

FILED
COURT OF APPEALS
DIVISION II

10 OCT 22 PM 1:29

No. 40588-1-II

STATE OF WASHINGTON
BY 
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WILLIAM D. WEBSTER

Appellant,

v.

SOMDET WEBSTER; SAMUEL K. FLOWER; SUE KUMLEE dba
ORIGINAL THAI TASTE,

Respondents.

BRIEF OF RESPONDENT SAMUEL K. FLOWER

MORTON MCGOLDRICK, P.S.
Kathleen E. Pierce, WSBA No. 12631
Attorneys for Respondent Samuel Flower

820 A Street, Suite 600
Tacoma, WA 98401
(253) 627-8131

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION	1
I. STATEMENT OF CASE	2
II. JOINDER IN BRIEF OF CO-RESPONDENTS WEBSTER AND KUMLUE	2
III. ARGUMENT	2
A. Washington’s Anti-SLAPP Statute Bars Claims Based on Samuel Flower’s Communication to Government Agencies	2
B. The Witness Immunity Bars Claims Based on Samuel Flower’s Statements to the Courts	4
C. All of William Webster’s Claims are Meritless	6
1. William Webster’s Abuse of Process Claims Fail as a Matter of Law	6
2. William Webster’s Outrage and “Intentional and Malicious Infliction of Emotional and Economic Distress” Claims Fail as a Matter of Law	7
3. William Webster’s Defamation and False Light Claims Fail as a Matter of Law	10
4. William Webster’s Loss of Consortium Fail as a Matter of Law	11
5. Civil Rights Claims	13
6. False Arrest, Imprisonment and Detention	13
7. Conspiracy Claims	16

D.	THE TRIAL COURT’S ACTIONS AT THE SUMMARY JUDGMENT HEARING WERE PROPER	18
IV.	MR. FLOWER IS ENTITLED TO AN AWARD OF ATTORNEY FEES INCURRED IN THIS APPEAL.	18
	CONCLUSION	20

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE(S)</u>
<i>All Star Gas, Inc. of Washington v. Bechard</i> , 100 Wn. App. 732, 740, 998 P.2d 367 (2000)	17
<i>Bailey v. State</i> , 147 Wn. App. 251, 261, 191 P.3d 1285 (2008)	3, 4
<i>Batten v. Abrams</i> , 28 Wn. App. 737, 748, 626 P.2d 984 (1981).	7
<i>Dang v. Ehredt</i> 95 Wash.App. 670, 681, 977 P.2d 29, 36 (1999)	13, 14, 15
<i>Demelash v. Ross Stores, Inc.</i> 105 Wash.App. 508, 529, 20 P.3d 447, 458 (2001)	16
<i>Devis</i> , 77 Cal.Rptr.2d at 243	14
<i>Dezell v. Day Island Yacht Club</i> , 796 F.2d 324 326-27 (9 th Cir. 1986)	13
<i>Dicomes v. State</i> , 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)	8
<i>Eastwood v. Cascade Broad. Co.</i> , 106 Wn.2d 466, 474, 722 P.2d 1295 (1986)	10
<i>Fite v. Lee</i> , 11 Wn. App. 21, 27, 521 P.2d 964 (1974)	7
<i>Grein v. La Poma</i> , 54 Wash.2d 844, 847, 340 P.2d 766, 767 (1959)	10
<i>Grimsby v. Samson</i> , 85 Wn.2d 52, 59, 530 P.2d 291 (1975).	8
<i>Heckart v. City of Yakima</i> , 42 Wn.App. 38, 39, 708 P.2d 407 (1985).	16
<i>Kearney v. Kearney</i> , 95 Wn. App. 405, 417, 974 P.2d 872 (1999)	18
<i>Kloepfel v. Bokor</i> , 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003).	8

