IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LORA BRAWLEY, Appellant, v. LEYLA ROUHFAR and REZA, FIROUZBAKHT, husband and wife, and the marital community thereof, Respondents.	)	NO. 65399-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 25, 2011

Lau, J. — After she was fired from her job as a nanny, Lora Brawley sued the parents, alleging unpaid wages, breach of contract, and defamation claims. She appeals the trial court's summary judgment dismissal of her defamation claim premised on absolute privilege under Washington's anti-SLAPP[1] statute (RCW 4.24.510) and the qualified common interest privilege. Because the parents' reports of alleged child abuse to police and Child Protective Services (CPS) are absolutely privileged under

[1] Strategic Lawsuit Against Public Participation.

RCW 4.24.510, the court properly dismissed this claim. But because material fact issues remain on whether the parents abused the common interest privilege based on statements to family members, healthcare providers, and school personnel, we reverse the court's grant of summary judgment on these claims. We affirm in part and reverse in part. We also affirm the court's fee award to Brawley and grant the parents' fee request. RAP18.1.

FACTS

Viewing the facts and reasonable inferences most favorably to Brawley, the record shows that in April 2008, Reza Firouzbakht and Leyla Rouhfar (the parents) hired Lora Brawley as a temporary nanny for their son, AF, who was then two years and six months old.[2] The parents hired Brawley through a nanny placement agency managed by Carrie Morris. In May, Brawley agreed to be AF's permanent nanny. The parties signed a contract that provided in part: "Either party upon 30 days written notice may terminate this agreement and all obligations shall cease at the end of said 30-day period. Parents may terminate Nanny at any time for just cause without notice."

On August 4, when Brawley attempted to cash her paycheck, the "teller advised that there were not enough funds available . . . ." Brawley asked and the parents agreed to directly deposit the funds into her account. The next pay period, the bank again refused to honor the parents' check. When Brawley arrived at work, she told the parents that she would no longer accept checks as payment. Afterwards, the parties'

[2] AF was born on October 3, 2005.

relationship deteriorated. At an August 22 meeting, Rouhfar demanded that Brawley apologize and Brawley refused.

On August 28, Brawley worked a full day. Towards the end of the day, Firouzbakht terminated Brawley effective in one week. He explained to her that Rouhfar's mother would be available to care for AF. Brawley reminded Firouzbakht that their contract required 30 days' notice to terminate. When Brawley came to work the next day, Rouhfar claimed Brawley was hostile towards her and AF. Rouhfar called Firouzbakht and asked him to come home to relieve Brawley because she "was not comfortable leaving [AF] in her care." That was the last day that Brawley provided child care for AF.

A few days later, on September 2, after Rouhfar told AF that Brawley would not be returning, he allegedly said, "Nanny Lora hit me and pushed me on my tummy." Rouhfar called Firouzbakht's voice mail and asked AF to repeat what he said. Brawley disputes the voice mail transcript, maintaining that it says only "that [she] had pushed him and held on, and pushed him in the tunnel." Her declaration explained that this statement must refer to pushing AF on a swing set and a slide with a tunnel. Neither the tape nor the voice mail transcript appears in our record. That same day, Rouhfar reported the allegations to police, who concluded the "case [did] not have enough evidence to forward to Child Protective Services" and "no basis for further investigations." At police suggestion, Rouhfar took AF to his pediatrician and to a child psychologist for evaluation. On September 4, Rouhfar reported the incident to CPS. On September 5, Rouhfar contacted the director of AF's preschool and "told her about the alleged abuse and that Brawley was

not allowed to have any interaction with [AF] or pick him up from school." Rouhfar also discussed the alleged abuse with several family members who occasionally cared for AF. Finally, on September 5, Rouhfar responded to an e-mailed reference check by Brawley's prospective employer by stating, "[N]ew information has been brought to our attention by our son since her termination . . . I would strongly recommend we speak before you offer her a position."[3]

