

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

WILLIAM D. WEBSTER,

Appellant,

v.

SOMDET WEBSTER, SAMUEL K.  
FLOWER, and SUE KUMLUE, dba  
ORIGINAL THAI TASTE,

Respondents.

No. 40588-1-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — William D. Webster appeals the trial court’s summary judgments in favor of Somdet Webster and Samuel Flower and its order granting a CR 12(c) motion in favor of Sue Kumlue.<sup>1</sup> William<sup>2</sup> filed a complaint with Pierce County Superior Court alleging Somdet, Flower, and Kumlue committed multiple torts including abuse of process, loss of consortium, defamation, false light, violation of his constitutional rights, and conspiracy arising out of his arrest for a violation of a temporary protection order. The trial court dismissed all of William’s

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<sup>1</sup> William Webster incorrectly spells Sue Kumlue’s name in all of his briefs both in this court and at the trial court. We use the correct spelling of her name except when quoting directly from his briefs.

<sup>2</sup> We use the Websters’ first names for clarity.

claims. William appeals, arguing that the trial court erred in finding that his claims failed as a matter of law; were barred by the statute of limitations, the Washington anti-“Strategic Lawsuit Against Public Participation” (SLAPP) statute, RCW 4.24.510, and the witness immunity doctrine; or were a collateral attack on prior decisions in the marriage dissolution between William and Somdet. William also argues that the trial court improperly struck his response to the defendants’ summary judgment motion and erred by not granting his motion to continue. Finally, William makes multiple allegations about the trial judge’s conduct, potential bias, and the defendants’ attorneys. We hold that the trial court properly granted the summary judgment motions and the CR 12(c) motion and the remainder of William’s claims lack merit. We affirm.

#### FACTS

William and Somdet married in Ketchikan, Alaska, on August 30, 1995. William and Somdet had one child, W.S.W. On January 29, 2007, William and Somdet separated. William was served with a petition for dissolution on March 9. As part of the dissolution proceeding, Somdet received a protection order against William from the Kitsap County Superior Court on February 8; the court specifically found that William had committed acts of domestic violence as defined in RCW 26.50.010. On May 24, 2007, William filed a petition for declaration concerning marriage validity and on July 23, 2008, William filed a petition for protection against Somdet. The trial court found insufficient evidence to support William’s claim that the marriage was invalid and denied William’s petition for a protection order against Somdet because the testimony and evidence did not support a finding that Somdet had committed acts of domestic violence.

Kitsap County Superior Court dissolved the marriage on June 13, 2008. The trial court entered findings of fact and conclusions of law and created a parenting plan, which established

Somdet as the primary residential parent. The trial court also made a specific finding that Somdet's relationship with another man began after William and Somdet separated, and that Somdet's new relationship had no negative impact on W.S.W.

William appealed the final dissolution decree and Division One of this court affirmed. *In re Marriage of Webster*, noted at 153 Wn. App. 1031 (2009), *review denied*, 169 Wn.2d 1003 (2010).

After the decree of dissolution was affirmed, William filed multiple lawsuits related to the dissolution proceeding,<sup>3</sup> including this action filed in Pierce County Superior Court on September 24, 2009, against Somdet, Kumlue, and Flower. The complaint alleged abuse of process, conspiracy to abuse process, intentional and malicious infliction of emotional and economic distress, conspiracy to inflict emotional and economic distress, outrage, false light, defamation of character, loss of consortium, violation of civil rights, and conspiracy to violate civil rights. The complaint was based on the following facts as set out in William's brief to the trial court:

1. Somdet had an adulterous affair with Flower while married to William.
2. On January 26, 2007, Somdet applied for a temporary restraining order alleging William poured hot water on her leg.
3. Flower helped Somdet fill out the restraining order while in Kumlue's restaurant, Original Thai Taste.
4. On January 29, 2007, Somdet and Flower called the Kitsap County Sheriff's Office from Original Thai Taste and reported William was violating the restraining order. William alleges that Somdet falsely reported that he called her cell phone and made false allegations to the Kitsap County Sheriff's Department in order to have him arrested.
5. After Somdet and Flower called the Kitsap County Sheriff's Office, Kumlue called William in order to "lure" William out of his house so he could be arrested.

