NO. 46095-5
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Douglas Verdier,

Plaintiff/Appellant,

vs.

Gregory Bost and Laurie Bost,

Defendants/Respondents,

vs.

Todd Verdier,

Counterclaim Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

REPLY BRIEF

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Table of Contents

STATUS OF THE CASE IN LIGHT OF *DAVIS v. COX* 1

ARGUMENT 4

I. The Anti-SLAPP Statute Is Applicable. 4

II. A Party Cannot Avoid the Sanctions Imposed by RCW 4.24.510 by Amending Pleadings. 6

III. Issues on Remand 8

IV. The Bosts Are Not Entitled to an Award of Attorneys' Fees 12

CONCLUSION 13

Table of Authorities

Cases

Akrie v. Grant, 178 Wn.App. 506, 512-514, 315 P.3d 567 (2013) 11

Alaska Structures, Inc. v. Hedlund, 180 Wn.App. 591, 323 P.3d 1082 (2014).....5, 7

Bailey v. State, 147 Wn.App. 251, 191 P.3d 1285 (2008).....6

City of Longview v. Wallin, 174 Wn.app. 763, 776, fn. 11, 301 P.3d 45 (2013).....7

City of Seattle v. Egan, 179 Wn.App. 333, 317 P.3d 568 (2014).....4

Davis v. Cox, ___ Wn.2d ___, ___ P.3d ___, 2015 W.L. 3413375 (May 28, 2015).....1, 2, 11

Elf-Man LLC v. Lamberson, 2014 WL 1048447 (E.D.Wa. 2014) 7

Gander v. Yeager, 167 Wn.App. 638, 645, 274 P.3d 293 (2012) 13

Gilman v. MacDonald, 74 Wn.App. 733, 875 P.2d 697 (1994).....10

Harris v. City of Seattle, 302 F.Supp.2d 1200 (W.D. Wash. 2004).....6

Hayfield v. Ruffier, ___ Wn.App. ___, ___P.3d ___, 2015 W.L. 3419742 (May 27, 2015) 12

Henne v. City of Yakima, 177 Wn.App. 583, 313 P.3d 1188 (2013) 7

Henne v. City of Yakima, 182 Wn.2d 447, fn. 5, 341 P.3d 284 (2015).....3, 8

Kauzlarich v. Yarbrough, 105 Wn.App. 632, 652-53, 20 P.3d 346 (2001) ..6

Right-Price Recreation, LLC v. Connell's Prairie Community Council, 146 Wn.2d 370, 383-84, 46 P.3d 789 (2002).....10

Rowe v. Lowe, 172 Wn.App. 253, 294 P.3d 6 (2012) 10

Sato v. Century 21 Ocean Shores Real Estate, 101 Wn.2d 599, 603, 681 P.2d 242 (1984) 13

Segaline v. Department of Labor and Industries, 169 Wn.2d 467, 482, 238 P.3d 1107 (2010) 8

Statutes

Laws of Washington, 2002, Chapter 232, § 1 13

Laws of Washington, 2002, Chapter 232, § 2 13

RCW 4.24 525(2) 1

RCW 4.24.500 13

RCW 4.24.510 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

RCW 4.24.525 ..... 1, 2, 4, 5, 6, 9, 11, 13, 14, 15

RCW 4.24.525(4) 1

RCW 4.24.525(4)(b), (c) 2

RCW 4.24.525(6) 11

RCW 4.24.525(6)(a)(iii) 15

RCW 42.56 5

Other Authorities

Wyrwich *A Cure for "Public Concern:" Washington's New Anti-SLAPP Law* 86 Wash. L. Rev. 663 (2011) 8, 10

Rules

California Code of Civil Procedure § 425.16 7

STATUS OF THE CASE IN LIGHT OF *DAVIS V. COX*

Douglas Verdier and Todd Verdier (the Verdiers) sought relief in the trial court based on both RCW 4.24.510 and RCW 4.24.525. (CP 19; CP 23-24) On May 28, 2015, the Supreme Court declared RCW 4.24.525 to be unconstitutional in *Davis v. Cox,* ___ Wn.2d ___, ___ P.3d ___, 2015 W.L. 3413375 (May 28, 2015). That decision did not affect the viability of the Verdiers' claims made under RCW 4.24.510.