On October 8, 2008. Brawley sued the parents for damages, alleging unpaid wages, breach of contract, and slander per se.[4] She also sought to enjoin further dissemination. Brawley's slander claim did not specify to whom the parents made the statements but sought damages for statements "published to others." The parents answered and counterclaimed, alleging assault, battery, and outrage based on allegations that they witnessed Brawley physically and verbally abuse AF.[5] They pleaded affirmative defenses to the unpaid wage and slander per se claims but not the RCW 4.24.510 immunity defense claim. The parents moved for partial summary judgment, arguing that their statements to police and CPS were absolutely privileged under Washington's anti-SLAPP statute, RCW 4.24.510. They also argued qualified common interest privilege for statements to family members, health care providers, and school personnel. Brawley opposed the motion, arguing material questions of fact

[3] Although Brawley includes this information in her factual recitation, she does not assert an assignment of error relevant to it. And the trial court's order does not reference Rouhfar's contact with the prospective employer.

[4] We use the terms "slander" and "defamation" interchangeably.

[5] The parents subsequently dismissed these counterclaims.

remained on the parents' abuse of the privileges. She did not oppose the motion based on the parents' failure to plead RCW 4.24.510 as an affirmative defense.

During the summary judgment hearing, the trial court requested additional briefing on the single issue of whether malice is a factual or legal question. Later, the trial court granted partial summary judgment, ruling:

> Plaintiff Brawley has failed to meet her burden of showing she can prove the four prima facie elements of her defamation claim and that Defendants made an unprivileged claim. Specifically, the court grants the motion on the basis that the statements made to the police and Child Protective Services are privileged and absolutely immune from liability under RCW 4.24.510. The statements made to family members, health care providers, and school personnel are privileged under a qualified common interest privilege. A qualified privilege may be lost if it can be shown that the privilege was abused. It is Plaintiff's burden to demonstrate abuse of that privilege and a showing of actual malice will defeat a conditional or qualified privilege which must be shown by clear and convincing proof of knowledge or reckless disregard as to the falsity of the statement. While the court agrees with Plaintiff that factual disputes regarding such should be reserved for the jury, there is no evidence in the record that would allow the court to conclude that there is a genuine issue of fact on this question. Plaintiff has not provided the court with the necessary evidence to survive partial summary judgment. In accordance with RCW 4.24.510 Defendants are entitled to fees and statutory damages.

The parents moved for an award of attorney fees, costs, and statutory damages under RCW 4.24.510.[6] The trial court ordered a reduced fee award.

On February 4, 2010, Brawley accepted the parents' CR 68 offer of judgment on her wage and breach of contract claims to include a payment of costs and reasonable attorney fees. Brawley then moved for an award of fees and costs, requesting $25,485 in fees and $1,306.68 in costs based on 107.25 hours. The parents objected on the

[6] Brawley's only assignment of error pertaining to the fees, costs, and statutory damages award is premised on "[whether] the order granting summary judgment is reversed on appeal." Appellant's Br. at 5.

basis that Brawley failed to provide adequate documentation for the hours worked and because the fee request far exceeded the $2,000 wage claim recovery.

The court reduced the fee award to $5,000 based on 25 hours worked. The court found that Brawley "should not be awarded fees for her defamation claim, her breach of contract claim and time spent defending the Parent[s'] counterclaim" and that there was no justification for the multiplier of 1.5 that Brawley sought. The court ruled:

> 3. Plaintiff Brawley has failed to support her claim of 107.25 hours [because she] provide[ed] a total number of hours that she and others spent on the case, but fail[ed] to give an explanation for how those hours were spent. This is insufficient to support the number of hours claimed.
>
> . . . .
>
> 6. The amount at issue is a relevant consideration in determining the reasonableness of the fee award. The wage dispute involved less than $2,000 in back-owed pay. In light of this, Brawley's claim for 107.25 hours for a total of $25,500 in fees is unreasonable.

This appeal followed.

ANALYSIS

Brawley makes three principle arguments: (1) failure to plead RCW 4.24.510 constitutes waiver, (2) RCW 4.24.510 does not apply to her defamation claim, and (3) abuse of the common interest privilege.