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<sup>3</sup> See, e.g., *Webster v. Costello*, 2008 WL 2856912 (W.D. Wash. Jul. 17, 2008) (dismissed); *Webster v. Holman*, 2009 WL 1160242 (W.D. Wash. Apr. 27, 2009) (dismissed).

On January 19, 2010, Somdet filed a motion for summary judgment. On January 20, 2010, Flower filed a motion for summary judgment. On February 2, 2010, Kumlue filed a CR 12(c) motion for judgment on the pleadings. The motions were noted for hearing on February 19, 2010. On February 12, 2010, William filed a motion to dismiss defendants' motion for summary judgment. The trial court treated William's motion as a response to summary judgment.

On February 19, 2010, Pierce County Superior Court Judge Frank Cuthbertson heard the parties' oral arguments on all of the defendants' motions. At the beginning of the hearing, Judge Cuthbertson informed all of the parties that 10 years earlier he had been employed by Gordon Thomas Honeywell, the law firm representing Somdet. Judge Cuthbertson noted that he had never met the attorney representing Somdet and that he believed he could be fair and impartial. Judge Cuthbertson then gave William the opportunity to object. William responded, "Your Honor, you're admitting this. I find that very honorable. I have no objections." Report of Proceedings (RP) at 5.

The defendants then requested that the trial court strike William's response brief as being untimely. The trial court agreed and granted the defendants' request to strike William's reply brief. Argument then proceeded on the merits. The defendants argued that all of William's claims failed as a matter of law; Somdet, Flower, and Kumlue were immune from suit based on Washington's anti-SLAPP statute and the witness immunity doctrine; and William's claims for defamation and false light were barred by the statute of limitations.

At the start of his response argument, William stated that he wanted to read a written statement. The trial court responded that William had seven minutes for oral argument. William responded, "I'll be quick, Your Honor." RP at 21. William then began his argument by stating,

Legal Voice, an ultra-feminist, homosexual, pseudo-law firm is piling whitewash on this case. Look at the pile of whitewash they've filed with the Court to muddle the case.

.....

. . . Defendants and homosexual attorneys say I'm a vexatious litigator. I've only been trying to defend myself against injustice done to me.

RP at 21-22. William's argument essentially consisted of reiterating the "facts" set forth in his complaint instead of responding to the defendants' legal arguments. He also listed multiple pieces of alleged evidence that were either stricken by the court or not presented. The trial court explained to William that under the summary judgment rule, he had to properly produce the evidence in court, which William failed to do. At that point, William stated that he did not know he was required to submit evidence and asked for a continuance. He then commenced with oral argument without the judge making any ruling on his continuance request.

The trial court then granted Kumlue's motion, finding that nothing in the pleadings or factual allegations suggested an actionable wrongdoing. Similarly, the trial court granted Flower's motion for summary judgment because Flower's actions did not constitute any actionable wrongdoing. Specifically, the trial court found that (1) there is no cause of action for loss of consortium, (2) the claims for defamation and false light were time barred, and (3) any civil rights claims were barred because Flower is a private actor. The trial court granted Somdet's motion for summary judgment for essentially the same reasons. The trial court also found that the bases for many of the claims were a collateral attack on the dissolution proceedings, and the abuse of process claims were barred by the anti-SLAPP statute.

After making its ruling, the trial court made the following statement to William:

One other thing, we don't make rulings -- and I let this go, but it is really, unless you can support it and even if you can support it, it's improper, to make allegations about, you know, members of the court's sexual preferences or alleged

sexual preferences or whether this is lesbian-gay conspiracy, that from what I have heard has no merit. It's inappropriate and has no place in court and that would be, you know, were you not pro se, I would certainly impose sanctions based on that conduct.