In *Davis v. Cox, supra,* the Supreme Court invalidated RCW 4.24.525 on the based on the procedures contained in that statute. Specifically, RCW 4.24.525 grants what amounts to a qualified immunity to any person sued based on that person's statements in legislative, executive, or judicial proceedings or based on that person's exercise of his or her rights of free speech or rights to petition. RCW 4.24 525(2); RCW 4.24.525(4). The statute goes on to allow the suing party to avoid this immunity by proving by clear and convincing evidence to the trial judge that he or she will probably prevail on the claim. RCW 4.24.525(4)(b), (c) The Court held that requiring a party to prove the probability of prevailing by clear and convincing evidence without allowing that person a jury trial violates the right to trial by jury guaranteed by Article 1, Section 21 of the Washington State Constitution.

The decision did not address RCW 4.24.510. That statute reads as follows in pertinent part:

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

As can be seen, RCW 4.24.510 is more limited than RCW 4.24.525 in that it grants immunity to persons sued based on communications to governmental entities that would be of interest to the agency as opposed to all rights of free speech and petition that the sued person might possess. It is also more expansive than RCW 4.24.525 in that it grants absolute immunity. The statute contains no procedures of any kind. That means that the Civil Rules in general and the summary judgment rules in particular apply to litigation arising under that statute, a result that presents no problems for the Supreme Court. *Davis v. Cox, supra,* paragraph 30.

Furthermore, RCW 4.24.510 is applicable to our facts. It immunizes persons who have communicated complaints or other information to governmental agencies. Gregory Bost and Laurie Bost (the

Bosts) sued the Verdiers for making complaints to governmental agencies. They alleged that the Verdiers told the Clark County Health Department that raw sewage was going into the Washougal River and that the Verdiers reported to the Washougal Fire Department that the Bosts had an unmaintained fire in their fire pit. Both complaints would be of interest to the agency involved. The Bosts' complaint is clearly covered by RCW 4.24.510.

Finally, all of the issues presented in this case also arise under RCW 4.24.510. The primary issue here is whether a party can escape paying attorney's fees and statutory damages by amending away the offending allegations. That is ripe for consideration under RCW 4.24.510. The Supreme Court declined to address that precise question in *Henne v. City of Yakima,* 182 Wn.2d 447, fn. 5, 341 P.3d 284 (2015). The City of Yakima had filed a motion in that case based on RCW 4.24.525, and not RCW 4.24.510. There is no reason, however, that the issue would not apply to motions brought under RCW 4.24.510.

The balance of this brief will address the claims that the Bosts have made in the Brief of Respondents. It will omit, however, references to RCW 4.24.525 except to show how cases interpreting that statute have no application to questions arising under RCW 4.24.510.

ARGUMENT

I. The Anti-SLAPP Statute Is Applicable.

The Bosts contend that anti-SLAPP statute does not protect the Verdiers from the claims that they made. That is not accurate.

The Bosts claim that the Verdiers are not entitled to any relief because the "gravamen" of their claim is alleged "harassment" by the Verdiers. Consideration of the "gravamen" of the claim arose only on claims brought under RCW 4.24.525 and not under RCW 4.24.510. Their argument fails for that reason.

As indicated, RCW 4.24.525 allows a qualified immunity for all manner of statements made in legislative, executive, or judicial proceedings, as well as statements in pursuit of a person's exercise of rights of free speech or the freedom to petition. In order to determine whether RCW 4.24.525 applied to a given suit, the Court had to determine what the "gravamen" of the suit might be.

