

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

GARY FILION,
Respondent,
vs.
JULIE JOHNSON, et al.,
Appellant.

CASE # 63978-1-I

[King County Superior Court
Case # 07-2-06353-6 SEA]

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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I. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing plaintiff's claims against Johnson under the mandatory dismissal provisions of CR 41(a)(1)(B);
2. The trial court erred in denying Johnson's CR 12(b)(6) motion to dismiss which was heard as a motion for summary judgment on November 21, 2008.

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in dismissing respondent Filion's claims against appellant Johnson under the mandatory dismissal provisions of CR 41(a)(1)(B) after the case had gone through a full hearing in mandatory arbitration and Johnson had appealed the arbitrator's decision by timely filing a request for trial de novo, which precludes Johnson from recovering her expense, reasonable attorney fees, and statutory damages under the Anti-SLAPP statute, RCW 4.24.510.
2. Whether the trial court erred in denying appellant Johnson's CR 12(b)(6) motion to dismiss which was heard as a motion for summary judgment on November 21, 2008. In other words, were there any genuine issues of material fact such that Johnson was precluded from being awarded summary judgment as a matter of law?

III. STATEMENT OF FACTS

The marriage of appellant Julie Johnson (“Johnson”) and respondent Gary Filion (“Filion”) was dissolved by final orders entered in Snohomish County Superior Court on June 1, 2006. (CP 19 – 28; CP 65 – 75)

The dissolution decree divides the parties’ personal property and provides as follows that certain items are to be transferred between the parties:

“9. * * * The following items shall be picked up by the husband: (list of items)”

“10: The table leaves that belonged to the Wife’s father that will be returned to the Wife at the time that the Husband picks up his personal property from the Wife.”

(CP 22, 1. 9 – 21)

The decree of dissolution contains the following restraining orders:

“Both parties are restrained . . .

“from disturbing the peace of the other party.”

“from going onto the grounds of or entering the home, work place or school of the other party”

“Husband is restrained and enjoined from going onto the grounds of or entering the home, workplace, school or day care of the following named children: Emelie Nye, Mitchell Nye, Jordan Nye, Spencer Nye.”

“from knowingly coming within or knowingly remaining within 500 feet of the home, work place or school of the other party, or the day care or school of these children listed above.”

(CP 26 line 18 to CP 27 line 16)

On August 1, 2006, Filion came onto the grounds of Johnson's home in violation of the restraining orders. Johnson's dissolution lawyer, Olson, coordinated the personal property exchange with Peter Jorgensen, Filion's dissolution lawyer. Olson's only communication with Filion was through Filion's lawyer. (See 12/10/2007 Declaration of Mark Olson, CP 17 -18)

On February 21, 2007 Filion filed the underlying lawsuit in this matter against Johnson and her dissolution lawyer, Mark D. Olson ("Olson") in King County Superior Court case no. 07-2-02353-6 SEA. (CP 1 -4: summons and complaint filed 2/21/2007; CP 5 – 6: first amended complaint filed 4/9/2007; CP 11 – 12: second amended complaint filed 8/15/2007).

Filion was aware of the restraining orders. His original complaint (CP 3, l. 26 – 27), first amended complaint (CP 5, l. 26 – 27), and second amended complaint (CP 11, l. 25), all allege that "Mutual restraining orders were contained in the divorce decree."

Johnson answered the complaint on 5/16/2007. (CP 8 – 10)

Filion's claims against Olson were dismissed on February 8, 2008. (CP 91) and Olson was awarded \$3,600 in CR 11 sanctions against Filion and his former counsel on February 25, 2008. (CP 105 – 107)

Filion's claims against Johnson in this lawsuit are based solely upon Johnson's emergency call to 911 when Filion came onto the grounds of

Johnson's home in the afternoon on August 1, 2006 in violation of the restraining orders of which he was fully aware.

Witness Pat Dornay notified Filion in the early afternoon of August 1, 2006 that Johnson will still be at the residence and that he is not to come onto the property. (CP 124 – 128; 143 – 147)

On October 24, 2008 Johnson filed a CR 12(b)(6) motion to dismiss Filion's claims on the grounds of the absolute privilege provided by the Anit-SLAPP statute RCW 4.24.510. (CP 115 – 121) The motion is supported by the Declaration of Pat Dornay, Johnson's real estate agent, (CP 124 – 128; 143 - 147).

Filion moved to strike the motion hearing. (CP 149 -151)

Johnson responded to Filion's motion to strike. (CP 153 – 162)

The court ordered that:

“the motion to strike the hearing is granted and the hearing is continued to November 21, 2008 for hearing on defendant's CR 12(b)(6) motion to dismiss which will be heard by the court as a motion for summary judgment under CR 56.”