To defeat a summary judgment motion in a defamation claim, the plaintiff must demonstrate the existence of all four elements: "falsity, an unprivileged communication, fault, and damages." LaMon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). To avoid summary judgment, the plaintiff must raise a material issue of fact for each element. Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). We review the facts in the light most favorable to the nonmoving party—Brawley. LaMon, 112 Wn.2d at

197. The trial court granted the parents' partial summary judgment motion because Brawley failed to establish the second element—the communications were not privileged. The court ruled that the parents' communications to police and CPS were absolutely privileged under RCW 4.24.510 and the other communications were qualifiedly privileged based on common interest. In defamation cases, the standard of proof at trial also applies at summary judgment. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 568, 27 P.3d 1208 (2001).

Waiver

Brawley first argues that the parents waived their RCW 4.24.510 immunity defense by failing to plead it as an affirmative defense in their answer under CR 8(c). CR 8(c) requires parties to plead certain enumerated affirmative defenses "and any other matter constituting an avoidance or affirmative defense" in the answer to a pleading. Affirmative defenses that are not properly pleaded are generally deemed waived. Rainier Nat'l Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

Brawley's waiver argument is based on a strict reading of CR 8(c). But our Supreme Court explicitly endorsed a more flexible reading of the CR 8(c) requirement in Mahoney v. Tingley, 85 Wn.2d 95, 529 P.2d 1068 (1975). There, the court explained that because the underlying policy of CR 8(c) is to avoid surprise, "federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless." Mahoney, 85 Wn.2d at 100 (citing Tillman v. Nat'l City Bank, 118 F.2d 631, 635 (2nd Cir.1941)). Therefore, the court reasoned, "objection to a failure to comply

with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense." Mahoney, 85 Wn.2d at 100.

In Bernsen v. Big Bend Electric Cooperative, Inc., 68 Wn. App. 427, 842 P.2d 1047 (1993), we affirmed the trial court's decision that the defense of failure to mitigate had not been waived by the defendant even though it was not raised in the pleadings. Bernsen, 68 Wn. App. at 434 ("[I]f the substantial rights of a party have not been affected, noncompliance is considered harmless and the defense is not waived."). Likewise, in Hogan v. Sacred Heart Medical Center, 101 Wn. App. 43, 2 P.3d 968 (2000), we concluded that the defendant had not waived its ability to assert release as an affirmative defense, despite failing to raise it in the pleadings. Hogan, 101 Wn. App. at 54-55. Because the plaintiff demonstrated neither surprise nor prejudice from the defendant's delay in asserting the defense, the court reasoned that "the failure to affirmatively plead release did not affect substantial rights of [the plaintiff]." Hogan, 101 Wn. App. at 55.

Here, Brawley establishes neither surprise nor prejudice that affected any substantial right. The parents' motion for partial summary judgment argued that "Defendants statements to police officers and Child Protective Services were privileged under RCW 4.24.510." (Capitalization omitted.) The record shows that Brawley's brief in response to summary judgment never argued waiver based on the parents' CR 8(c) pleading deficiency. Instead, she argued that RCW 4.24.510 did not apply because the parents made the statements to authorities in bad faith. Over three weeks after the summary judgment hearing, Brawley

argued waiver for the first time in a supplemental brief requested by the court on the single issue of actual malice. We conclude Brawley's waiver claim is untimely because she raised it after the RCW 4.24.510 immunity issue was fully briefed and argued at the summary judgment hearing without objection. Under Mahoney, Bernsen, and Hogan, Brawley's pleading deficiency claim fails.[7]

But Brawley asserts her supplemental brief argues waiver, therefore, it was timely "called to the attention of the trial court." CR 56(h). We disagree. Allowing Brawley to raise a new issue in a supplemental brief deprives the parents of an opportunity to respond and ignores the trial court's directive to brief a single, narrow question—actual malice. Nothing in CR 56(c), which governs summary judgment proceedings, permits the nonmoving party (Brawley) to raise a new issue in a supplemental brief that could have been raised earlier in her response materials. Brawley waived her argument that RCW 4.24.510 is an affirmative defense that must be pleaded.

RCW 4.24.510 Immunity

Brawley next argues that her lawsuit is not a SLAPP. But the parties disagree on whether Brawley raises this claim for the first time on appeal. Our review of the record shows Brawley never raised this claim in her response brief or at oral argument on summary judgment. Even assuming Brawley properly raised it below, the claim fails. The anti-SLAPP statute, RCW 4.24.510, grants immunity to a person who

[7] Given our disposition on Brawley's waiver claim, we do not address the parents' contention that immunity under RCW 4.24.510 is not an affirmative defense.