The issue first arose in *City of Seattle v. Egan,* 179 Wn.App. 333, 317 P.3d 568 (2014). The City sued Mr. Egan for declaratory relief on whether it was required to produce certain materials that he had requested under the Public Disclosure Act, RCW 42.56. Mr. Egan claimed that this suit violated his constitutional right to petition. The Court disagreed. It held that Mr. Egan was not entitled to relief under RCW 4.24.525 because

the purpose or "gravamen" of the City's suit was resolution of issues under the Public Disclosure Act—a process that act specifically provided for—and not chilling Mr. Egan's right to petition. Similarly, in *Alaska Structures, Inc. v. Hedlund,* 180 Wn.App. 591, 323 P.3d 1082 (2014), the Court held that a defendant sued for violating a confidentiality agreement he signed with a former employer was not entitled to relief under RCW 4.24.525. It ruled that the "gravamen" of the suit was a breach of contract question and not Mr. Hedlund's rights of free speech. Notably, the alleged offending statement in both cases was the lawsuit itself.

The same difficulty does not exist in determining whether RCW 4.24.510 applies to a given suit. As the statute says, a party is immune from claims for damages based on reports to public agencies on a matter of concern to that agency. In other words, the party being sued either made or did not make a report to a governmental agency. And the suit is either based on that report or it is not.

In any event, RCW 4.24.510 is clearly applicable here. The Bosts sued the Verdiers for making a report to public agencies on matters of concern to the agencies affected. (Brief of Appellants, pps. 14-16)

The anti-SLAPP statute also protects a defendant from the type of claims that the Bosts made against the Verdiers. The allegations in question were part of their claims for infliction of emotional distress. (CP

12-14) A party is precluded by RCW 4.24.510 from basing an emotional distress claim on a report to a governmental agency. *Harris v. City of Seattle,* 302 F.Supp.2d 1200 (W.D. Wash. 2004); *Kauzlarich v. Yarbrough,* 105 Wn.App. 632, 652-53, 20 P.3d 346 (2001); *Bailey v. State,* 147 Wn.App. 251, 191 P.3d 1285 (2008). The Verdiers are clearly protected from the Bosts' claims by RCW 4.24.510.

In short, RCW 4.24.510 applies here and protects the Verdiers any liability arising from reports to public agencies.

II. A Party Cannot Avoid the Sanctions Imposed by RCW 4.24.510 by Amending Pleadings.

As pointed out in the Brief of Appellants, p. 7, RCW 4.24.510 is designed to protect from civil suits people who make good-faith reports to public agencies. There is nothing in RCW 4.24.510 that allows a party to avoid sanctions and payment of attorney's fees by amending a pleading to delete references that violate the anti-SLAPP statutes. Construing the statute to allow for such a result is at odds with this policy. The Bosts have not pointed to anything within RCW 4.24.510 that supports their position.

In the Brief of Appellants, the Verdiers referred to cases from California that do not allow a party to amend his or her way out of paying attorney's fees or sanctions. (Brief of Appellants, pps. 9-10) The Bosts contend that California law should not be followed because the California

anti-SLAPP statute is different from Washington's. A respected commentator on the subject believes that California precedent should guide interpretation of Washington's anti-SLAPP statutes when there are no differences between the language of the provisions. Wyrwich *A Cure for "Public Concern:" Washington's New Anti-SLAPP Law* 86 Wash. L. Rev. 663 (2011); See, e.g., *City of Longview v. Wallin,* 174 Wn.app. 763, 776, fn. 11, 301 P.3d 45 (2013); *Alaska Structures v. Hedlund, supra,* 180 Wn.App. at 599. California's anti-SLAPP statute, contained in California Code of Civil Procedure § 425.16 does not allow a party to escape paying attorney's fees by amending his or her pleadings to eliminate the offending allegations.

The Bosts refer to the decisions in *Henne v. City of Yakima,* 177 Wn.App. 583, 313 P.3d 1188 (2013) together with *Elf-Man LLC v. Lamberson*, 2014 WL 1048447 (E.D.Wa. 2014). While both decisions allow a party who files a claim containing prohibited allegations to avoid sanctions or to pay attorney's fees by amendment, neither decision is based upon any particular language authorizing such a result contained within RCW 4.24.510. In fact, neither decision was based on RCW 4.24.510—both interpret RCW 4.24.525. Each decision is also at odds with the legislative policy behind the two statutes — protection of persons who make complaints to public agencies. The observations of Judge

Fearing in his dissent in *Henne v. City of Yakima, supra*, set out in Brief of Appellants, p. 7, is the proper policy statement.

