue allowed Original Thai Taste to be used as a "headquarters" for Webster's false arrest, as Ms. Webster and Mr. Flower made phone calls from Original Thai Taste that lead to Webster's arrest for

violating the terms of a temporary restraining order.
CP 13, ¶¶ 31, 32.

5. Ms. Kumlue called the Webster residence while Webster was there sleeping with the alleged intent of luring him outside of his house. CP 13, ¶ 32.

The Complaint alleged no other facts about Ms. Kumlue. *See* CP 12-15.

Webster sought damages against Ms. Kumlue, Ms. Webster, and

Mr. Flower in the amount of \$250,000. CP 15.

B. The Trial Court Dismissed Webster’s Claims After a Fair Hearing.

While motions for summary judgment from the other two defendants were pending,³ Ms. Kumlue filed a motion for judgment on the pleadings, noting the motion for hearing at the same time as the other pending motions.⁴ CP 128-139. In response to the three motions, Webster filed a Motion, Declaration, Order to Dismiss Defendant’s Motion for Summary Judgment (“Webster Response”) on February 12, 2010, to which he attached phone records for Ms. Webster, a transcript of Ms. Webster’s testimony from a prior proceeding, and a declaration from

³ Ms. Webster filed a motion for summary judgment on January 19, 2010 and Mr. Flower filed a motion for summary judgment on January 20, 2010. CP 94-109, 113-27. Both motions were noted for consideration on February 19, 2010. CP 110-11, 114.

⁴ Ms. Kumlue’s motion for judgment on the pleadings was filed on February 2, 2010, and noted for oral argument on February 19, 2010. CP 128-139.

Webster's brother. CP 140-59. Webster served the Response by U.S. Mail. *Id.* While his response was timely as to Ms. Kumlue's motion, the Webster Response was not timely filed and served under CR 56.

As relevant on appeal, the Webster Response contained the following allegations about Ms. Kumlue: (1) that "Sue Kumlee owns a restaurant with employees" (CP 140), and (2) Somdet Webster and Samuel Flower, using Ms. Kumlue's restaurant "as a base," applied for a temporary restraining order against William S. Webster (CP 141, 144, and 152).⁵

At the February 19, 2010 hearing, Ms. Webster moved to strike the documents filed by Webster as untimely and inadmissible. Verbatim Report of Proceedings ("VRP") at 6:9-17, 10:9-14. The trial court granted the motion. VRP at 12:10-11.

Despite striking the Webster Response, the Court allowed Webster to present oral argument in opposition to the motions. VRP at 21-32. Rather than respond to defendants' arguments, Webster indicated that he wished to read a prepared statement. VRP at 21:20-22. The Court

⁵ The two other statements regarding Ms. Kumlue in the Webster Response relate to the phone call she allegedly placed to Webster to "lure" him out of the house. *See* CP 141, 148. These statements relate to Webster's false arrest claim, the dismissal of which was not appealed. *See* Appellant's Br. at 3; *see also* RCW 4.16.100(1) (two-year statute of limitations applicable to false arrest).

allowed Webster to read the statement, but stated that Webster would have seven minutes to do so. VRP at 21:23-24. Webster began his remarks with ad hominem attacks on the “ultra-feminist, homosexual, pseudo-law firm” and “homosexual attorneys” representing the defendants. VRP at 22:1-4.

Following oral argument, the trial court granted Ms. Kumlue’s motion for judgment on the pleadings, CP 200-02; Ms. Webster’s motion for summary judgment, CP 250-53; Mr. Flower’s motion for summary judgment, CP 198-99; and dismissed all of Webster’s claims with prejudice. After subsequent motion practice and oral argument, the trial court granted Ms. Kumlue \$23,811.00 in attorney fees for defending the lawsuit. CP 346.

Webster filed a Notice of Appeal and has assigned error to various decisions of the trial court including: (1) the dismissal of his claims against Ms. Kumlue (Assignment of Error No. 4); (2) the alleged imposition of a time limit on his oral argument (Assignment of Error No. 8); (3) the trial court’s decision to allegedly hold Webster to the same standards as a licensed attorney (Assignment of Error No. 11); (4) the denial of Webster’s request for a continuance for the purpose of transcribing 911 tapes (Assignment of Error No. 12); and (5) the decision

to strike the Webster Response and attached evidence (Assignment of Error No. 13). CP 292-329; Brief of Appellant (“Appellant’s Br.”) at 3-5.