(CP 152; CP 164)

Filion responded on the merits of Johnson's motion to dismiss. (CP 165 – 175; CP 176 – 177; CP 178 – 180). Johnson replied. (CP 181 – 185)

The summary judgment hearing on Johnson's motion to dismiss was held on November 21, 2008. The court entered an order stating that "the motion is denied." CP 188)

The matter had been transferred to mandatory arbitration on August 21, 2008. (CP 110 – 111;

The issues in arbitration were heard on February 9, 2009. The arbitrator issued an award, which is under seal, on February 13, 2009. The award was mailed to the parties on February 13, 2009. (CP 191) But the award was not filed in the trial court until March 4, 2009 (CP 190) and the proof of service of the award was not filed in the trial court until March 13, 2009. (CP 191)

Johnson timely appealed the arbitrator's award by filing and serving a request for trial de novo (CP 209 – 210; CP 324 – 325) together with proof of service (CP 211 – 212) and payment of the \$250 filing fee (CP 213) on April 2, 2009

However, the King County Arbitration Department intercepted the original file-stamped request for trial de novo and proof of service and mailed them back to Johnson's counsel. (CP 214)

Johnson filed a motion to require the Clerk to process her request for trial de novo. (CP 193 – 217)

Filion responded by filing a motion to dismiss all of his claims (CP 223 – 227), a declaration of Noah Davis (CP 228 – 240), a supplemental declaration of Noah Davis (CP 241 – 245), and a third declaration of Noah Davis (CP 262 – 279), and a response memorandum (CP 280 – 291).

Johnson filed a response in opposition to Filion's motion to dismiss all claims. (CP 246 – 256; CP 292 – 294; CP 311 – 312))

Johnson replied to Filion's response. (CP 298 – 305)

Filion replied regarding his motion for dismissal. (CP 307 – 310)

A hearing was held before the Honorable James A. Doerty, Judge, King County Superior Court, on May 19, 2009. (CP 314) (VRP 5/19/2009 pp. 1 – 17)

The court determined that Johnson's request for trial de novo had been timely filed and served and ordered that it shall be accepted by the Clerk and duly filed in this case, and denied Filion's motion for dismissal. (CP 321 – 323)

On May 19, 2009 the Clerk issued an ORDER SETTING CASE SCHEDULE FOR ARBITRATION TRIAL DE NOVO. (CP 326 – 330)

On June 12, 2009 Filion filed a notice of hearing and a 2nd CR 41(a) motion for dismissal of all claims (CP 333 – 338) supported by declarations of Noah Davis (CP 338; CP 341 – 357), and on June 15, 2009 filed an amended

motion for dismissal with an alternative motion to continue the scheduled trial date of July 20, 2009. (CP 358 – 365)

Johnson responded on June 25, 2009. (CP 366 – 380)

Filion replied on June 25 and June 26, 2009. (CP 381 – 382; CP 383 – 388)

On July 29, 2009 the court entered an order granting plaintiff Gary Filion’s motion for dismissal of all claims. (CP 395 – 396).

Johnson filed this appeal because (1) Johnson’s motion for summary judgment heard November 21, 2008 should have been granted, (2) after the parties engaged in a full arbitration hearing and Johnson had appealed the award the case was no longer subject to voluntary dismissal under CR 41(a), and (3) the order of dismissal aggrieves Johnson because it precludes her from recovering the substantial litigation costs, expenses, and attorney fees she has incurred in the matter, as well as the statutory damages provided by RCW 4.24.510.

IV. ARGUMENT AND AUTHORITIES

(Argument applicable to
all assignments of error)

**Filion’s motion for dismissal under
CR 41(a)(1)(B) should have been denied
and should be reversed.**

Because Johnson timely filed and served her request for trial de novo, Filion’s claims should not have been dismissed under the mandatory dismissal

provisions of CR 41(a)(1)(B) because plaintiff did not move for dismissal before resting in the mandatory arbitration hearing.

Filion had a full hearing on the merits of his claims in mandatory arbitration. He took the mandatory arbitration hearing to its conclusion and the arbitrator issued an award. The award is in Johnson's favor but leaves her aggrieved to the extent that the arbitrator denied Johnson's request for expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510.

Johnson has fully and adequately pleaded her claim for an award of expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510. That the claim was not "pleaded" within a document labeled "answer" is of no moment in this case. Johnson's claims for statutory immunity and for recovery of her expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510 were squarely before the trial court. These claims were not only asserted in the arbitration (CP 252 – 256) but also in the summary judgment proceedings on Johnson's motion to dismiss. (CP 115 – 121; CP 153 – 162; CP 246 – 251; CP 292 – 294; CP 366 – 380)

Under the posture of this case, dismissal was only properly available under CR 41(a)(2) and (a)(3) such that defendant Johnson's claims for expenses, reasonable attorney fees, and statutory damages under RCW 4.24.510 were allowed to continue for independent adjudication by the court..

**The trial court's denial of Johnson's
CR 12(b)(6) motion to dismiss which
was heard as motion for summary judgment
should be reversed and judgment should
accordingly be entered in Johnson's favor.**

That Johnson is entitled to the benefit of the defense of absolute immunity accorded by RCW 4.24.500 - .510 is clearly established by the undisputed facts of this case: Filion's several complaints allege that (1) there existed mutual restraining orders, (2) he went to Johnson's residence on August 1, 2006, (3) when he arrived the police were called, (4) he was placed under arrest for violation of the no contact order, (5) he sued Johnson because she reported his restraining order violation to law enforcement.