RP at 38. Later, the trial court granted the defendants' motions for attorney fees. William timely appeals the orders granting summary judgment and Kumlue's CR 12(c) motion.

## DISCUSSION

### Order Granting Summary Judgment in Favor of Somdet and Flower<sup>4</sup>

We review summary judgment orders de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005)). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). And we consider all facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Atherton*, 115 Wn.2d at 516.

The parties did not dispute the facts that William alleged and the trial court determined that there were no disputed facts presented at the motion hearing. Accordingly, the legal merits of William's claims are discussed below.

#### A. Abuse of Process

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<sup>4</sup> To avoid unnecessary repetition, the claims against Somdet and Flower will be discussed together because the claims are essentially the same, based on the same facts, and the trial court granted summary judgment based on the same theories.

William argues that Somdet and Flower committed abuse of process by filing a protection order against him and then having the Kitsap County Sheriff's Office arrest him for a violation of that order. William argues that the protection order was based on perjury and that Somdet and Flower lied to the police when reporting the violation of the protection order to the Kitsap County Sheriff's Office. William also alleged that Somdet and Flower took these actions with the intent to send him to jail and use his house for their adulterous affair. Somdet and Flower argue that the trial court properly granted summary judgment on this claim because (1) William failed to show some additional act that demonstrated an abuse of process, (2) they are immune from suit under Washington's anti-SLAPP law, and (3) Somdet is immune from suit under the witness immunity doctrine.

To establish an abuse of process claim, the plaintiff must show (1) the existence of an ulterior purpose to accomplish an object not within the proper scope of process, and (2) an act in the use of process not proper in the regular prosecution of the proceedings. *Fite v. Lee*, 11 Wn. App. 21, 27, 521 P.2d 964, *review denied*, 84 Wn.2d 1005 (1974). A malicious motive alone is not sufficient to establish an abuse of process claim. *Fite*, 11 Wn. App. at 27-28.

William's allegation *only* assigns a malicious or wrongful motive behind Somdet and Flower's use of process that does not give rise to a cause of action. *Fite*, 11 Wn. App. at 27-28. Reporting a violation of a protection order, even with a malicious motive, would be the type of action that is proper in the regular prosecution of such proceedings. William would have had to demonstrate some additional improper act to establish a valid abuse of process claim and he has not. Accordingly, the trial court properly granted the defendants' motion for summary judgment.

B. Loss of Consortium

William also alleges that the “adulterous affair” between Somdet and Flower resulted in a loss of consortium. But the Washington Supreme Court has explicitly abolished such a claim. *Lund v. Caple*, 100 Wn.2d 739, 747, 675 P.2d 226 (1984) (“Therefore, we hold the prohibition of alienation of affections actions extends to those cases in which a lone spouse sues a third party for alleged sexual misconduct with his or her spouse and seeks only loss of consortium damages.”); *see also Wyman v. Wallace*, 94 Wn.2d 99, 100, 615 P.2d 452 (1980) (abolishing the action for alienation of affections). Because loss of consortium is not recognized as an actionable claim in Washington, the trial court properly granted summary judgment.

C. Intentional Infliction of Emotional and Economic Distress/Outrage

William alleges both intentional infliction of emotional and economic distress and outrage in his complaint. Under Washington law, intentional infliction of emotional distress and the tort of outrage are considered the same cause of action. *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003) (citing *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 250, 35 P.3d 1158 (2001)).

The tort of outrage includes three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (citing *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)). The defendant’s conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Reid*, 136 Wn.2d at 202 (emphasis omitted) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975)). The plaintiff must also be physically present at the time



of the tortious conduct. *Reid*, 136 Wn.2d at 203.

William alleges that Somdet and Flower obtained a protection order against him to have him thrown in jail so they could use his house to carry on their adulterous affair and that if a jury heard this, it would be outraged. William alleges that if the court had considered the evidence presented in his response (which was stricken for untimeliness) and allowed him a continuance to obtain the 911 tape transcripts, he would be able to prove his claim. But none of the evidence that William sought to introduce would have raised a genuine issue of material fact as to William's presence at the time that Somdet and Flower took the alleged action. Thus, his claim for outrage fails as a matter of law and the trial court properly entered summary judgment in favor of the defendants.