<i>Lund v. Caple</i> , 100 Wn.2d 739, 745-48, 675 P.2d 226 (1984)	9, 10,12
<i>Miles v. Child Protective Services Dep 't</i> , 102 Wn. App. 142, 157, 6 P.3d 112 (2000)	9
<i>N.W. Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc.</i> , 58 F. Supp.2d 1211, 1216 (W.D. Wash. 1999)	17
<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 387, 186 P.3d 1117 (2008)	4
<i>W.G. Platts, Inc. v. Charles W. Platts</i> , 73 Wn.2d 434, 440, 438 P.2d 867 (1968)	6
<i>Wilson v. State</i> , 84 Wn. App. 32, 350-51, 929 P.2d 448 (1996)	17
<i>Wyman v. Wallace</i> , 94 Wn.2d 99, 615 P.2d 452 (1980)	9,12
<i>Wynn v. Earin</i> , 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008)	5
<i>Yurtis v. Phipps</i> , 143 Wn. App. 680, 696, 181 P.3d 849 (2008)	18, 19

STATUTES:

RCW 4.24.500	3
RCW 4.24.510	3, 4, 11, 14
RCW 4.84.185	18

RULES:

RAP 18.1	18
RAP 18.9	18, 19

INTRODUCTION

Mr. Flower, the only Respondent without the benefit of a pro bono defense, is the victim of unrelenting litigation by William Webster which the trial court found to be frivolous. Mr. Webster continues his frivolous attack in this Appeal.

Mr. Webster's alleged claims against Mr. Flower, are as follows: (1) abuse of process; (2) "intentional and malicious infliction of emotional and economic distress"; (3) outrage; (4) false light; (5) defamation of character; (6) loss of consortium; (7) violation of civil rights; and (8) conspiracy to commit several of the alleged torts. These claims are based upon Mr. Webster's allegations that Mr. Flower had an extra-marital affair with his wife, Somdet Webster, and that Mr. Flower and Somdet Webster's employer, Sue Kumlue, conspired with Somdet Webster to obtain a restraining order against him and to have him thrown in jail as a result of their contacts with the police.

Mr. Webster's claims have no factual support and no legal basis. Mr. Flower obtained a summary judgment dismissing these claims as a matter of law. The Order Granting Summary Judgment was proper and should be upheld on appeal.

I. STATEMENT OF CASE

A detailed statement of the case is contained within Respondent, Somdet Webster's brief. Respondent, Flower, adopts and incorporates that statement as his own rather than repeat it here.

II. COUNTER-STATEMENT OF THE ISSUES

In order to avoid unnecessary and duplicative briefing before the Court, Mr. Flower hereby joins in Co-Respondents Somdet Webster's and Sue Kumlue's Briefs regarding the **Counter-Statement of the Issues**, as if fully set forth herein.

III. COUNTER-STATEMENT OF THE ISSUES

A. WASHINGTON'S ANTI-SLAPP STATUTE BARS CLAIMS BASED ON SAMUEL FLOWER'S COMMUNICATIONS TO GOVERNMENT AGENCIES.

Washington has adopted an "anti-SLAPP" ("Strategic Litigation Against Public Participation") statute. This statute provides:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that

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

RCW 4.24.510 (emphasis added). Within RCW 4.24, the legislature specifically expressed a policy to protect citizens who report potential wrongdoing to any government agency:

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 4.24.500 (emphasis added). Under the statute, immunity applies when a person (1) “communicates a complaint or information to any branch or agency 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*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008) (quoting RCW 4.24.510).

RCW 4.24.510 does not simply provide immunity in cases where a complaint to a government agency is made in “good faith.” The Legislature specifically amended the statute in 2002 to remove any “good faith” requirement. *Id.* at 262-63. As a result courts have since held that immunity attaches under RCW 4.24.510 without the need to determine whether a communication was made in good faith. *Id.* This specifically covers calls to the police. *Saldivar v. Momah*, 145 Wn. App. 365, 387, 186 P.3d 1117 (2008).

Therefore, any claims by Mr. Webster that are based on allegations that Mr. Flower communicated information to a government agency on a matter “reasonably of concern” to that agency are barred by the anti-SLAPP statute.

