IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORMAN WHERRETT, an individual; and ANABELLA WHERRETT, an individual)

Appellants and Cross Respondents,)

v.)

LAVONNE EKREN, an individual; MARY WHITE, an individual; and DAVID WHITE, an individual,)

Respondents and Cross Appellants,)

MARLIS CROSSON,)

Respondent,)

ADRIENNE ZUCKERBERG, and individual; and KATHY ADMIRE, an individual,)

Defendants.)

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No. 65914-6-I
(consolidated with
No. 66110-8-I)

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 21, 2012

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Appelwick, J. — Tensions arose among neighbors in a Redmond cul-de-sac after the Wherretts began parking numerous vehicles and buses on their property and on the street. Tensions heightened as the neighbors petitioned the city to change parking ordinances. Eventually, the neighbors obtained antiharassment orders against Norman Wherrett and made repeated complaints to the Redmond Police Department and the city's code compliance office. The Wherretts sued the neighbors for harassment. The trial court granted summary judgment against the Wherretts, determining that the neighbors had immunity for their communications with government entities under state anti-SLAPP statutes. However, the court denied statutory damages against the Wherretts. We affirm the order of summary judgment and award of

attorneys' fees, but remand for further findings relative to bad faith that are necessary to resolve the issue of statutory damages.

FACTS

In 2004, Norman and Anabella Wherrett moved into a new home in Redmond. Mary White, David White, LaVonne Ekren, and Marlis Crosson (collectively, the neighbors) all live in the same cul-de-sac as the Wherretts. David White is Mary White's adult son and caretaker.

In 2007 or 2008, Norman Wherrett began to collect vehicles and buses. He parked them on the Wherretts' property and on the street. The neighbors became frustrated about the eyesore, and started petitioning for changes to city parking ordinances.

In 2008, Norman Wherrett accused David White of damaging vehicles on the Wherretts' property. Wherrett then sought an antiharassment order. After the district court denied the request, David White succeeded in obtaining a temporary antiharassment order against Wherrett on August 18, 2008. White obtained a 1 year antiharassment order on September 10, 2008. On May 5, 2009, Crosson obtained a temporary antiharassment order. Crosson and Ekren each obtained 90 year antiharassment orders on July 28.

Both before and after they obtained antiharassment orders, the neighbors made numerous complaints to the Redmond Police Department (RPD) and the city code compliance office. Most of their early communications are complaints to the RPD about the Wherretts' vehicles. Other calls to the RPD allege that Norman Wherrett was

tampering with mailboxes, that he was at home even though he had told the court he would be out of town, and that Norman Wherrett was violating an antiharassment order. The neighbors also wrote e-mails to each other, to a code compliance officer and an RPD officer who were familiar with the ongoing situation, and to the organizer of a volunteer emergency response team that Wherrett was training to become a part of.

In addition to their communications, the neighbors have monitored the Wherretts' activities, including keeping track of where they park their vehicles. They have taken pictures of the Wherretts' yard and vehicles. In a call to the RPD, David White said he had videotape of Norman Wherrett tampering with mailboxes. Also, Ekren purposely walks on the sidewalk in front of the Wherretts' home, even though she has an antiharassment order against Norman Wherrett and she could cross the street and walk on the other side.

The Wherretts sued Ekren, Crosson, and the Whites for civil harassment, malicious harassment, intentional infliction of emotional distress, and negligent infliction of emotional distress. They later agreed to dismiss the malicious harassment claim.

The trial court granted summary judgment in favor of Ekren, Crosson, and the Whites. It found that the defendants were immune pursuant to RCW 4.24.510, Washington's anti-strategic lawsuits against public participation (anti-SLAPP) statute. It awarded attorney fees, but denied their requests for statutory damages. The Wherretts appeal the order granting summary judgment. Ekren and the Whites cross-appeal the denial of statutory damages.

DISCUSSION

I. The anti-SLAPP Statute Does Not Contain a Good Faith Requirement

RCW 4.24.510 immunizes persons who communicate a complaint or information to a branch or agency of federal, state, or local government that is reasonably of concern to the agency. It was enacted in response to legislative concern that lawsuits were being used to intimidate citizens from exercising their rights under the First Amendment and article I, section 5 of the Washington State Constitution to report potential wrongdoing to government agencies. Segaline v. Dep't of Labor & Indus., 169 Wn.2d 467, 473, 238 P.3d 1107 (2010).

The stated legislative purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies. RCW 4.24.500. Former RCW 4.24.510 (1989) expressly required that the protected communications be made in good faith. But, the legislature eliminated the good faith language in a 2002 amendment. Laws of 202, ch. 232, § 2. And, it modified a provision that awards $10,000 in statutory damages to a successful defendant, as applicable "unless the court finds that the complaint or information was communicated in bad faith.[1] Id.