Furthermore, the sanctions contained within the anti-SLAPP statute serve to deter persons from filing claims that violate the statute's provisions. *Segaline v. Department of Labor and Industries,* 169 Wn.2d 467, 482, 238 P.3d 1107 (2010), Madsen, J. concurring; Wyrich, *supra,* 67 Wash. L. Rev. at 670-71. This deterrent effect would be lost, of course, if a person could avoid sanctions by the simple mechanism of amendment. To the contrary, a premium would be put on filing a complaint containing an offending allegation; waiting to see if the defendant invoked the anti-SLAPP statute; and then amending.

At the end of the day, RCW 4.24.510 cannot be interpreted to allow a party to avoid paying attorney's fees and statutory damages if that party has sued based on a report to a governmental agency. (Brief of Appellants, pps. 6-7) For that reason alone, the Bosts must be assessed attorney's fees and statutory damages.

III. Issues on Remand.

The Verdiers have asked the Court to rule on certain damages issues because the matters are likely to arise on remand. (Brief of Appellants, pps. 14-21) The Bosts oppose this, suggesting that the questions can be resolved on a subsequent appeal. Judicial economy

requires consideration of these matters so that the subsequent appeal can be avoided.

The Bosts have argued that the Verdiers did not prevail on a special motion filed under RCW 4.24.525, and that sanctions are only available to a party that prevails on such a motion as stated in RCW 4.24.525(6). The language of RCW 4.24.510 is different. It allows attorney's fees and statutory damages to "a person prevailing on the defense provided for in this section." This language by its terms does not require any particular action by the person seeking the statute's benefit, except, perhaps, asserting that the statute grants immunity. Both Verdiers asserted the defense. As a result, the offending allegations were withdrawn. For that reason, the Verdiers obviously prevailed.

Certain of the issues are different now that RCW 4.24.525 has been declared unconstitutional. Most, however, involve the same considerations—such as whether each of the two Verdiers is entitled to statutory damages; whether both Mr. Bost and Ms. Bost must pay the statutory amount; the balance of this section will deal with these questions in light of RCW 4.24.510 only.

First of all, the Verdiers are entitled to statutory damages unless it is shown that their communication to the Clark County Health Department and the Washougal Fire Department were made in bad faith as RCW

4.24.510 provides. The trial court obviously did not decide whether they made the reports and whether they did so in bad faith. The matter must be remanded for that determination.

To avoid damages, however, the Bosts must prove by clear and convincing evidence that a report was made; that each report was false; and that each of the two Verdiers knew that the report was false or acted with reckless disregard as to their falsity. *Right-Price Recreation, LLC v. Connell's Prairie Community Council,* 146 Wn.2d 370, 383-84, 46 P.3d 789 (2002); *Gilman v. MacDonald,* 74 Wn.App. 733, 875 P.2d 697 (1994). The Court in each case adopted the test used to define actual malice in defamation cases.

Both *Right-Price Recreation, LLC v. Connell's Prairie Community Council, supra,* and *Gilman v. MacDonald, supra,* dealt with RCW 4.24.510 prior to its amendment in 2002. Before 2002, immunity was available only to reports communicated in good faith. The amendment removed the good faith requirement for immunity but allowed for the denial of statutory damages if the report was made in bad faith. Laws of Washington, 2002, Chapter 232, § 2[1] This test should still apply. There is

[1] The Bosts cannot rely on RCW 4.24.500, which was not amended in 2002, to argue that immunity is only available for good faith reports. *Rowe v. Lowe,* 172 Wn.App. 253, 294 P.3d 6 (2012) The legislature clearly intended that there would be immunity regardless of intent. Laws of Washington, 2002, Chapter 232, § 1.

no reason why it shouldn't. Protection of persons making reports to governmental agencies continues to be the policy behind RCW 4.24.510. The high burden for denial of damages advances that policy.