B. THE WITNESS IMMUNITY RULE BARS CLAIMS BASED ON SAMUEL FLOWER’S STATEMENTS TO THE COURTS.

Mr. Webster alleges that Mr. Flower made false statements and vilified him to the Kitsap County Court. He does not state whether this was through testimony at a Court hearing, in a declaration or affidavit, or by conspiring with Somdet to assist her in preparing and submitting paperwork to obtain a domestic violence protection order. However, the common law witness immunity rule bars any claims by Mr. Webster based

on Mr. Flower's testimony or statements in judicial proceedings. As the Washington Supreme Court recently noted:

The general rule is that witnesses in judicial proceedings are absolutely immune from suit founded on their testimony. The purpose of this common law rule "is to preserve the integrity of the judicial process by encouraging full and frank testimony." Absent immunity, witnesses might self-censor in two ways. They might be reluctant to come forward to testify and they might distort testimony due to fear of subsequent liability. In addition, "the rule also rests on the safeguards against false or inaccurate testimony which inhere in the judicial process itself. ... [R]eliability is ensured by [the witness's] oath, the hazard of cross examination and the threat of prosecution for perjury." These safeguards ensure truthful and accurate testimony.

Wynn v. Earin, 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008) (internal citations omitted) (emphasis added).

For those reasons, a person cannot bring a civil claim based on allegations that a defendant committed perjury or made false statements. As the Washington Supreme Court has observed, "[p]erjury is, of course, a public offense and punishable in criminal proceedings, but from earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings" and "[t]his same immunity applies to

statements made preliminary to testifying.” *W.G. Platts, Inc. v. Charles W. Platts*, 73 Wn.2d 434, 440, 438 P.2d 867 (1968).

C. ALL OF WILLIAM WEBSTER’S CLAIMS ARE MERITLESS.

The trial court properly dismissed Mr. Webster’s claims against Mr. Flower as a matter of law. No admissible evidence was submitted to create any genuine issue of fact to preclude summary judgment.

1. WILLIAM WEBSTER’S ABUSE OF PROCESS CLAIMS FAIL AS A MATTER OF LAW.

Mr. Webster alleges that Mr. Flower committed abuse of process by conspiring with Mr. Webster’s wife when she applied for a temporary restraining and lying to the Sheriff’s office. See CP 1 - 15. This “abuse of process” claim is without merit.

First, Mr. Flower cannot be liable to Mr. Webster for statements that Mrs. Webster made in judicial proceedings, including statements in her petition to obtain a temporary protection order against Mr. Webster, even if he somehow assisted her with the paperwork. In the event the abuse of process claim is based upon alleged false statements or “lies” to the Sheriff’s office, the Anti-SLAPP statute bars civil suits based on such statements.

In any case, there is no evidence to support an abuse of process claim. The essential elements of an abuse of process claim are: (1) the

existence of an ulterior purpose – to accomplish an object not within the proper scope of the process – and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings. *Fite v. Lee*, 11 Wn. App. 21, 27, 521 P.2d 964 (1974). “The mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.” *Id.* at 27-28. “Thus, there must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit.” *Batten v. Abrams*, 28 Wn. App. 737, 748, 626 P.2d 984 (1981). Here, there is no evidence that Mr. Flower commenced any suit against Mr. Webster. Here could not have used the legal process empowered by Mrs. Webster’s lawsuit to accomplish an end not within the purview of the suit. Therefore, Mr. Webster’s claim for “abuse of process” against Mr. Flower should be dismissed.

2. **WILLIAM WEBSTER’S OUTRAGE AND “INTENTIONAL AND MALICIOUS INFLICTION OF EMOTIONAL AND ECONOMIC DISTRESS” CLAIMS FAIL AS A MATTER OF LAW.**

Mr. Webster asserts a claim for outrage. CP 9, ¶25. He also purports to bring a claim for “intentional and malicious infliction of emotional and economic distress.” However, such a claim does not exist under Washington law. At best, this asserted cause of action could be regarded as a claim for intentional infliction of emotional distress. But under Washington law, “outrage” and “intentional infliction of emotional

distress” are synonyms for the same tort, so it is not necessary to analyze the two claims separately. *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003).