[1] RCW 4.24.510 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

The Wherretts argue that the statute still requires that the communications be made in good faith. They claim that the stated purpose in RCW 4.24.500 should carry through to RCW 4.24.510. Therefore, they assert that there are issues of fact regarding the neighbors' conduct and whether their communications were made in good faith.

First, statutory policy statements do not give rise to enforceable rights and duties. Bailey v. State, 147 Wn. App. 251, 263, 191 P.3d 1285 (2008). Second, the plain language of the current statute only requires the court to consider bad faith when awarding statutory damages. Bad faith is a defense that the plaintiff who fails on the underlying merits must establish to defeat an award of statutory damages. Thus, good faith is not a defense which the defendant must prove to defeat the plaintiff's claims.

Next, the Wherretts argue that, if the statute does not have a good faith element, then it is unconstitutional because it is overbroad and restricts their right of access to the courts. When the constitutionality of a statute is challenged, the statute is presumed to be constitutional, and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. Tunstall v. Bergeson, 141 Wn.2d 201, 220, 5 P.3d 691 (2000).

The 2002 amendments were made to reflect that "the United States Constitution protects advocacy to government, regardless of content or motive. Laws of 2002, ch. 232, § 1. Indeed, the United States Supreme Court has held that petitions to the government are protected regardless of intent or purpose, so long as the

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dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

communications are intended to influence government decisions. See, e.g., City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991); Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 49-60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). The Wherretts have not met their burden to establish that the anti-SLAPP statute is unconstitutional beyond a reasonable doubt.

II. Summary Judgment

We review a summary judgment order de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The evidence is construed in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We review the order based solely on the record before the trial court at the time of the motion for summary judgment. RAP 9.12; Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). But, the order may be affirmed on any grounds raised below and properly before this court. Tropiano v. City of Tacoma, 105 Wn.2d 873, 876-77, 718 P.2d 801 (1986).

The Wherretts claim that, even if the anti-SLAPP statute does not require that communications be made in good faith, their claims can still survive. They argue that there is no immunity for the neighbors' conduct and communications with nongovernment parties, and that some communications were not of reasonable concern to the applicable agency.

A. Civil Harassment

The Wherretts acknowledge that they are statutorily precluded from recovering damages for civil harassment under chapter 10.14 RCW. Nevertheless, they contend their claim can survive because they requested an antiharassment order, and the anti-SLAPP statute does not preclude equitable remedies, such as an antiharassment order.

First, the Wherretts' claim that they requested an antiharassment order is dubious. In their complaint, the Wherretts specifically requested monetary damages and added that they "will also seek leave of this court for appropriate orders to restrain and/or prohibit further harassing conduct." They did not request an antiharassment order.

Second, they rely on Emmerson v. Weilep, in which the court held that RCW 4.24.510 does not apply to a petition for a temporary protection order, because it is not a civil action for damages. 126 Wn. App. 930, 937, 110 P.3d 214 (2005). Their reliance ignores that this case *is* a civil action for damages. The Wherretts' civil harassment claim necessarily fails. They remain free to separately petition for antiharassment orders against the neighbors.

B. Negligent Infliction of Emotional Distress

To succeed on their negligent infliction of emotional distress claim, the Wherretts must prove (1) duty, (2) breach of that duty, (3) proximate cause, (4) damage or injury, and (5) objective symptomatology that is susceptible to medical diagnosis and proven by medical evidence. Hunsley v. Giard, 87 Wn.2d 424, 434-36, 553 P.2d 1096 (1976); Hegel v. McMahon, 136 Wn.2d 122, 135, 960 P.2d 424 (1998).

The Wherretts' claim fails as a matter of law because they have not provided

any evidence, or even allegations, of objective symptomatology that would allow their case to go forward. The sole basis for their claim is a portion of Norman Wherrett's declaration in which he says that his family has seen a psychiatrist "for stress from these incidents" and that their young daughter has exhibited inappropriate and aggressive behavior. That claim is insufficient to establish objective symptomology. The neighbors were entitled to summary judgment.

C. Intentional Infliction of Emotional Distress

The Wherretts' intentional infliction of emotional distress claim requires (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) resulting in actual severe emotional distress. Snyder v. Med. Serv. Corp. of E. Wash., 98 Wn. App. 315, 321, 988 P.2d 1023 (1999), aff'd, 145 Wn.2d 233, 35 P.2 407 (2000). If reasonable minds could not differ in determining that the conduct is not extreme and outrageous, then summary judgment is appropriate. Id. at 322. The Wherretts argue that their claim should survive based on the neighbors' conduct, communications between the neighbors and nongovernment parties, and communications that were not reasonably of concern to an agency. We hold that summary judgment was proper.