Filion admitted in subsequent pleadings that the mutual restraining orders prohibited him from going to Johnson's residence, that he knew Johnson was present before he went to the residence, and that he was charged with violation of the restraining order because Johnson reported the violation to the police.

On the basis of the undisputed record in this case, Filion's claims against Johnson are barred by RCW 4.24.500 and 4.24.510, Washington's anti-SLAPP statute ("SLAPP" is an acronym for Strategic Lawsuit Against Public Participation) which provide as follows:

The purpose of Washington's anti-SLAPP legislation is set out in RCW 4.24.500:

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

RCW 4.24.510, the remedy statute, provides that:

“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.”

For Johnson to have immunity under RCW 4.24.510, Filion’s claim against her must be based on a communication she made to the police “regarding any matter reasonably of concern to that agency or organization.”

Filion's pleadings allege that "*when he [plaintiff] arrived at Johnson's residence, the police were called and he was placed under arrest for violation of a no contact order.*" Thus, Filion's complaint alleges that Filion was arrested and prosecuted because Johnson reported to the police that Filion had violated a no contact order. Johnson reported a matter reasonably of concern to the police. Thus, her communication falls squarely under the immunity provided by RCW 4.24.510. Filion's allegation that "*Defendant Johnson, by misrepresentation and false statements to police officers, caused the false arrest and malicious prosecution of Plaintiff*" does not avoid the application of statutory immunity under RCW 4.24.510.

RCW 4.24.510 requires that the Johnson communicate the complaint or information "to any agency of federal, state or local government," but the statute does not define "agency". Our appellate courts have held that the statute applies to communications with the police and law enforcement. *Dang v. Ehredt*, 95. Wn. App. 670, 977 P.2d 29, review denied. 139 Wn.2d 1012 (1999) (bank employees called 911 to report what they mistakenly believed was a counterfeit check); to communications with officials of a land development division and county executive. *Gilman v. MacDonald*, 74 Wn. App. 733, 875 P.2d 697, review denied, 125 Wn.2d 1010 (1994); and to communications with judicial offices such as the Superior Court

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

The facts of this case are similar to facts in *Dang v. Ehredt*, supra. In *Dang* a bank, through its employees, called 911 to report that *Dang* was attempting to pass a counterfeit check. The police came to the bank and arrested *Dang*, who later sued the bank and its employees among others for damages. When it was later determined that the check was valid and not counterfeit, *Dang* was released and the charges were dismissed. The *Dang* court held that the bank and its employees, who did nothing to restrain or otherwise imprison Ms. Dang other than call and make a report to 911, are entitled to immunity from liability for their actions under RCW 4.24.510. The facts in *Dang* mirror the facts in this case. Ms. Johnson is entitled to immunity under RCW 4.24.510. That conclusion is compelled by an analysis of the pleadings without reference to any other material.

The issue whether “good faith” is an element on the question whether immunity under RCW 4.24.510 applies was squarely addressed in the case of *Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008), review denied 166 Wn.2d 1005, 208 P.3d 1123 (2009). The court held that “good faith” is not an element on the issue of statutory immunity.

The analysis under RCW 4.24.510 is a two part process: The court first determines whether Johnson is protected by the statutory immunity afforded by RCW 4.24.510. If so, Johnson is entitled to an award of her

expenses and reasonable attorney fees and, in addition, the statutory damages of \$10,000.00. If Fillion asserts that Johnson's complaint or information was communicated to the police in bad faith, then the court must decide whether Johnson should be denied the statutory damages. Fillion has the burden of proof on the latter issue.

V. ATTORNEY FEES

Appellant Johnson requests an award of her expenses and reasonable attorney fees on this appeal pursuant to RCW 4.24.510 which provides that:

“ * * * 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. * * *.”

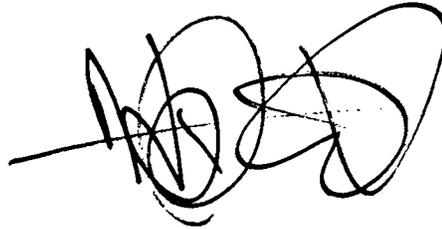
VI. CONCLUSION

Appellant respectfully asks this Court to:

1. Reverse the trial court's order of dismissal;
2. Remand this matter to the trial court for trial or, in the alternative, reverse the trial court's November 21, 2008 denial of Johnson's motion for summary judgment, and rule in Johnson's favor on the basis that there was no genuine issue of material fact and that Johnson was entitled to judgment of dismissal under RCW 4.24.510 as a matter of law;
3. Award Johnson her expenses and reasonable attorney fees on this appeal;
4. Award Johnson her reasonable expenses and attorney fees in the trial court;

5. Award Johnson the statutory damages of \$10,000 provided for by RCW 4.24.510.

Respectfully submitted this 10th day of March, 2010.

A handwritten signature in black ink, appearing to be 'Helmut Kah', written in a cursive style with several loops and a long horizontal stroke extending to the left.

Helmut Kah, WSBA # 18541
Attorney for Appellant