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Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DOUGLAS VERDIER and TODD VERDIER, Appellants, v. GREGORY BOST and LAURIE BOST, Respondent.	No. 46095-5-II UNPUBLISHED OPINION

SUTTON, J. — Douglas and Todd Verdier appeal the trial court's denial of their special motion to strike and request for an award of statutory damages, reasonable expenses and attorney fees under RCW 4.24.510 and .525, Washington's anti-SLAPP statutes.[1] The Verdiers argue that the trial court erred because the defendants cannot avoid statutory damages by amending their pleadings to eliminate the allegations prohibited by the anti-SLAPP statutes.

We hold that, because RCW 4.24.525 is unconstitutional, the Verdiers's claims under RCW 4.24.525 are moot. Further, we hold that the Gregory and Laurie Bosts's amended pleadings were proper, and thus, the Verdiers's claims under RCW 4.24.510 are also moot. Accordingly, we affirm.

FACTS

This matter arises from a dispute between neighbors, Douglas and Todd Verdier and Gregory and Laurie Bost, over a common property line and shared well access and maintenance.

[1] Strategic lawsuit against public participation (SLAPP).

On January 30, 2013, the Verdiers sued the Bosts to quiet title to the disputed land and damages for the maintenance and use of the well. The Bosts filed their answer and affirmative defenses to the Verdiers's complaint on February 20, 2013.

On December 13, 2013, the Bosts filed their first amended answer, affirmative defenses, and counterclaims alleging that both Verdiers had, at various times, entered and caused damage to their property, and that, on a number of separate occasions, Todd Verdier attempted to verbally and physically intimidate both of the Bosts. The Bosts further alleged that the Verdiers:

> a) Falsely report[ed] to the Clark County Department of Health that raw sewage was seeping from [the Bosts's] property and entering the Washougal River;
>
> b) Falsely report[ed] to the Washougal Fire Department that [the Bosts's] campfire in their riverside fire pit was an unmaintained and out of control fire[.]

Clerk's papers (CP) at 13. The Verdiers failed to file any response to the Bosts's affirmative defenses or their first amended pleadings and counterclaims.

On February 14, 2014, the Verdiers filed a special motion to strike the Bosts's allegations that they made false reports to the Clark County Department of Health and the Camas-Washougal Fire Department.[2] The Verdiers alleged that they were immune from liability under RCW 4.24.510, and moved for statutory damages, reasonable expenses, and attorney fees and costs under RCW 4.24.510 and .525(6)(a)(ii). Following the Verdiers's motion to strike, the Bosts filed a second amended answer, removing the allegations regarding false reporting by the Verdiers to the health and fire departments.

[2] Although related, the boundary dispute litigation is separate from the anti-SLAPP litigation, which arose after the initiation of the boundary dispute.

In light of the Bosts's amended pleadings, the trial court ruled that the Verdiers's motion to strike under RCW 4.24.525 and their request for statutory damages, reasonable expenses, and attorney fees under RCW 4.24.510 were moot and denied the Verdiers's motion. The Verdiers appeal.

ANALYSIS

The Verdiers argue that the trial court erred when it ruled that their claims were moot and denied their special motion to strike and request for statutory damages, reasonable expenses and attorney fees under RCW 4.24.510 and .525. They also argue that the Bosts cannot avoid liability for the statutory damages available under RCW 4.24.510 by amending their pleadings to remove the offending allegations implicating RCW 4.24.510. We disagree.

I. LEGAL PRINCIPLES

A strategic lawsuit against public participation, a SLAPP suit, is a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights. *City of Seattle v. Egan*, 179 Wn. App. 333, 337, 317 P.3d 568 (2014). This court reviews the denial of an anti-SLAPP motion de novo. *Bevan v. Meyers*, 183 Wn. App. 177, 183, 334 P.3d 39 (2014). Both RCW 4.24.510 and .525 allow recovery of statutory damages, reasonable expenses, and attorney fees.[3]

[3] RCW 4.24.525(6)(a-b) allowed the prevailing party to recover statutory sanctions, reasonable expenses, and attorney fees; however, RCW 4.24.510 allows only "[a] person prevailing upon the defense" of allegations based on reporting to a government agency to recover statutory damages, reasonable expenses, and attorney fees.

In 2015, our Supreme Court struck down RCW 4.24.525 as unconstitutional.[4] *Davis v. Cox*, 183 Wn.2d 269, 296, 351 P.3d 862 (2015). Before our Supreme Court declared it unconstitutional, RCW 4.24.525(4) provided for a procedural defense against a SLAPP suit—the special motion to strike; however, RCW 4.24.510 does not provide for such a procedural mechanism. RCW 4.24.510 states,

> 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 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.

Although RCW 4.24.510 provides no procedural mechanism to defend a SLAPP suit, a party may still be immune from civil liability and recover statutory damages, reasonable expenses, and attorney fees under RCW 4.24.510. *See, e.g.*, *Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 238 P.3d 1107 (2010); *Harris v. City of Seattle*, 302 F. Supp. 2d 1200 (W.D. Wash. 2004). While the anti-SLAPP statute entitles a defendant to immunity from liability for bad-faith reporting to a government agency, it does not entitle him to recover statutory damages, reasonable expenses, and attorney fees. *See* RCW 4.24.510.

II. AMENDED PLEADING

The Verdiers argue that the Bosts cannot amend their pleadings to avoid the sanctions imposed by RCW 4.24.510. We disagree.

[4] Because RCW 4.24.525 is unconstitutional, Verdiers's claims on appeal pertaining to RCW 4.24.525 are moot. Therefore, we address only the claims related to RCW 4.24.510.

A party may amend a pleading at any time before a responsive pleading is served or, if the pleading is one that does not require a response and the matter is not on the trial calendar, at any time within 20 days after the initial pleading is served. CR 15(a). Otherwise, the party may amend its pleading only with permission of the court or by written consent of the other party. CR 15(a). The court is required to freely give the requesting party leave to amend when "justice so requires." CR 15(a). The amended complaint supersedes the original complaint. *Henne v City of Yakima*, 177 Wn. App. 583, 588, 313 P.3d 1188 (2013), *rev'd on other grounds*, 182 Wn.2d 447 (2015).

Here, there is no evidence in the record that the Verdiers ever responded to any of the Bosts's pleadings asserting their affirmative defenses and counterclaims. CR 15 allows a party to amend a pleading at any time before receiving a response, and if a response is not required, then within 20 days of filing. The Bosts's asserted affirmative defenses and counterclaims required a response from the Verdiers, and because there is no evidence that they ever did respond, the Bosts's second amended answer filed after the motion to strike is a proper pleading. Thus, under CR 15, the Bosts had a right to amend their pleading to remove the offending allegations. Therefore, even if RCW 4.254.510 provided a means of recovery if the Verdiers successfully defended the SLAPP lawsuit, the amended pleadings rendered their claims moot, and the trial court properly denied the Verdiers's motion to strike and request for statutory damages, reasonable expenses, and attorney fees under RCW 4.24.510. Accordingly, we affirm.

ATTORNEY FEES

Both parties request attorney fees under RAP 18.1 should they prevail on appeal.[5] Neither the Verdiers nor the Bosts are entitled to attorney fees on appeal.

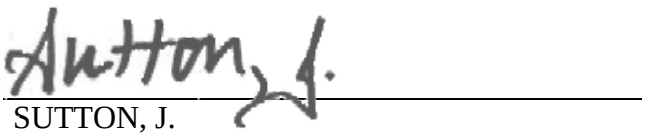
A prevailing party may recover attorney fees only if provided by statute, agreement, or equitable principles. *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 84, 96 P.3d 454 (2004). RAP 18.1 requires more than just a bald request for attorney fees, and the party requesting fees must provide argument and citation to authority to support their request. *In re Marriage of Coy*, 160 Wn. App. 797, 808, 248 P.3d 1101 (2011). Here, the Bosts do provide citation to case law supporting their request. However, the authority those cases cite is RCW 4.24.525(6)(a)(i), which was ruled unconstitutional by our Supreme Court in *Davis*. 183 Wn.2d at 295-96. The remaining statute, RCW 4.24.510 provides recovery of attorney fees and costs to a "person prevailing upon the defense" of claims that violate the statute. The Bosts were not the party asserting a defense under RCW 4.24.510, and cite no other statutory authority, contract agreement, or equitable principles to support their request for attorney fees. Thus, we deny their request for attorney fees under RAP 18.1.

[5] The Bosts cite to *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1117 (W.D. Wash. 2010) and *Davis v. Cox*, 180 Wn. App. 514, 551, 325 P.3d 255 (2014), *reversed*, 183 Wn.2d 269 (2015), which provide that the prevailing party on appeal is entitled to attorney fees under RCW 4.24.525(6)(a)(i).

CONCLUSION

We hold that, because RCW 4.24.525 is unconstitutional, the Verdiers's claims under RCW 4.24.525 are moot. Further, we hold that the Bosts's amended pleadings were proper, thus, the Verdiers's claims under RCW 4.24.510 are also moot. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



SUTTON, J.

We concur:

BJORGEN, A.C.J.

MELNICK, J.