1. Ekren

Ekren called the RPD two times. On June 21, 2008, she reported that Norman Wherrett threatened her with a lien, and requested officer contact. On May 16, 2009, Ekren alleged that she walked by Norman Wherrett, who was outside washing his car, and he made disparaging comments and pig calls. In the context of the ongoing altercations, and the RPD's involvement, these calls were of reasonable concern to the

agency.

Ekren also sent e-mails to police officers and city officials. She wrote to a police officer who was aware of the ongoing situation that Wherrett growled at her that morning. She wrote to a code compliance officer that the Wherretts had machinery on their property, and it looked like they were building a second driveway. She wrote to a police officer and a code compliance officer that Norman Wherrett was harassing service people, and specifically that he had approached a tow truck driver in the cul-de-sac. As it turns out, not all of her allegations were true. But, given the ongoing altercations with Norman Wherrett and the continuing dialogue about parking ordinances, her communications were of reasonable concern to the RPD and the code compliance officer.

In May 2009, Norman Wherrett was training to become a member of the Community Emergency Resource Team (CERT). Ekren e-mailed the CERT volunteer coordinator and contact person. She expressed concern that Norman Wherrett would believe he acquired new rights by being part of the team, asked if the program conducted background checks, and relayed that she had "heard that records exist in more than one court in King County." The Wherretts' argument that there is no immunity for that e-mail presupposes, without argument or explanation, that there is no immunity for communications made to a volunteer acting on behalf of the local government. Regardless, the e-mail does not evidence extreme and outrageous conduct. Ekren merely expressed her concern about Norman Wherrett's participation in the program, and relayed a piece of gossip about his criminal background.

Ekren also wrote e-mails to other neighbors. In one, neighbor Kathy Admire told

Ekren that the first strategy of war is to divide and conquer, and that the Wherretts had won because the neighbors were beginning to disagree about how far to push them. In another, Ekren relayed to another neighbor that Admire had seen someone looking under the car covers on the Wherretts' property and speculated that perhaps they were now perpetrating insurance fraud. At best, those e-mails provide marginal evidence about the neighbors' motivations and tactics. But, that purpose is immaterial. The anti-SLAPP statute does not require good faith. And, those e-mails were not communicated to Wherrett. They were obtained in discovery. They could not have formed the predicate of the complaint.

Further, Ekren's conduct was not extreme and outrageous. The Wherretts argue that Ekren walked on their side of the street, when she could have easily walked on the other side of the street. Although it would have been prudent to cross the street, walking on a public sidewalk does not entitle the Wherretts to maintain a lawsuit against her. The Wherretts also argue that the neighbors kept them under surveillance by taking pictures of the Wherretts' vehicles and yard, and possibly making a video tape of Norman Wherrett tampering with mailboxes. The neighbors took the pictures to document where the Wherretts were parking their vehicles, which was necessary due to their ongoing dialogue with city officials. All of the photographs and the video tape were taken of things clearly in public view. This conduct cannot be used to maintain the Wherretts' claims against any of the neighbors.

2. Crosson

Crosson called the RPD six times. On June 18, 2007, Wherrett moved Crosson's garbage cans. They had an altercation, and Crosson asked the RPD to

come and tell Wherrett to stay off her property. On October 9, 2007, she called the RPD to report that it looked like Wherrett was selling cars on the street. On February 18, 2008, she called to report that Wherrett had 17 cars parked on the street and she was worried that an aid car or fire truck could not pass through. On May 19, 2008, she called to report that Wherrett was removing mailbox posts. On May 7, 2009, Wherrett approached Crosson's daughter and said good morning. Crosson called because she felt threatened. On August 2, 2009, Crosson called after she found Wherretts' garbage cans in front of her yard, and thought it was a violation of her antiharassment order. Crosson had immunity for each of those calls because they were about acts which were of reasonable concern to the RPD.

After Wherrett approached Crosson's daughter, Crosson wrote an e-mail to Ekren advising her that they should call the police anytime Wherrett approaches their friends or family. That e-mail is not probative of any relevant issue.