"(1) 'communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization,' and (2) the complaint is 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). The 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. The parents' reports to local police and state CPA satisfy the plain language of the statute because (1) they communicated a complaint to their local police and state CPS and (2) a child abuse complaint is reasonably of concern to those government agencies. Therefore, the parents' reports fall within the scope of RCW 4.24.510. "The purpose of the statute is to protect citizens who provide information to government agencies by providing a defense for retaliatory lawsuits." Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 167, 225 P.3d 339 (2010).

Brawley next maintains that her lawsuit "is no SLAPP" and that RCW 4.24.510 does not apply as a matter of law because she did not know about the police and CPS reports until after filing suit. Appellant's Br. at 28. Therefore, no retaliatory motive prompted her defamation claim against the parents.

The parents counter, "Whether Brawley knew about the statements to police or CPS when she filed her lawsuit is irrelevant because Brawley clearly intended to hold[ ] the Parents accountable for their statements to police and CPS in her slander claim, contrary to RCW 4.24.510." Resp't's Br. at 13. We agree that Brawley's litigation conduct below shows she intended to include police and CPA reports in her defamation claim. For example, the parents moved for summary judgment premised in part on RCW 4.24.510—"The Parents' statements to the police and Child Protective Services are absolutely immune from liability under RCW 4.24.510." Rather than informing the trial court that her defamation claim did not include any statements to government agencies, the record shows Brawley repeatedly argued these statements were made in bad faith.[8]

And after the parents filed their summary judgment motion, Brawley did not seek the court's permission or the parents' consent under CR 15(a) to amend her complaint to make clear that her defamation allegations did not include reports to government agencies.[9] And as discussed above, Brawley's RCW 4.24.510 waiver objection fails.

Brawley's argument that RCW 4.24.510 immunity requires a showing of

[8] Brawley's broadly worded complaint alleged defamatory statements "were published to others." Neither the summary judgment record nor her appellant briefs make clear that she never intended to hold the parents accountable for their reports to police and CPS.

[9] Under CR 15(a), pleadings may be amended only by leave of court or with the written consent of the adverse party. Absent actual prejudice to the adverse party, amendments should be freely granted. Olson v. Roberts & Schaeffer Co., 25 Wn. App. 225, 607 P.29 319 (1980).

retaliatory motivation by a defamation plaintiff is not supported by any controlling or persuasive authority. RCW 4.24.510's plain language contains no retaliation motive requirement. We decline to read this requirement into the statute absent a clear expression of legislative intent. Courts may not read into a statute matters that are not in it. Progressive Animal Welfare Soc'y. v. Univ. of Wash., 114 Wn.2d 677, 688, 790 P.2d 604 (1990). We conclude the trial court properly dismissed Brawley's defamation claims premised on reports to police and CPS.[10]

Common Interest Privilege[11]

Brawley next argues that the trial court improperly dismissed her defamation claims based on the statements to family members, health care providers, and school personnel because material issues of fact remain on whether the common interest

[10] We requested supplemental briefs on the relationship, if any, between RCW 4.24.510 and RCW 26.44.060. These briefs shed no new light on the central issues on appeal. RCW 26.44.060 makes it a criminal misdemeanor for any person "intentionally and in bad faith, knowingly makes a false report of alleged abuse or neglect." And although RCW 26.44.060 grants immunity to a "good faith" reporter, the legislature amended RCW 4.24.510 in 2002 to eliminate a good faith requirement. This amended legislation also provides: "A person prevailing upon the defense . . . is entitled to recover expenses and reasonable attorneys' fees . . . and shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." (Emphasis added.)