D. Violation of Constitutional Rights

William alleges that Somdet and Flower violated his First and Second Amendment rights and violated his constitutional right to access his son. But a 42 U.S.C. § 1983 claim for violation of a constitutional right is cognizable only against a state actor, not against a private citizen. *See Rivera v. Green*, 775 F.2d 1381, 1384 (9th Cir., 1985) (neighbors who called the police were not acting "under color of state law" for purposes of § 1983 claim), *cert. denied*, 475 U.S. 1128 (1986). Accordingly, the trial court properly dismissed William's civil rights claims.

E. Conspiracy

William also claims that Somdet, Flower, and Kumlue conspired to commit abuse of process, outrage, and violation of his civil rights. He alleges that the conspiracy occurred when Flower helped Somdet fill out the paperwork for the protection order in Kumlue's restaurant.

To establish a civil conspiracy, William must prove by clear, cogent, and convincing

evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448, *review denied*, 131 Wn.2d 1022 (1996), *cert. denied*, 522 U.S. 949 (1997). In addition, civil conspiracy is not, by itself, an actionable claim. *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 439, 438 P.2d 867 (1968). The plaintiff must be able to show an underlying actionable claim which was accomplished by the conspiracy for the civil claim of conspiracy to be valid. *W.G. Platts*, 73 Wn.2d at 439; *N.W. Laborers-Emp'rs Health & Sec. Trust Fund v. Phillip Morris, Inc.*, 58 F. Supp. 2d 1211, 1215 (W.D. Wash. 1999).

William's claim of conspiracy fails because he has presented no valid underlying claim to support the claim of conspiracy. His complaint specifically alleges conspiracy to abuse process, outrage, and conspiracy to violate his constitutional rights. But as discussed above, both the abuse of process claim and the claim for violation of constitutional rights fail as a matter of law. Accordingly, he has failed to present any cognizable claim that can serve as a basis for the conspiracy claim and the conspiracy claim is not valid.

F. Defamation/False Light

The trial court found that William's claims for defamation and false light were barred by the statute of limitations. The statute of limitations for both defamation and false light claims is two years. RCW 4.16.100; *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 474, 722 P.2d 1295 (1986). William's claims arise from events that occurred on January 26, 2007, and January 29, 2007. To comply with the statute of limitations, William would have had to file his claims on or before January 29, 2009. William filed his complaint on September 24, 2009, approximately

eight months after the statute of limitations had run on his claims. William's claims were time barred by the statute of limitations and the trial court properly granted summary judgment dismissing these claims as a matter of law.

#### Order Granting Kumlue's CR 12(c) Motion

We review a trial court's order for judgment on the pleadings de novo. *N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 858, 974 P.2d 1257, review denied, 138 Wn.2d 1022 (1999). For a court to render judgment on the pleadings, the allegations in the pleadings must be construed strictly against the moving party and, only where it appears that there are no factual issues requiring trial and the issues can be determined as a matter of law, can a motion for judgment on the pleadings be granted. *Hodgson v. Bicknell*, 49 Wn.2d 130, 136, 298 P.2d 844 (1956). In a motion for judgment on the pleadings, the moving party admits all facts well pleaded by the nonmoving party, but not the truth of the opponent's conclusions or construction of the subject matter. *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965); *Hodgson*, 49 Wn.2d at 136. A judgment on the pleadings is appropriate only if it is clear beyond doubt that the nonmoving party can prove no set of facts that entitle him to relief. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

William's primary claim against Kumlue is that she conspired with Somdet and Flower in obtaining the protection order and having William arrested. He also alleges intentional infliction of emotional distress for the phone call she made to him on the day of his arrest. The only facts alleged against Kumlue are that (1) she operated a Thai restaurant, (2) she allowed Somdet and Flowers to fill out the documents requesting a temporary protection order in the restaurant, (3) she allowed Somdet and Flowers to use the restaurant's phone to call the police, and (4) she

called William at his house to tell him to go outside. The trial court found that Kumlue did not take any cognizable action that could give rise to liability and properly granted her CR 12(c) motion to dismiss on the pleadings.