In the absence of such a bad faith finding, the Verdiers are entitled to an award of damages. The statute states that a person prevailing on the defense "shall receive" the damages award. This language is mandatory. *Akrie v. Grant,* 178 Wn.App. 506, 512-514, 315 P.3d 567 (2013).

The Court in *Akrie v. Grant, supra,* ruled that each person sued was entitled to a $10,000.00 damage award available under RCW 4.24.525. It also supported its decision by referring to the legislature's intention in enacting the 2002 amendment to RCW 4.24.510. 178 Wn.App. at 513. There is no difference between the language of RCW 4.24.525 and RCW 4.24.510 in this respect. Under RCW 4.24.510, "a person" prevailing on the defense is entitled to statutory damages. Both the Verdiers are persons. Therefore, each is entitled to a separate award of statutory damages.[2]

As noted in the Brief of Appellants, each of the Bosts must pay damages to each of the Verdiers and must pay $10,000 for each separate

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[2] The Supreme Court accepted review in *Akrie v. Grant,* 180 Wn.2d 1008 (2014) It declined to reach the issue of whether each person sued was entitled to an award of damages because of its conclusion that RCW 4.24.525 is unconstitutional. *Davis v. Cox, supra,* fn.1.

complaint. Interpreting RCW 4.24.510 in this way would advance the policy behind that section—protecting people who make reports to governmental agencies and deterring those who would sue based on those reports. The invalidation of RCW 4.24.525 does not change the policy or dictate a different result where RCW 4.24.510 is concerned.

Finally, each of the Verdiers is entitled to an award of attorney's fees. Once again, RCW 4.24.510 states that "a person" who prevails on the defense within the statute "is entitled" to an award of attorney's fees. That language is mandatory. *Hayfield v. Ruffier,* ___ Wn.App. ___, ___P.3d ___, 2015 W.L. 3419742 (May 27, 2015). Since each of the Verdiers is a person, each is entitled to an award of attorney's fees.

In the Brief of Appellants, the Verdiers also argued that the trial court on remand could impose other sanctions. This argument was based on RCW 4.24.525(6)(a)(iii). In light of the decision in *Davis v. Cox, supra,* that contention is withdrawn.

IV. The Bosts Are Not Entitled to an Award of Attorneys' Fees.

The Bosts do not dispute that the Verdiers are entitled to any award of attorney's fees on appeal if they prevail. They do claim that they should receive their attorney's fees if they are successful. That relief is not available to them.

An award of attorney's fees is proper only when justified by a contract, statutory provision, or equitable principal. See, e.g., *Gander v. Yeager,* 167 Wn.App. 638, 645, 274 P.3d 293 (2012). The Bosts' request for attorney's fees must be based on a statute. But there is nothing in RCW 4.24.510 that allows attorney's fees to the responding party. As the statute states in pertinent 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. . .

When a statute allows attorney's fees to only one party, the other party cannot also obtain such an award. For example, a party successfully defending a Consumer Protection Act claim is not entitled to an award of attorney's fees. *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242 (1984).

The Bosts should not prevail on this appeal. For that reason alone, their request for attorney's fees should be denied. Even if they were to prevail, however, they are not entitled to such an award.

CONCLUSION

The Bosts have not successfully rebutted the arguments made by the Verdiers. This matter should be reversed with directions to award the Verdiers their attorney's fees incurred in the trial court on this issue and otherwise remanded for further proceedings. The Court should also

address matters that will arise on remand as the Verdiers have requested. Finally, the Verdiers should be awarded their attorney's fees on appeal.

DATED this 11 day of June, 2015.

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APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

DECLARATION OF MAILING

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COMES NOW Lorrie Vaughn and declares as follows:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On June 11, 2015, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of REPLY BRIEF to the following person(s):

Mr. Stephen Leatham
Heurlin Potter Jahn Leatham Holtman & Stoker
PO Box 611
Vancouver, WA 98666-0611

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 11th day of June, 2015.

Lorrie Vaughn
LORRIE VAUGHN