[11] We decline to address any alleged defamatory statements made to nanny agency manager Carrie Morris and prospective employer Kathleen Proctor because the parents' partial summary judgment and the trial court's order granting summary judgment encompassed statements made only to the police, CPS, family members, health care providers, and school personnel.

privilege was lost when the parents abused it. A qualified privilege based on a common interest arises if there is a common interest in the subject matter being communicated between the declarant and the recipient. Moe v. Wise, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (1999). The parties sharing the information need not be allied with each other, but they must share the common interest. Moe, 97 Wn. App. at 959. The privilege does not extend to the entire public. Owens v. Scott Publ'g Co., 46 Wn.2d 666, 674, 284 P.2d 296 (1955).

While the qualified privilege generally protects a speaker from liability for statements that might otherwise be considered defamatory, the privilege is lost if the plaintiff can show by clear and convincing evidence that it was abused. Bender v. City of Seattle, 99 Wn.2d 582, 600-01, 664 P.2d 492 (1983). A plaintiff can establish abuse of the qualified privilege if the defendant

> (1) knows the matter to be false or acts in reckless disregard as to its truth or falsity, (2) does not act for the purpose of protecting the interest that is the reason for the existence of the privilege, (3) knowingly publishes the matter to a person to whom its publication is not otherwise privileged, (4) does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given, or (5) publishes unprivileged as well as privileged matter.

Moe, 97 Wn. App. at 963 (citations omitted).

To demonstrate abuse, the plaintiff must show actual malice, which is a false statement made with either actual knowledge of its falsity or reckless disregard for its truth or falsity. Herron v. KING Broadcasting Co., 112 Wn.2d 762, 775, 776 P.2d 98 (1989). "Actual malice must be shown by clear and convincing proof of knowledge or reckless disregard as to the falsity of a statement." Momah v. Bharti, 144 Wn. App. 731, 742, 182 P.3d 455 (2008) see also

Herron, 112 Wn.2d at 768 ("The plaintiff responding to a motion for summary judgment in a defamation case must show that the jury could decide in his favor while applying the clear and convincing evidence standard."); Richmond v. Thompson, 130 Wn.2d 368, 386, 922 P.2d 1343 (1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) ("[W]e conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to that case."); Mark v. Seattle Times, 96 Wn.2d 473, 487, 635 P.2d 1081 (1981) (holding that "a defamation plaintiff resisting a defense motion for summary judgment must establish a prima facie case by evidence of convincing clarity").

The actual malice standard is subjective and focuses on the declarant's belief in or attitude toward the truth of the statement at issue. Story v. Shelter Bay Co., 52 Wn. App. 334, 343, 760 P.2d 368 (1988). Proof of the statement's falsity alone is not sufficient to overcome the privilege. Wood, 107 Wn. App. at 570. ""Reckless disregard" means (1) a "high degree of awareness of . . . probable falsity" or (2) that the defendant "in fact entertained serious doubts" as to the statement's truth.'" Story, 52 Wn. App. at 344 (quoting Herron v. King Broadcasting Co., 109 Wn.2d 514, 523, 746 P.2d 295 (1987)). "Failure to investigate is not sufficient to prove recklessness." Herron v. KING Broadcasting Co., 112 Wn. 2d 762, 777, 776 P.2d 98 (1989); see also Moe, 97 Wn. App. at 965-66.

> [While a] private figure defamation plaintiff need prove only the defendant's negligence by a preponderance of the evidence to establish a prima facie case of defamation . . . . once the defendant establishes a qualified privilege, to prove the abuse of that privilege even a private figure plaintiff must satisfy the higher

clear and convincing standard otherwise applied only to public figure plaintiffs.[12] Moe, 97 Wn. App. at 963. "Whether an abuse has occurred is ordinarily a jury question 'unless the facts are such that only one conclusion can reasonably be drawn.'" Alpine Indus. Computers, Inc. v. Cowles Publ'g Co., 114 Wn. App. 371, 382, 57 P.3d 1178, 64 P.3d 49 (2002) (quoting Restatement (Second) of Torts § 619(2) cmt. b); see also Moe, 97 Wn. App. at 962.

Viewing all the evidence and reasonable inferences most favorably to Brawley, reasonable minds could differ on the factual question of actual malice. The parents' credibility is central.

> [W]here material facts [as here] are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment. In such cases, "it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying."