To support these claims, Mr. Webster alleges that Mr. Flower “in conspiracy with his co-conspirators did commit outrage by wanton cruel acts against Mr. Webster”, “engaged in a cycle of scandalous behavior with premeditated intent to harm Mr. Webster” and “had reckless disregard” for his health due to their adulterous actions. CP 11.

The elements of the tort of outrage are: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989). “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 atrocious, and utterly intolerable in a civilized community.’” *Id.* (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). “[M]ere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability.” *Id.* Here, there is no evidence that Somdet engaged in conduct that would support a claim for outrage.

The allegations are that an extramarital affair constitutes outrage. Mr. Webster did not observe the adulterous conduct but bases his knowledge of it upon sworn answers to interrogatories signed by his wife. CP 11. Mr. Webster cannot base an outrage claim on acts that did not occur in his presence. Under Washington law, “[a] plaintiff may not sue for outrage unless he or she was present when the conduct occurred.” *Miles v. Child Protective Services Dep’t*, 102 Wn. App. 142, 157, 6 P.3d 112 (2000).

In short, Mr. Webster has no evidence that would support a cause of action for outrage/intentional infliction of emotional distress. In effect, his claim is an action for alienation of affections, which Washington abolished many years ago. See *Lund v. Caple*, 100 Wn.2d 739, 745-48, 675 P.2d 226 (1984); *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980). He cannot recover for an action which has been abolished by alleging that the exact same conduct constitutes the tort of outrage. Previous attempts to recover for adulterous conduct by alleging that it constitutes the tort of outrage have been rejected. *Lund v. Caple*, 100 Wash.2d 739, 742, 675 P.2d 226, 229 (1984). The Court, in *Lund*, specifically rejected an outrage claim based on adultery stating as follows:

The fatal flaw in appellant's outrage theory is that he was not present when the alleged outrageous conduct occurred, and did not even learn of the conduct until several months

later. Since appellant was not present, he has not established the tort of outrage. Such presence is a crucial element of a claim for outrage when the conduct is directed at a third person.

Id. Mr. Webster's claim for outrage fails as a matter of law.

3. WILLIAM WEBSTER'S DEFAMATION AND FALSE LIGHT CLAIMS FAIL AS A MATTER OF LAW.

Mr. Webster also brings defamation and "false light" claims against Mr. Flower. He alleges that Mr. Flower "falsely vilified Mr. Webster before the Court of Kitsap County by making and/or contributing to the making of false and slanderous statements to the Court." CP 11. In addition, he alleges that Somdet "committed false light," apparently by obtaining a temporary protection order against him in January 2007. CP 12. Mr. Webster's claims for slander (that is, "defamed by word of mouth", *Grein v. La Poma*, 54 Wash.2d 844, 847, 340 P.2d 766, 767 (1959)) and "false light" must fail for several reasons.

First, even if Mr. Webster had a basis for defamation or false light claims against Mr. Flower (which he does not), the statute of limitations has expired for bringing such claims based on events that occurred in January 2007. Under Washington law, the statute of limitations for a defamation claim or a "false light" claim is two years. *See Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 474, 722 P.2d 1295 (1986). Here, Mr. Webster did not file his complaint until September 2009 – more than

two years after the events in January 2007 that give rise to his defamation and “false light” claims. Therefore, these claims are barred as a matter of law.

Second, as discussed above, Washington’s anti-SLAPP statute provides that one who communicates information to any branch or agency of federal, state, or local government on any matter reasonably of concern to the agency is “immune from civil liability for claims based upon the communication.” RCW 4.24.510. As a result, Mr. Webster’s claims that Mr. Flower made *or contributed to* the making of defamatory by making communications to the Kitsap County Sheriff’s Office are barred by the anti-SLAPP statute.