As discussed above, William must support the conspiracy claim with a valid underlying claim. *W.G. Platts*, 73 Wn.2d at 439; *Phillip Morris*, 58 F. Supp. 2d at 1215. William has failed to do so. Therefore, his claim of conspiracy against Kumlue fails as a matter of law and it was proper for the trial court to grant Kumlue's motion on the pleadings.

William also claims outrage against Kumlue. The only action William alleges that could give rise to such a claim is the alleged phone call Kumlue made in order to "lure" William out of his house to be arrested. The trial court correctly found that this action alone does not give rise to any cognizable claim. To support a claim of outrage, the defendant's actions must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Reid*, 136 Wn.2d at 202 (emphasis omitted) (quoting *Grimsby*, 85 Wn.2d at 59-60). Kumlue's act of making a phone call, even if the purpose of the phone call truly was to lure William out of his house to facilitate his arrest, does not meet the standard of outrageous conduct. *See Saldivar v. Momah*, 145 Wn. App. 365, 390, 186 P.3d 1117 (2008) (holding that plaintiff filing a complaint, even under false pretenses, is not outrageous conduct), *review denied*, 165 Wn.2d 1049 (2009); *Keates v. City of Vancouver*, 73 Wn. App. 257, 264-65, 869 P.2d 88 (holding that officer accusing plaintiff of murdering his wife during an investigative interview was not beyond all reasonable bounds of decency), *review denied*, 124 Wn.2d 1026 (1994). Accordingly, the trial court properly dismissed William's claim for outrage against Kumlue.

### William's Additional Assignments of Error

William failed to object to any of the errors he now assigns to the trial court. Under RAP 2.5(a) we do not review errors raised for the first time on appeal unless they fall under one of the three exceptions in the rule. We will review issues raised for the first time on appeal if they allege (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief may be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). William raises the following additional errors: (1) the trial court was biased, (2) the trial court improperly granted the motion to strike his reply brief, (3) the trial court improperly denied his motion to continue, (4) the trial court improperly held William to the standard of a licensed attorney, (5) the trial court's conduct during the motion hearing was improper, (6) a Pierce County Sheriff's Deputy was brought into court to intimidate him, (7) Judge Cuthbertson is a communist and convicted felon, and (8) the defendants' attorneys are engaged in a pro bono scam. The errors alleged by William do not fall within any of the exceptions outlined in RAP 2.5(a) and we decline to address them further.

### Attorney Fees

Somdet, Flower, and Kumlue request attorney fees for this appeal. We can award attorney fees for frivolous appeals under RAP 18.9(a). An appeal is frivolous if there are no debatable issues and it is so devoid of merit there is no reasonable possibility of reversal. *Andrus v. State Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005 (2006).

William's appeal of the summary judgment motion is frivolous because his claims fail as a matter of law and he did not make any reasoned argument why this court should revisit the applicable legal standards. In some instances, there may be valid arguments challenging the

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dismissal of claims barred by the statute of limitations or that are not cognizable under the current law. But William made no such argument; his appeal focused primarily on attacking the trial judge and opposing counsel instead of addressing the legal merits of his case. William also raised numerous issues that have no basis in law or fact because he waived them by his own consent, failed to raise them at the trial court, or made allegations completely unsupported by the record. We hold that William's appeal is frivolous and grant the respondents' request for attorney fees in an amount to be determined by the commissioner of this court.

Accordingly, we affirm the trial court's grant of summary judgment in favor of Somdet and Flower and the CR 12(c) motion in favor of Kumlue.

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.

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QUINN-BRINTNALL, J.

We concur:

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HUNT, J.

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PENYOYAR, C.J.