Riley v. Andrew, 107 Wn. App. 391, 395, 27 P.3d 618 (2001) (citation omitted) (internal quotation marks omitted) (quoting Mich. Nat'l Bank v. Olson, 44 Wn. App. 898, 905, 723 P.2d 438 (1986). Our review of the record shows overwhelming evidence of the parents' animus towards Brawley. In Momah, 144 Wn. App. at 750-51, we explained the relevance of motive evidence to establish "actual malice" in a defamation case.

> Abuse of privilege requires clear and convincing evidence of actual malice. Since Momah would then need to show Bharti's malice in making the statements,

---

[12] Brawley argues that the trial court improperly determined "Brawley was a public figure because it required her to show actual malice to defeat the Rouhfars' immunity defense." Appellant's Br. at 25. But the trial court granted summary judgment on privilege grounds and, as noted here, even a private plaintiff must show actual malice to establish abuse of the common interest privilege.

> proof of a motive for making false statements would have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. As a result, the web site information may tend to show a motive for self-promotion and may be relevant to malice. The trial court erred in excluding the evidence.

(Emphasis added.)

On August 16, 2008, after two of their checks were returned for insufficient funds, Brawley told the parents that she would no longer accept checks from them. Brawley repeated this demand on August 22 during a meeting with Rouhfar. According to Brawley "Leyla became very agitated and angry, and reiterated that I knew that they had the money and that it 'wasn't their fault.' She demanded an apology." Brawley refused. On August 28, Firouzbakht informed Brawley he was terminating her effective in one week. When she insisted on 30 days' notice, Firouzbakht's attitude, according to Brawley, "changed . . . . [i]t was clear that he was very angry with me at the end of this discussion."

And Carrie Morris, manager of the nanny agency that placed Brawley with the parents, testified that the parents were "very upset and disappointed" with Brawley's tone over the bounced checks issue. She further described the relationship between Brawley and the parents as "so much friction" and "definitely friction."

The mother's summary judgment declaration described that Brawley "exhibited problematic behavior," "hostile attitude," and refused to "follow direct orders I gave her."

The father's September 1, 2008 e-mail to Brawley, which he sent one day before

the child's alleged abuse disclosure, further demonstrates this level of animus.

> There is a more serious issue of which I need to make you aware. I understand when you and Leyla spoke on September 22, 2008, Leyla communicated our concerns regarding your recent emotional outburst directed at me and Leyla. Regardless of the context, we find your outbursts to be disrespectful and unprofessional. However, your latest outburst on Friday morning of August 29th, 2008—which occurred in front of [AF] and was directed at him—was completely unacceptable, abusive and grounds for immediate dismissal for cause. Leyla was so distraught that she asked me to return home to relieve you immediately.

A month later, the parents' attorney wrote to Brawley:

> Investigations by this office and by the Firouzbakht's themselves indicate that your client routinely and without thought or care battered and assaulted [AF].
>
> . . . .
>
> You should also be aware that this office contacted both the Redmond police department and the Prosecutors office to pursue this matter fully. We expect that their office will move quickly and swiftly to criminally prosecute your client.

The parents' attorney then filed a November 2008 answer and counterclaim, alleging that the parents "witnessed the verbal and physical abuse of their child" by Brawley.[13] The record demonstrates that more than one year later in January 2010, the parents' attorney withdrew the portion of their counterclaim that they witnessed physical abuse of their son. The parents' withdrawal excused this allegation premised on "incorrectly drafted" pleadings that "the parents failed to catch the error when they reviewed and approved the counterclaims." This revelation was made by a footnote in the parents' supplemental brief on actual malice, unsupported by the parents' declaration and weeks after the summary judgment hearing. Although the parents argue this evidence is irrelevant on the question of actual malice, we disagree. That

[13] The parents' former attorney drafted the letter, answer, and counterclaim.

the parents made unsubstantiated claims about witnessing Brawley's alleged routine physical assault on AF bears on the parents' credibility, motive, and subjective state of mind. An admission in a pleading is treated like any other admission and may be introduced as evidence. 5B Karl B. Tegland, Washington Practice: Evidence § 801.53, at 426 (5th ed. 2007).