3. Mary and David White

The Whites made nine calls to the RPD. On August 3, 2006, David and Mary called to report that Wherrett had been going through the neighborhood mailboxes a few weeks earlier. On May 19, 2008, David called to say he had video of Norman Wherrett destroying mailboxes. On August 18, 2008, David obtained a temporary antiharassment order against Wherrett. On August 23, 2008, David called because Wherrett had parked his car in front of the Whites' residence and alleged that Wherrett had to stay 100 feet away pursuant to an antiharassment order. The officer who responded noted that the judge had specifically declined David's request to put in a distance restriction. On August 30, 2008, David called to report that Wherrett had told

a judge he could not come to court because he was out of town, but that he was actually home. David acknowledged that he only saw Wherrett's car, and did not actually see Wherrett. On August 31, 2008, David called again to say he saw Wherrett moving his cars and covering them up. On September 10, 2008, David obtained a 1-year antiharassment order. The order provided that Wherrett could not come within 10 feet of David. On September 27, 2008, David called because Wherrett parked a car within 10 feet of White's residence, and walked to the middle of the street and took a picture of David. The responding officer determined there was no violation. On January 18, 2009, David called and said he saw Wherrett place a bag on the curb with a body in it. David admitted he got carried away with his thoughts. On March 21, 2009, he called after Wherrett picked up a branch that had fallen from one of Crosson's trees and threw it back into Crosson's yard. He believed Wherrett had violated the antiharassment order that was by then in place. On May 8, 2009, David called because Wherrett was talking to the Whites' yard worker. The responding officer determined there was no violation because Wherrett didn't come onto the property, contact David, or come within ten feet of David.

These calls were all of reasonable concern to the RPD. David White's claim that Wherrett placed a body on the sidewalk lacked a basis in fact. But, good faith is not a prerequisite to immunity. While the lack of basis in fact may go to the issue of statutory damages, that call alone is not sufficiently extreme or outrageous to allow the Wherretts to survive summary judgment.

III. Statutory Damages

A party that defeats a lawsuit because it had immunity pursuant to RCW

4.24.510 is entitled to $10,000 in statutory damages. However, the trial court may disallow the damages if it finds that the party acted in bad faith. RCW 4.24.510. The trial court summarily denied Ekren, Crosson, and the Whites' request for statutory damages below without making specific findings that they acted in bad faith. This was error. The Whites and Ekren cross appeal the trial court's denial of their request for statutory damages.

To support its denial of statutory damages, the trial court should have entered findings on whether or not any of the actions were taken in bad faith. As to Mary White, it is unclear that she made any communications at all. The RPD call log suggests there was one call made by both Mary and David White. The rest of the calls are from David White alone. The Whites specifically argue that Mary is entitled to statutory damages because she did not make any communications at all. Mary White was granted summary judgment and prevailed. Unless Wherrett establishes she acted in bad faith, she is entitled to statutory damages.

We remand for the trial court to enter appropriate findings as to the bad faith of each of the defendants based on the summary judgment record.

IV. CR 11 Sanctions

After winning on summary judgment below, the Whites asked for CR 11 sanctions. The trial court denied the request, ruling that the Whites failed to show (1) that the action was not well grounded in fact, (2) that it was not warranted by law, or (3) that plaintiffs' counsel failed to conduct a reasonable inquiry into the factual or legal basis of the action.

CR 11 sanctions may be imposed if an attorney brings claims that are baseless

and signed without reasonable inquiry. Bryant v. Joseph Tree Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). A claim is baseless if it is (a) not well-grounded in fact, or (b) not warranted by existing law or a good faith argument for the alteration of existing law. Id. The attorney's reasonable inquiry is judged based on the time available to the signer, the extent of the attorney's reliance on the client's factual assertions, whether the attorney accepted the case from another attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying the claim. Id. at 220-21. Sanctions should be imposed only when it is patently clear that a claim has absolutely no chance of success. In re Cooke, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). Sanctions are not appropriate when an action is undertaken as a good faith argument for the extension, modification, or reversal of existing law. Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 121-22, 780 P.2d 853 (1989).

We use an objective standard to determine whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. Madden v. Foley, 83 Wn. App. 385, 390, 922 P.2d 1364 (1996). We will only overturn a trial court's denial of CR 11 sanctions for an abuse of discretion. Fluke Capital & Mgmt. Svs. Co. v. Richmond, 106 Wn.2d 614, 625, 724 P.2d 356 (1986).

The trial court did not abuse its discretion by denying CR 11 sanctions. Plaintiffs' counsel argued for a different statutory interpretation of the anti-SLAPP statute and its 2002 amendments. It was not an abuse of discretion to conclude that it was a good faith argument. We will not award sanctions merely because his theory failed.

V. Attorney Fees

Ekren, Crosson, and the Whites request reasonable attorney fees for this appeal pursuant to RCW 4.24.510 and RAP 18.1. We award them reasonable fees and expenses incurred in defending the Wherretts' appeal.

We affirm summary judgment dismissing the Wherretts' claims, and remand for further findings relative to bad faith that are necessary to resolve the issue of statutory damages.

Appelwick, J.

WE CONCUR:

Cox, J.

Becker, J.