V. ARGUMENT

A. **The Trial Court Properly Dismissed the Claims Against Ms. Kumlue.**

A trial court’s ruling granting a motion for judgment on the pleadings is subject to *de novo* review. *See N. Coast Enters., Inc. v. Factoria P’ship*, 94 Wn. App. 855, 858, 974 P.2d 1257 (1999). Like the trial court, the appellate court examines the pleadings to determine whether the plaintiff could prove any set of facts, consistent with the complaint, which would entitle him to relief. *See City of Moses Lake v. Grant Cnty.*, 39 Wn. App. 256, 258, 693 P.2d 140 (1984). While a motion for judgment on the pleadings admits facts well pleaded, “[i]t does not admit mere conclusions nor the pleader’s interpretation of statutes involved nor his construction of the subject matter.” *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965) (internal citation and quotation marks omitted). Here, the trial court dismissed the claims against Ms. Kumlue after correctly determining that Webster’s “allegations against [Ms.] Kumlue fail[ed] to state any cause of action,” were “without basis in law or fact,” and were “frivolous and advanced without reasonable cause.” CP 201. This ruling should be affirmed.

Below, Webster purported to bring three claims against Ms. Kumlue. *See* CP 12-15. He failed to appeal the dismissal of his false arrest claim, leaving two causes of action (conspiracy and intentional infliction of emotional distress) as the subject of this appeal.⁶ *See* Appellant's Br. at 3. In his brief, Webster fails to identify any set of facts that would entitle him to relief against Ms. Kumlue on these claims. *See id.* at 11-13. Moreover, the record overwhelmingly supports the dismissal of the claims against Ms. Kumlue. The allegations in Webster's Complaint regarding Ms. Kumlue were limited to allegations that she operates a restaurant, that she periodically employed Ms. Webster, that she allowed Ms. Webster and Mr. Flower to meet at and make phone calls from that restaurant, and that she called Webster once at home. *See*

⁶ While Webster's Complaint also purported to state claims for Abuse of Process, False Light, Defamation of Character, Loss of Consortium, Violation of Civil Rights, and Conspiracy to Violate Civil Rights against Ms. Webster and Mr. Flower, it did not allege those claims against Ms. Kumlue. *See* CP 1-15. The Complaint also included a claim for false arrest, but Webster did not appeal the dismissal of that claim, which was barred by a two-year statute of limitations. *See* RCW 4.16.100(1) (two-year statute of limitations for false imprisonment); *Heckart v. City of Yakima*, 42 Wn. App. 38, 39, 708 P.2d 407 (1985) (RCW 4.16.100(1) applies to claims for false arrest). Finally, while the Brief of Appellant references a claim for Malicious Prosecution/Intent, no such claim was alleged below, nor has Webster identified any basis for such a claim against Ms. Kumlue. *See* CP 1-15.

CP 12-15. As a matter of law, these facts do not state a cause of action for conspiracy or intentional infliction of emotional distress.

1. The trial court properly dismissed the conspiracy claim.

Webster failed to properly state a claim for conspiracy against Ms. Kumlue because he failed to allege facts supporting an explicit agreement, or an unlawful purpose or means. “To establish a claim for civil conspiracy, [a plaintiff] ‘must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy.’” *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (quoting *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000)).

Webster’s conclusory allegations and repeated references to Ms. Kumlue as a “conspirator” do not state a claim. *See Layne v. Hyde*, 54 Wn. App. 125, 134, 773 P.2d 83 (1989) (“General conclusory allegations are not sufficient to establish the existence of a conspiracy.”) (citation omitted). Instead, he was required to allege an explicit agreement to engage in a conspiracy. *See, e.g., Allard v. Bd. of Regents of the Univ. of Wash.*, 25 Wn. App. 243, 248, 606 P.2d 280 (1980). In the Complaint, Webster failed to allege that Ms. Kumlue agreed with the other defendants (or anyone else) to do anything. *See* CP 12-15.

Additionally, Webster failed to allege that Ms. Kumlue had an unlawful purpose or used unlawful means. Webster's conspiracy allegations all related to Ms. Webster's attempts to obtain and enforce a restraining order, which is not an "unlawful purpose." *See* CP 13-15. Nor did Webster allege that Ms. Kumlue participated in using any "unlawful means" to obtain the restraining order. *See id.* Instead, Webster alleged only that Ms. Kumlue operated a Thai restaurant that Ms. Webster and Mr. Flower used as a "headquarters" to fill out paperwork for the restraining order. CP 13. Such allegations do not establish that Ms. Kumlue participated in using "unlawful means." The conspiracy claim was properly dismissed.

2. The trial court properly dismissed the intentional infliction of emotional distress claim.

The trial court also properly dismissed Webster's claim against Ms. Kumlue for intentional infliction of emotional distress.⁷ Under Washington law, a claim for intentional infliction of emotional distress or outrage requires proof of three elements: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). "The conduct in question must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

⁷ Webster also appeals the dismissal of his claim for intentional infliction of economic distress, but no Washington court has recognized such a cause of action.

atrocious, and utterly intolerable in a civilized community.’” *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (citations omitted). “[M]ere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability on a claim of outrage.” *Id.* (citations omitted.).

The Complaint failed to include any allegations about Ms. Kumlue that rise to the level of “extreme and outrageous conduct,” or that she intentionally or recklessly inflicted emotional distress on Webster. The fact that Ms. Kumlue operates the Original Thai Taste restaurant in Port Orchard, Washington, or that she employed Ms. Webster in 2006 and 2007, does not suggest extreme or outrageous conduct. *See* CP 12-13. Even if Ms. Kumlue did allow Ms. Webster and Mr. Flower to use her restaurant as a “headquarters” for filling out court paperwork or making phone calls to the authorities, her behavior fails to support a claim for intentional infliction of emotional distress as a matter of law. *Dicomes*, 113 Wn.2d at 630 (an employee’s discharge could not support a claim for intentional infliction of emotional distress because it was not “outrageous” conduct).

The Complaint failed to state a claim for intentional infliction of emotional distress against Ms. Kumlue, and the trial court properly dismissed it.

B. The Trial Court's Remaining Rulings Were Appropriate Exercises of Discretion and Any Error Was Harmless.

The three other trial court rulings about which Webster complains—the striking of his untimely filing, time limitations on oral argument, and the denial of his request for a continuance—are reviewed for abuse of discretion. *King Cnty. Fire Prot. Dist. No. 16 v. Hous. Auth. Of King Cnty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (decision on a motion to strike an untimely response reviewed for abuse of discretion); *State v. Bandura*, 85 Wn. App. 87, 92-93, 931 P.2d 174 (1997) (decisions regarding oral argument are reviewed for abuse of discretion); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007) (“A trial court’s grant or denial of a motion for continuance is reviewed for abuse of discretion.”).

The abuse of discretion standard is highly deferential and gives trial courts “wide latitude.” *State v. Harris*, 97 Wn. App. 865, 870, 989 P.2d 553 (1999). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A “discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies

the wrong legal standard.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A discretionary decision is only “manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” *Id.* (internal quotation marks and citations omitted).

Further, even if this Court determines that the trial court erred in exercising its discretion, any such error is subject to harmless error analysis. *See State v. Frost*, 160 Wn.2d 765, 779, 161 P.3d 361 (2007) (decision limiting oral argument subject to harmless error analysis); *Cowell v. Good Samaritan Cmty. Health Care*, 153 Wn. App. 911, 941-42, 225 P.3d 294 (2009) (claim that court erred by striking evidence subject to harmless error analysis); *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (denial of a motion for continuance will be reversed only on a showing of prejudice by the denial or that the result likely would have been different had the continuance not been denied).

An error is harmless if it is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Error is not prejudicial unless, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d

591, 599, 637 P.2d 961 (1981). All of the rulings below were appropriate, and they should be affirmed.

1. The Trial Court Properly Struck Webster’s Untimely Response.

Webster complains that, in striking his untimely response papers, the Court unfairly held him to the procedural requirements of the court rules.⁸ To the contrary, “pro se litigants are bound by the same rules of procedure and substantive law as attorneys.” *Westberg v. All-Purpose Structures*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997); *see also In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983) (“[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.”). Moreover, “[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and

⁸ Although Webster asserts a separate assignment of error, that the trial court erred in holding him to the standards of a licensed attorney generally (Assignment of Error No. 11), there is no independent significance to this argument. Under Washington law, *pro se* litigants are held to the same legal and procedural requirements as attorneys. *See Westberg v. All-Purpose Structures*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). As such, Ms. Kumlue addresses Webster’s argument only insofar as he asserts that the trial court erred in not considering his *pro se* status in striking his untimely response, imposing time limits for oral argument, and denying his request for a continuance. In all of these instances, the trial court acted within its discretion.

substantive law.” *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (considering the right to self-representation in criminal cases).⁹

Furthermore, a trial court has “considerable latitude” in managing its court schedule to insure the orderly and expeditious disposition of cases, including the latitude to strike untimely responses. *Idahosa v. King County*, 113 Wn. App. 930, 936, 55 P.3d 657 (2002) (holding that the trial court did not abuse its discretion in refusing to accept and striking an untimely summary judgment response); *see also Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995); *Wagner v.*

⁹ To the extent that Webster suggests that the trial court did not take Webster’s *pro se* status into consideration at all, this assertion is belied by the record. For example, the trial court declined to sanction Webster for some of his statements, even though the court noted that it would sanction an attorney who made the same remarks:

THE COURT: One other thing, we don’t make rulings – and I let this go, but it is really, unless you can support it and even if you can support it, it’s improper, to make allegations about, you know, members of the court’s sexual preferences or alleged sexual preferences or whether this is lesbian-gay conspiracy, that from what I have heard today has no merit. It’s inappropriate and has no place in court and that would be, you know, were you not *pro se*, I would certainly impose sanctions based on that conduct. I just wanted to be clear about that.

VRP at 38:1-11. Thus, the trial court did make allowances for Webster’s *pro se* status.

McDonald, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973); RCW 2.28.010.

The trial court's ruling striking Webster's response was well within the court's discretion and should be affirmed.

a. The Webster Response was irrelevant to the claims against Ms. Kumlue.

With regard to the other defendants, the Webster Response was untimely.¹⁰ While timely as to Ms. Kumlue, the Webster Response did not raise any issues of fact or law relevant to her motion for judgment on the pleadings. The Response contained the following limited statements relating to Ms. Kumlue: (1) that "Sue' Kumlee owns a restaurant with employees," CP 140, and (2) that Somdet Webster and Samuel Flower, with Ms. Kumlue and using Ms. Kumlue's restaurant "as a base," formulated a temporary restraining order against William S. Webster, CP 141, 144, and 152. The statements duplicated those in Webster's Complaint. *See* CP 1-15.

Thus, the Webster Response did not raise any new matter outside of the pleadings relevant to Ms. Kumlue's motion. *See* CR 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . ."). Because the alleged additional facts

¹⁰ *See* Brief of Respondent Somdet Webster.

provided in the Webster Response were irrelevant to the claims against Ms. Kumlue, they were not sufficient to convert her motion into one for summary judgment. Thus, the trial court did not err in declining to consider the Webster Response in relation to Ms. Kumlue's motion for judgment on the pleadings.

b. Any error in striking the Webster Response was harmless.

Even if this Court finds that the trial court abused its discretion in striking the Webster Response and attached papers, any error was harmless. Despite the fact that the trial court struck the Webster Response, the trial court admitted it had read and considered that response. *See* VRP at 24:1-4. Further, the Webster Response contained no admissible evidence that would materially have affected the trial court's decision regarding Ms. Kumlue's motion for judgment on the pleadings, *see* CP 141, 144, and 152, or Ms. Webster's or Mr. Flower's motions for summary judgment, *see generally* CP 140-85. Thus, the outcome of the case would not have been materially different, and any such error was harmless.

2. The Trial Court Properly Limited Webster's Oral Argument.

a. Webster failed to preserve the issue of oral argument time limits before the trial court.

On appeal, Webster objects for the first time to the trial court's imposition of a seven-minute time limit on his oral argument. Appellant's Br. at 4. Webster, however, did not object to the trial court's imposition of time limits for oral argument during the proceedings below. VRP at 21:23-25. At oral argument, Webster indicated that he wanted to read a prepared statement. VRP at 21:20-22. The court then stated it would limit his argument to seven minutes. In response, Webster did not object, but instead responded, "I'll be quick, Your Honor." VRP at 21:25. Thus, the Court need not review Webster's assigned error, which is raised for the first time on appeal. *See* RAP 2.5(a).

Moreover, Webster's asserted error meets none of the three exceptions enumerated in RAP 2.5. RAP 2.5 provides that the appellate court may review errors for: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; and (3) manifest error affecting a constitutional right, regardless of whether a party objected below. RAP 2.5(a). Contrary to Webster's assertion that his First and Fourteenth Amendment rights were violated, "oral argument is not a due process right." *Hanson v. Shim*, 87 Wn. App. 538, 551, 943 P.2d 322

(1997). Due process “requires only ‘that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.’” *Id.* (quoting *Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 728, 649 P.2d 181 (1982)). The trial court provided Webster with adequate opportunity to present his position. *See* VRP at 22-38. Consequently, this Court should not review Webster’s asserted error, which does not affect any constitutional right and is raised for the first time on appeal.

b. The trial court acted within its discretion by limiting Webster’s oral argument.

Should this Court choose to review Webster’s asserted error, this Court should hold that the trial court set appropriate limits on oral argument. As a threshold matter, oral argument is a matter of trial court discretion, so long as the moving party is given the opportunity to present his or her version of the facts and law. *See Bandura*, 85 Wn. App. at 92-93; *see also* Pierce County Local Rule (“PCLR”) 7(8)(b) (trial court has discretion to “waive oral argument for civil motions”). During the proceedings below, Webster had ample opportunity to present both written¹¹ and oral argument to the trial court.

¹¹ Although the trial court struck Webster’s written response as untimely, the record indicates that the trial court read and considered Webster’s written response. *See* VRP at 24:1-4.

Moreover, a limitation of seven minutes for one party's argument is not unreasonable or an abuse of discretion. Such argument times are contemplated by the court rules in Pierce County. *See* PCLR 7(8)(b) (containing presumption that motion arguments may be less than 10 minutes, and requiring motions "requiring more than ten (10) minutes [to] be placed at the end of the calendar"). Here, the record demonstrates that Webster used more time for oral argument than all three Defendants combined. *Compare* VRP at 12-16 (oral argument by counsel for Somdet Webster); VRP at 17-19 (oral argument by counsel for Mr. Flower); VRP at 19-21 (oral argument by counsel for Ms. Kumlue) *with* VRP at 21-32 (oral argument by Webster).

The limitations the trial court set on Webster's argument time were further justified by the content and tone of his remarks. A trial court is empowered by statute "[t]o enforce order in the proceedings before it" and "[t]o provide for the orderly conduct of proceedings before it or its officers." RCW 2.28.010(1)-(3). As a result, every Washington court has the inherent power to "control the conduct of litigants who impede the orderly conduct of proceedings." *Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849 (2008).

The record reflects that, as in his written Response, Webster intended to use his argument time to attack the character, political beliefs,

and sexual orientation of opposing counsel, rather than to address the substance of his legal claims:

WEBSTER: I'll be quick, Your Honor. Legal Voice, an ultra-feminist, homosexual, pseudo-law firm is piling whitewash on this case. Look at the pile of whitewash they've filed with the Court to muddle this case. Defendants and homosexual attorneys -- ... Defendants and homosexual attorneys say I am a vexatious litigator. I've only been trying to defend myself against injustice done to me. ... The law firms brought against me have upwards of 2,000 attorneys. When they sue people, it's good business. When I sue people, it's vexatious. Is there a double standard because I'm not a member of the Washington State Bar Association? These law firms makes [sic] millions of dollars in lawsuits.

VRP at 21:25 – 22:16. The trial court's limits on the duration of Webster's argument were not an abuse of his discretion.

c. Any error resulting from the time limit was harmless.

Even if this Court finds that the trial court abused its discretion in limiting Webster's time for oral argument, any such error was harmless. Webster cannot seriously contend that granting him more time to read his prepared statement and present argument on issues unrelated to the merits of his claims would have resulted in a materially different outcome. Moreover, oral argument was irrelevant for the purposes of Ms. Kumlue's motion for judgment on the pleadings, because the trial court considered Webster's pleadings and found that there was nothing in the factual allegations to support any actionable claim. VRP at 32:20 - 33:2. Thus,

additional time for oral argument would not have resulted in a materially different outcome.

3. The Trial Court Properly Denied Webster's Request for a Continuance.

a. The trial court acted within its discretion by declining to grant a continuance.

The trial court acted within its discretion by declining to grant Webster a continuance for the purpose of transcribing 911 tapes.¹² A trial court may, in its discretion, deny a motion for a continuance when:

(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of material fact.

Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003). Webster's request for a continuance failed to satisfy any of these three prongs.¹³ He

¹² While Webster now characterizes his request for a continuance as related solely to these transcripts, his request to the trial court was not so specific:

WEBSTER: Your Honor, if I have to – I didn't realize that I had to submit evidence at this time. If so, if they want me to submit evidence, I ask for a continuance to submit the evidence. I didn't realize I didn't have to submit evidence until the time of trial.

VRP at 30:3-7.

¹³ Regardless of whether Webster's request for a continuance is characterized as a CR 56(f) continuance, the denial of the request is

did not make a sufficient showing to justify delaying the rulings on the defendants' dispositive motions.

Webster did not proffer a good reason to the trial court for his delay in obtaining this evidence; to the contrary, Webster's Complaint alleges that the 911 tapes/transcriptions *already* were in his possession. *See* CP 9, ¶ 22; CP 10, ¶¶ 23, 24; CP 11, ¶ 25. At hearing, Webster failed to offer a justification for his delay in transcribing the calls. VRP at 29:11-13; VRP at 30:4-7. While Webster initially stated that he did not realize that he was required to submit any evidence until the time of trial, VRP at 30:6-7; now, on appeal, he claims that it was too "expensive" to have the tapes transcribed, Appellant's Br. at 27. Neither constitutes a sufficient justification, as Webster indisputably had access to the 911 tapes and inevitably would have had to pay to transcribe them. *See Janda v. Brier Realty*, 97 Wn. App. 45, 54-55, 984 P.2d 412 (1999) (finding there was no abuse of discretion in denying a motion for a continuance because movant "offered no good reason for the delay in obtaining evidence" that was supposedly "central" to movant's damages argument).

Further, Webster did not identify what admissible evidence would be established by transcription of the 911 tapes. Because the 911 tapes

reviewed for an abuse of discretion. *See Janda v. Brier Realty*, 97 Wn. App. 45, 54, 984 P.2d 412 (1999).

relate only to phone calls placed by Mr. Flower and Ms. Webster, VRP at 28:4-9, they have no bearing whatsoever on Ms. Kumlue's motion.

Additionally, because the anti-SLAPP statute, RCW 4.24.510, protects communications made to government agencies and organizations, the transcripts were inadmissible.

Finally, Webster failed to demonstrate how the 911 tape transcripts would raise any issue of material fact. The transcripts would have had no bearing on Ms. Kumlue's motion for judgment on the pleadings, because Webster failed to make any factual allegations sufficient to support an actionable claim.

b. Any error in denying the continuance was harmless.

Even if this Court finds that the trial court abused its discretion in denying Webster a continuance to have the 911 tapes transcribed, any error was harmless. As set forth above, the 911 tapes were irrelevant to the claims against Ms. Kumlue and could not have changed the outcome of her motion. Similarly, because any statements Ms. Webster or Mr. Flower made in the 911 calls would be inadmissible under the Anti-SLAPP statute, transcription of the 911 tapes could not have affected the outcome of the proceedings.

VI. REQUEST FOR ATTORNEY FEES

In the action below, the trial court found that Webster's claims against Ms. Kumlue were alleged without basis in law or fact, were advanced without reasonable cause, and were frivolous. CP 343-347. On this basis, the court granted Ms. Kumlue an award of attorney fees, a ruling Webster has not challenged before this Court.

This appeal also was prosecuted without basis in law or fact, and Ms. Kumlue requests an award of all reasonable attorney fees and expenses incurred in this appeal. *See* RAP 18.9 (authorizing the appellate court to award compensatory damages when a party files a frivolous appeal); *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999) (compensatory damages may include an award of attorney fees and costs to the opposing party); *Yurtis*, 143 Wn. App. at 696 ("An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that is so devoid of merit that there is no possibility of reversal.").

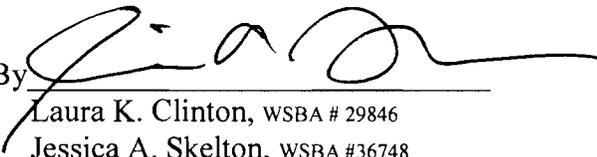
VII. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Respondent Somdet Webster, Ms. Kumlue respectfully requests that the

Court affirm the rulings below and award her fees for the defense of this appeal.

RESPECTFULLY SUBMITTED this 22nd day of October, 2010.

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STATE OF WASHINGTON
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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

WILLIAM D. WEBSTER,

Appellant,

v.

SOMDET WEBSTER, SUE
KUMLUE, and SAMUEL
FLOWER,

Respondents.

No. 40588-1-II

PROOF OF SERVICE

Bill Hill declares as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 22nd day of October, 2010 I caused to be served true copies of the following documents:

ORIGINAL

1. Brief of Respondent Sue Kumlue; and
2. Proof of Service

upon:

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Appellant

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- via overnight courier
- via first-class U.S. mail
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- via hand delivery

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- via hand delivery

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

DATED this 22nd day of October, 2010.

By Bill Hill
BILL HILL