The record also indicates a material conflict between the parents' description of what AF told them and what he said in the recorded voice mail message. The parents testified that AF revealed that "'Nanny Lora hit me and pushed me on my tummy.' I called [the father's] voice mail and asked [AF] to repeat what he told me." According to Brawley, who reviewed the voice mail message transcript, "that [AF] actually stated that I had pushed him in the tunnel. This would have been an accurate reporting of a time in the park when I pushed him on the swings, and pushed him down the slide, and through a tunnel at the end of the slide." Notably, the mother's response declaration does not challenge Brawley's account of the voice mail message transcript. Neither the taped voice mail message nor transcript is in our record.

The mother's testimony on this issue states:

> 4. I have reviewed the tape identified as Exhibit A to the declaration of Reza Firouzbakht and the transcript identified as Exhibit B and compared them to the events on September 2, 2008.
> 5. The tape accurately portrays the phone call [AF] and I made to Mr. Firouzbakht's voice mail.

Finally, neither the police nor CPS investigated the parents' allegation given their bare assertions.

We conclude that when the facts and inferences here are viewed most favorably to Brawley, reasonable minds could differ

on whether the parents abused and therefore lost any common interest privilege.[14]

Reasonableness of Attorney Fee Award

After the court dismissed the slander per se claim on summary judgment, the parents made the following CR 68 offer of judgment related to unpaid wages, breach of contract, and injunctive relief, which Brawley accepted.

> The amount of $3,780.00 (based on Plaintiff's claim that that [sic] the total amount of wages owed is $1,890 and that she is entitled to statutory enhancements under RCW 49.52.070),
>
> 12 percent interest from August 29, 2008 until February 3, 2010, calculated to be $649.95,
>
> costs of suit, and
>
> a reasonable sum for attorney's fees incurred in prosecuting Plaintiff's wage claim, pursuant to RCW 49.48.030 and 49.52.070, in an amount to be determined by the Court.

Brawley then requested fees of $25,485 and costs of $1,306.68, based on 107 hours of work performed by two attorneys, a paralegal, and an office manager. She also sought a 1.5 multiplier based on the contingent fee agreement with her attorney.

---

[14] Brawley also argues that "the trial court improperly determined the Rouhfars were protected by the common interest privilege where they did not have an organizational or business relationship with the recipients of their communications." Appellant's Br. at 30. Relying on Moe, Brawley maintains that the privilege "generally applies to organizations, partnerships and associations." Appellant's Br. at 30. But as the parents correctly note, that case held only that the privilege was "available generally for persons involved in the same organizations, partnerships, associations, or enterprises." Moe, 97 Wn. App. at 958. And subsequent case law has applied the common interest privilege to the nonorganizational context. See, e.g., Hitter v. Bellevue Sch. Dist. No. 405, 66 Wn. App. 391, 401, 832 P.2d 130 (1992) (common interest protected communications between principal and parent); Kauzlarich v. Yarbrough, 105 Wn. App. 632, 643, 20 P.3d 946 (2001) (recognizing privilege where statements were made to protect the safety of a client, court personnel, and the public). Brawley does not respond to this argument in her reply brief.

Brawley contends that "The trial court abused its discretion by limiting Brawley's fee award on the basis that her request far exceeded the wages recovered." Appellant's Br. at 34. The parents counter that the court was within its discretion because "The amount at issue is a relevant consideration in determining the reasonableness of the fee award" and because Brawley failed to "segregate time spent on non-wage claims, . . . fail[ed] to justify a multiplier and . . . fail[ed] to provide an adequate accounting." Br. of Respondent at 26-28. The parties agree that because Brawley prevailed on her wage dispute only, RCW 49.48.030 and 49.52.070 entitle her to an award of reasonable fees.

Generally, the reasonableness of attorney fees is a factual question and the trial court has broad discretion in fixing attorney fees. Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). The trial court's attorney fee award will not be overturned absent a manifest abuse of discretion. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). A trial court abuses its discretion if the decision is manifestly unreasonable or based on untenable grounds. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Courts should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees and costs. Mahler, 135 Wn.2d at 433. The lodestar fee is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended and should exclude wasteful or duplicative hours and any hours spent on unsuccessful claims or theories. Mahler, 135 Wn.2d at 434. The party requesting fees bears the burden of proving the reasonableness of the fees. Mahler, 135 Wn.2d at 433-34.