Finally, Mr. Webster suggests that Mr. Flower defamed him by falsely vilifying him to the Court in the course of judicial proceedings. However, as discussed above, Mr. Flower is immune from liability for any statements he made to the court under the witness immunity rule. Therefore, Mr. Webster’s claims for defamation and “false light” against defendant Flower should be dismissed.

4. WILLIAM WEBSTER’S LOSS OF CONSORTIUM CLAIMS FAIL AS A MATTER OF LAW.

Mr. Webster alleges in his complaint that he suffered a “loss of consortium” with his former spouse as a result of her relationship with Mr.

Flower, a relationship that (according to the findings in the dissolution action) arose after her separation from her husband. Specifically, he alleges:

Upon information, evidence and belief, that starting in December 2006, Somdet Webster and Samuel K. Flower engaged in an adulterous affair while Somdet Webster was still married to Mr. Webster, to the detriment of [Mr. Webster], that due to the loss of benefits of consortium with Somdet Webster, Mr. Webster was abused by Somdet Webster, held up to ridicule and suffered deep emotional trauma for which Mr. Webster was forced to seek medical aid and medication.

CP 7, ¶18. He further alleges that due to “Mr. Flower’s adulterous actions, Mr. Webster lost the benefits of consortium with his then wife.” *Id.* In essence, Mr. Webster suggests that the alleged “adulterous affair” caused him a loss of consortium. *Id.*

Washington law does not permit a spouse to bring a cause of action for “loss of consortium” based on allegations that the other spouse engaged in adultery. In effect, such a claim would be an action for alienation of affections, which Washington abolished many years ago. *See Lund v. Caple*, 100 Wn.2d 739, 745-48, 675 P.2d 226 (1984); *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980). As a result, Mr. Webster’s claim for “loss of consortium” fails.

5. CIVIL RIGHTS CLAIMS.

Mr. Webster claims that Mr. Flower denied him his First and Second Amendment rights and his constitutional right to access his son. CP 7, ¶19. However, there is no cause of action against private individuals for deprivation of a constitutional right. *See, e.g., Dezell v. Day Island Yacht Club*, 796 F.2d 324, 326-27 (9th Cir. 1986). Thus, Mr. Webster's claim fails as a matter of law.

6. FALSE ARREST, IMPRISONMENT AND DETENTION.

Under both statutory and common law, a person is not liable for merely communicating information to a law enforcement officer. Under common law, liability will not be imposed on a defendant who does nothing more than detail his or her version of the facts to a police officer and ask the officer for assistance, thus leaving it to the officer to determine the appropriate response. *Dang v. Ehredt* 95 Wash.App. 670, 681, 977 P.2d 29, 36 (1999). In *Dang*, the plaintiff alleged that a bank was liable in a civil case for false imprisonment where the bank called the police to report a potential crime regarding counterfeit checks, resulting in the plaintiff's arrest. The plaintiff argued that although the call to the police was protected under the Anti-SLAPP statute, the bank could be liable for their negligent investigations that lead to the call to the police. *Id. at 683.*

The Court rejected such an argument, holding that all conduct leading up to the call to the police is protected. The Court stated:

Allowing a cause of action for negligence in the investigation which leads to a report to the police would be tantamount to allowing a cause of action for error in the report.

....

... [I]f an individual could be sued for negligently performing the acts which lead to a report to the police, the policy of assuring utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing would be seriously compromised. The open channel of communication between police and citizens would be closed, and citizens would be discouraged from conveying information to the police, to the detriment of society as a whole.^{FN24}

FN24. (Internal quotations omitted.) *Devis*, 77 Cal.Rptr.2d at 243.

We agree with the court's reasoning in *Devis* and reject Ms. Dang's argument that the immunity afforded by RCW 4.24.510 is limited to the bank's telephone call to the police. As the *Devis* court noted, allowing a cause of action for the events surrounding the communication to the police, while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute. Moreover, as in *Devis*, no meaningful distinction can be drawn between the cause of action based on the bank's communication to the police and a cause of action based on the method of arriving at the content of the communication. All of the actions of which Ms. Dang complains and all of the damages she claims to have suffered stem from that is, are "based upon") the bank's telephone call to the police.^{FN25}

Dang v. Ehredt, 95 Wn. App. 670, 683-684, 977 P.2d 29, 37 (1999). The only allegation supporting the false arrest, detention and imprisonment claims is that “Samuel K. Flower made numerous phone calls to Kitsap County Sherriff’s office” and “gave false information to the Kitsap County Sheriff’s to have Mr. Webster falsely arrested”. CP 8, ¶21. Calls to the police are immune, as well as actions taken, even if negligent, in investigating the basis for making such calls.

Violation of one’s right of personal liberty or restraint without legal authority are “the gist” of an action for false imprisonment. *Dang at 685-86*. A person is restrained or imprisoned when he or she “is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.” *Id.* There is no allegation that Mr. Flower used or threatened to use force against Mr. Webster, or that he deprived him of his liberty of movement. The allegation is simply that Mr. Flowers calls to the police resulted in *the police* arresting, detaining or imprisoning him. Mr. Webster’s false imprisonment claim fails.

False arrest occurs when a law enforcement officer, or one claiming to have the powers of a police officer, unlawfully restrains or imprisons another by physical force, threat of force, or conduct reasonably

implying the use of force against the detainee should he resist. *Demelash v. Ross Stores, Inc.* 105 Wash.App. 508, 529, 20 P.3d 447, 458 (2001). The claim does not turn on the misperceptions of the detainee, but on the intent of the person making the arrest. *Id.* Here the allegation, on its face, involves the Kitsap County Sheriff arresting or detaining Mr. Webster, not Mr. Flower. A claim for false arrest has a two year statute of limitations. RCW 4.16.100(1); *Heckart v. City of Yakima*, 42 Wn.App. 38, 39, 708 P.2d 407 (1985). Mr. Flowers filed his action more that two years after his arrest in January of 2007. The claim is time barred. The false arrest claim against Mr. Flower fails as a matter of law.

7. **CONSPIRACY CLAIMS.**

Finally, Mr. Webster's complaint is rife with allegations of conspiracy against him, including claims for "conspiracy to abuse process," "conspiracy to inflict emotional and economic distress," and "conspiracy to violate civil rights." However, any conspiracy claims alleged by Mr. Webster must be dismissed.

To establish a 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.” *All Star Gas, Inc. of Washington v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). “Mere suspicion or commonality of interests is insufficient to prove a conspiracy.” *Id.* (quoting *Wilson v. State*, 84 Wn. App. 32, 350-51, 929 P.2d 448 (1996)). Here, Mr. Webster’s conspiracy claims are based on suspicion, rather than on evidence.

In any event, Mr. Webster cannot maintain a civil conspiracy claim against Samuel Flower because he has not brought any other actionable claims:

In Washington, as elsewhere, a civil conspiracy claim must be premised on underlying “actionable wrongs,” “overt acts,” or a “tort working damage to the plaintiffs.” A conspiracy claim fails if the underlying act or claim is not actionable.

N.W. Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc., 58 F. Supp.2d 1211, 1216 (W.D. Wash. 1999) (internal citations omitted). As a result, Mr. Webster cannot bring claims for “conspiracy to abuse process,” “conspiracy to inflict emotional and economic distress,” “conspiracy to cause false arrest, imprisonment or detention” or “conspiracy to violate civil rights” unless the underlying tort claims are actionable. Here, because none of the other claims alleged by Mr. Webster are actionable, his conspiracy claims must fail as well.

D. THE TRIAL COURT'S ACTIONS AT THE SUMMARY JUDGMENT HEARING WERE PROPER.

Mr. Flower adopts and incorporates by reference herein Section V, subparagraph B of Respondent Somdet Webster's Reply Brief and Section V, subparagraph B of Respondent Kumlue's Reply Brief.

IV. MR. FLOWER IS ENTITLED TO AN AWARD OF ATTORNEY FEES INCURRED IN THIS APPEAL.

Pursuant to RAP 18.1, Mr. Flower requests an award of attorney fees and costs incurred in this appeal. The trial court did not award attorney fees to Mr. Flower based upon the anti-SLAPP statute, because it held that the professed evidence regarding what was stated in the 911 tapes was inadmissible hearsay. CP 198 – 199. The Court did, however, award Mr. Flower judgment for attorney's fees under RCW 4.84.185 (CP 336 – 337) making specific findings that the litigation Mr. Webster commenced was frivolous. CP 333 – 335.

Mr. Flower requests attorney's fees and costs under RAP 18.9, which authorizes 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 v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008). "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.” *Id.*

An award of attorney’s fees and costs under RAP 18.9 is appropriate in this case. Mr. Webster’s appeal presents no debatable issues. All of his claims plainly fail as a matter of law and he presents no reasoned argument that the trial court abused its discretion in conducting the summary judgment hearing. Instead, Mr. Webster resorts to making baseless attacks on the integrity of the trial court and the attorneys who represented the Respondents in this case.

Awarding fees and costs under RAP 18.9 would also serve to deter Mr. Webster from continuing his pattern of abusive and frivolous litigation. As noted in Respondent, Somdet Webster’s brief, Mr. Webster has now brought eight lawsuits based on the events surrounding his separation and divorce from Ms. Webster. He has not only sued Ms. Webster and her friends, but has also brought meritless lawsuits against her attorneys, the judges who have presided over his cases, and other government officials. This pattern of litigation abuse must end.

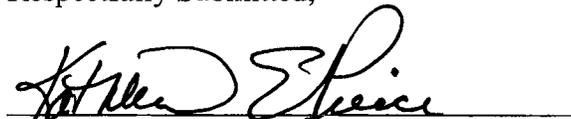
CONCLUSION

There was never any merit to Mr. Webster's lawsuit against Ms. Webster, Mr. Flower, and Ms. Kumlue. The trial court properly dismissed all of Mr. Webster's claims against Mr. Flower.

Mr. Flower requests this Court to affirm the trial court's ruling, affirm the admonishment by the trial court for the remarks made by Mr. Webster about the opposing attorneys, and award Mr. Flower's attorney fees and costs incurred in this appeal.

Dated this 22nd day of October, 2010.

Respectfully Submitted,



Kathleen E. Pierce, WSBA #12631

kepierce@bvmm.com

Morton McGoldrick, P.S.

Attorneys for Respondent Samuel K. Flower

10 OCT 22 PM 1:29

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

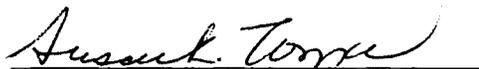
THIS IS TO CERTIFY that on October 22nd, 2010, ~~By~~ ~~did serve via ABC~~
Legal Messengers (or other method indicated below), true and correct
copies of the foregoing by addressing and directing for delivery to the
following:

William D. Webster
2102 – 25th Avenue SE
Puyallup, WA 98374
VIA U.S. MAIL

David J. Ward
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101-1818
VIA E-MAIL: dward@LegalVoice.org

Laura K. Clinton
Jessica A. Skelton
K&L GATES LLP
325 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
VIA E-MAIL: Jessica.Skelton@klgates.com
Laura.Clinton@klgates.com

Salvador A. Mungia
Christine Sanders
GORDON THOMAS HONEYWELL LLP
1201 Pacific Avenue, Ste. 2100
Tacoma, WA 98402
VIA E-MAIL: smungia@gth-law.com
csanders@gth-law.com



Susan K. Toma
Legal Assistant to Kathleen E. Pierce