The attorney seeking fees must

provide "reasonable documentation of work performed to calculate the number of hours . . . ." Wash. State Physicians Ins. Exch. & Assn. v. Fisons Corp., 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). The court in Mahler stated that in determining the lodestar amount, the attorney requesting fees must provide "contemporaneous records documenting the hours worked." Mahler, 135 Wn.2d at 434. Documentation of hours need not be exhaustive or in minute detail, "'but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.).'" Mahler, 135 Wn.2d at 434 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

Relying on Mahler, Brawley argues that the trial court abused its discretion by reducing the fee award based on the small amount of the wage recovery. In Mahler, the court noted, "We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." Mahler, 135 Wn.2d at 433. But it also reasoned "the amount of the recovery, while a relevant consideration in determining the reasonableness of the fee award, is not a conclusive factor." Mahler, 135 Wn.2d at 433. Consistent with Mahler, the trial court ruled, "The amount at issue is a relevant consideration in determining the reasonableness of the fee award. The wage dispute involved less than $2,000 in back owed pay. In light of this, Brawley's claim for 107.25 hours for a total of $25,500 in fees is unreasonable."

The record shows that the trial court properly considered the amount of the recovery as a relevant, but not conclusive factor. Unchallenged finding of fact 3 provides, "Plaintiff Brawley has failed to

support her claim of 107.25 hours [because she] provide[ed] a total number of hours that she and others spent on the case, but fail[ed] to give an explanation for how those hours were spent. This is insufficient to support the number of hours claimed." Brawley's fee request documented the total number of hours worked by each member of her attorney's office, without explaining how those hours were spent. And she provided no documentation on "the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.)"[15] Mahler, 135 Wn.2d at 434 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

Although this documentation need not be exhaustive or in minute detail, it must inform the court's discretionary award of fees. The record here shows no time records or segregation of the time spent and costs expended on the wage claim from the defamation claim.

> "If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues." This is true, even if the claims overlap or are interrelated. An exception exists, however, if "no reasonable segregation . . . can be made." The burden of segregating, like the burden of showing reasonableness over all, rests on the one claiming such fees.

Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 690, 82 P.3d 1199 (2004) (footnotes omitted) (internal quotation marks omitted) (quoting Mayer v. City of Seattle, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000) and Travis v. Wash. Horse Breeders Ass'n, 111

[15] Brawley's request does differentiate between attorney and nonattorney hours and shows time for two different attorneys at different hourly rates.

Wn.2d 396, 411, 759 P.2d 418 (1988)). We conclude the court's reduced fee award to Brawley was proper.

Attorney Fees on Appeal

Both parties request attorney fees on appeal. Brawley requests fees premised on RCW 49.48.030 and 49.52.070. Those sections apply to wage claims. Because on appeal Brawley prevailed on no wage claim, statutory fees are unwarranted.

Since the parents prevailed on their RCW 4.24.510[16] defense, they are entitled to fees related to this issue incurred on appeal. RAP 18.1.

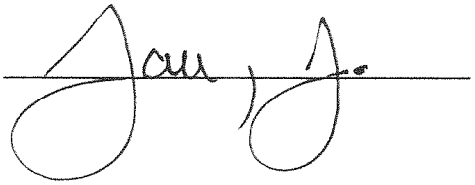
Sealed Medical Records

Finally, the parents "request an order from this Court striking the improper designation of the child's medical records as part of the appeal record and sanctions against Brawley for improperly designating these records." Resp't's Br. at 2-3. The trial court ordered these records sealed below. Because those records remain sealed in the appellate court under GR 1.5, we deny the parents' request to strike and for sanctions.

CONCLUSION

Based on the reasons discussed above, we affirm the trial court's summary judgment dismissal of Brawley's defamation allegations premised on statements to police and CPS. As to the statements to family members, health care providers, and school personnel, we reverse and remand for proceedings consistent with this opinion.

[16] This section provides, "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 we affirm the trial court's fee award to Brawley and grant the parents' fee request on appeal. RAP 18.1.

WE CONCUR: