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Judge Nicole Gaines Phelps
Trial Date: July 27, 2020

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LARGO WALES, a married woman,

Plaintiff,

No. 19-2-20274-2 KNT

v.

CITY OF AUBURN, WA, a Washington,
State municipality; NANCY BACKUS, as
Mayor of the City of Auburn, and
Individually and her marital community;
and The Committee to Elect Nancy
Backus and
its J. Doe committee members thereto; and
ROB ROSCOE and his marital
community,

Defendants.

DEFENDANTS CITY OF AUBURN,
ROB ROSCOE AND MAYOR NANCY
BACKUS' CR 12(B)(6) MOTION TO
DISMISS PLAINTIFF'S COMPLAINT

NOTED FOR HEARING:
Friday, December 6, 2019 at 9:00 a.m.

I. INTRODUCTION

This case involves claims by an elected Auburn City Councilmember against the City she was elected to serve, the City's Mayor, and a former City employee. *See, Plaintiff's Second Amend. Cmplt, Sect. II, ¶¶ 1-4, copy attached hereto as Appendix A.* Regardless of the content of her allegations, Plaintiff has failed to state any actionable claims against Defendants, and therefore her Complaint should be dismissed as a matter of law.

II. RELIEF REQUESTED

Pursuant to CR 12(b)(6), Defendants City of Auburn, Rob Roscoe, and Mayor Nancy Backus, in her professional capacity as Mayor for the City of Auburn, request the court enter

1 an order dismissing Plaintiff's Second Amended Complaint and all claims asserted therein
2 as a matter of law.¹

3 III. FACTS

4 According to her Complaint, which has now been amended twice, Plaintiff Largo
5 Wales, a member of the Auburn City Council, alleges that Defendant Rob Roscoe, the
6 former Director of Human Resources and Risk Management for the City of Auburn, met
7 with her at City Hall in 2016 to discuss a statement she had made, and to advise her to
8 "attenuate" her speech around City employees. *Plaintiff's Second Amended Complaint,*
9 *Sect. III, ¶1-2.* Councilmember Wales alleges this meeting occurred during a time that
10 Mr. Roscoe was supervised by the Mayor of Auburn, Defendant Nancy Backus. *Id.,*
11 *Sect. III, ¶3.*

12 Ms. Wales further alleges that, during a subsequent election campaign, Defendant
13 "Committee to Elect Nancy Backus" issued a campaign notice describing the meeting
14 between Roscoe and Wales as "The City of Auburn chastised Largo Wales...". *Id. Sect. III,*
15 *¶4.* Plaintiff does not allege that Ms. Backus' private campaign "Committee" has any
16 connection to the official business of the City of Auburn, and it does not.

17 Three years later, on August 1, 2019, Councilmember Wales filed this lawsuit
18 against the City of Auburn, Mayor Nancy Backus in her capacity as Mayor and as an
19 individual, and Mr. Roscoe, as well as the private Committee to Elect Nancy Backus. *See,*
20 *Plaintiff's Complaint for Damages Violation of Freedom of Speech, Right to Privacy.* She
21 then filed an Amended Complaint on September 12th, then a Second Amended Complaint on
22 September 19, 2019. *See, Plaintiff's First and Second Amended Complaints.* After further
23 fine-tuning her Complaint, Ms. Wales clarified that she is pursuing claims for damages and
24 attorney fees against Defendants based on two legal theories:

25
26
27 ¹ Plaintiff is also pursuing these same claims against Defendant Nancy Backus in her individual capacity and her marital community.

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COUNT 1-Violation of Free Speech

1. The Rosco-Wales [sic] meeting was a violation of Ms. Wales **State of Washington Constitution Fifth Section right to free speech, to wit “Every person may freely speak, write, and publish on all subjects, being responsible for abuse of that right.”** (bold in original)

COUNT 2- Violation of Right to Privacy

1. The release of said meeting contents by and between Rob Roscoe and Ms. Wales was a violation on [sic] Ms. Wales expectation of privacy, as enunciated by the Washington State Supreme Court in *State v Afana* at paragraph 15, to wit:

“...our state constitution “clearly recognizes an individual’s right to privacy with no express limitations.” *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). In contrast to the Fourth Amendment, article I, section 7 emphasizes “protecting personal rights rather thancurbing governmental actions.’ *State v. Afana*, 169 Wn.2d 169, 233 P.3d 879, 2010 Wash. LEXIS 539...”.

Article 1, section 7 of the Washington State Constitution reads as follows, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

<http://leg.wa.gov/LawsAndAgencyRules/Pages/consitution.aspx>.

Plt. Second Amend. Cmplt., p. 3 (bold in original), attached as Appendix A; *See also*, p. 4 (Demand for Relief seeking special and general damages, and statutory costs and attorney fees).

IV. EVIDENCE RELIED UPON

- Plaintiff’s Complaint for Damages Violation of Freedom of Speech, Right to Privacy (filed in King County Superior Court August 1, 2019)
- Plaintiff’s Amended Complaint for Violation of Freedom of Speech, Right to Privacy (filed filed in King County Superior Court September 12, 2019)
- Plaintiff’s 2nd Amended Complaint to Correct Scriveners Error; Violation of Freedom of Speech, Right to Privacy (filed filed in King County Superior Court September 19, 2019) (copy attached hereto as Appendix A)

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V. LEGAL AUTHORITY

A. Pursuant to CR 12(b)(6), Defendants are Entitled to Dismissal of Claims that Fail to State A Claim Upon Which Relief Can be Granted.

CR 12(b)(6) permits summary dismissal of a civil action if the complaint fails to state a claim on which relief can be granted. When ruling on a CR 12(b)(6) motion, the trial court presumes all facts alleged in the plaintiff's complaint are true. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). "If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

When a complaint fails to adequately state a cognizable legal claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Saade v. Dep't of Health*, WL 4464401, at *2 (W.D. Wash. Sept. 18, 2019). Here, regardless of the nature of any hypothetical facts alleged by Plaintiff against any Defendant, she has simply not stated a legal claim upon which she can obtain relief. Thus, her claims, which consist only of damages claims based solely on alleged violations of the Washington State Constitution, should be dismissed as a matter of law.

B. The Washington State Constitution Does Not Provide a Private Cause of Action, and Therefore Plaintiff's "Free Speech" and "Privacy" Claims Based Thereon Must Be Dismissed With Prejudice as a Matter of Law.

Plaintiff's Complaint alleges the City of Auburn, Mr. Roscoe, and Mayor Backus acted in their capacities as City agents to violate Ms. Wales' "right" to free speech and privacy based solely on the Washington State Constitution. *Plt. Second Amend. Complaint, Count I and II*. She specifies her claims are based on Wash. Const. art. I, § 5 and §7. *Id.*

However, it is well-established that no cause of action for damages exists arising from alleged violations of the State constitution. See, *Blinka v. Wash. State Bar Ass'n*, 109 Wn.App. 575, 591, 36 P.3d 1094 (2001), *rev. den.* 146 Wn.2d 1021 (2002). Washington courts have consistently rejected invitations to establish a cause of action for damages based

1 upon state constitutional violations. *Id.*; *See also, Sys. Amuse., Inc. v. State*, 7 Wn.App. 516,
2 517, 500 P.2d 1253 (1972) (while acts that violate constitutional protection may be declared
3 void by the courts, the state constitution does not provide a private cause of action); *Spurrell*
4 *v. Bloch*, 40 Wn.App. 854, 860–61, 701 P.2d 529 (1985) (no cause of action for abuse of
5 governmental position or due process violation of state constitution); *Reid v. Pierce County*,
6 136 Wash.2d 195, 961 P.2d 333 (1998).

7 Because no claim is recognized based on the Washington Constitution, claims such
8 as those alleged in Plaintiff Wales’ Second Amended Complaint are routinely dismissed as a
9 matter of law. *Blinka, supra.*; *See also, e.g. Saade v. Dept. of Health*, 2019 WL 4464401
10 (W.D.Wash. Sept. 18, 2019) (dismissing state constitutional claims pursuant to
11 FRCP 12(b)(6)); *Jackson v. Asotin Cty.*, 2019 WL 1245786, at *3 (E.D. Wash. Mar. 15,
12 2019)(no cause of action for search and seizure that violated State Constitution); *Rorvik v.*
13 *Snohomish Sch. Dist.*, at *6 (W.D. Wash. 2018), *appeal dismiss.*, 2018 WL 7575588 (9th Cir.
14 2018) (no cause of action for allegation that school officials violated student’s right to
15 privacy under the Washington Constitution); *Lewis v. Soc’y of Counsel Rep. Acc. Pers.*,
16 2013 WL 6513009, at *5 (W.D. Wash. 2013) (no cause of action for “vindicating rights
17 conferred by the state constitution” such as the right of accused to appear and defend criminal
18 charges in person).

19 After filing three version of her Complaint, Plaintiff has definitively clarified that her
20 claims against Defendants are based solely on the Washington State Constitution. However,
21 no such cause of action exists for such claims. Thus, Count I and Count II do not state any
22 cognizable claims for relief and Plaintiff’s Second Amended Complaint should be dismissed
23 as a matter of law.

24 VI. CONCLUSION

25 Based on the foregoing, Defendants request the court dismiss Plaintiff’s Second
26 Amended Complaint and the claims alleged therein with prejudice as a matter of law.

1 *I certify that this memorandum contains 1,401 words, in compliance with the*
2 *Local Civil Rules.*

3
4 DATED: November 19, 2019

KEATING, BUCKLIN & McCORMACK, INC., P.S.

5
6
7 By: /s/Jayne L. Freeman

Jayne L. Freeman, WSBA #24318

8 *Attorney for Defendants City of Auburn, Rob Roscoe,*
9 *and Nancy Backus, in Her Official Capacity as Mayor*
10 *of City of Auburn*

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Seattle, WA 98104

Telephone: (206) 623-8861

Fax: (206) 223-9423

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on November 19, 2019, a true and correct copy of the foregoing DEFENDANTS CITY OF AUBURN, ROB ROSCOE AND MAYOR NANCY BACKUS' CR 12(B)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT was e-filed with King County Superior Court served upon the parties listed below *via the King County Superior Court Efiling system and courtesy email:*

Attorney for Plaintiff

John Max Torres Jr., WSBA #26287
AUBURN LAW OFFICES PLLC
220 1st Street NE
Auburn, WA 98002-5052
Phone: (253) 288-8015
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Attorney for Defendant Nancy Backus, in Her Individual Capacity

Scott Wakefield, WSBA #11222
WAKEFIELD & KIRKPATRICK, PLLC
17544 Midvale Avenue North, Suite 307
Shoreline, WA 98133
phone: (206) 629-5489
fax: (206) 629-2120
Email: swakefield@wakefieldkirkpatrick.com
esolbrig@wakefieldkirkpatrick.com

DATED this 19th day of November, 2019, at Seattle, Washington.

/s/ LaHoma Walker
LaHoma Walker, Legal Assistant

Appendix A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

| | | |
|---|---|--------------------------------------|
| LARGO WALES, a married woman, |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| v. |) | No. 19-2-20274-2 KNT |
| |) | |
| CITY OF AUBURN, WA, a Washington |) | 2 ND AMENDED COMPLAINT TO |
| State municipality; NANCY BACKUS, as |) | CORRECT SCRIVENERS ERROR; |
| Mayor of the City of Auburn, and |) | VIOLATION OF FREEDOM OF |
| Individually and her marital community; and |) | SPEECH, RIGHT TO PRIVACY |
| The Committee to Elect Nancy Backus and |) | |
| its J. Doe committee members thereto; and |) | |
| ROB ROSCOE and his marital community, |) | |
| |) | |
| Defendants |) | |
| |) | |

Plaintiff LARGO WALES alleges:

I. JURISDICTION

1. This court has jurisdiction over the case pursuant to RCW 2.08.010.

II. PARTIES AND VENUE

1. Plaintiff LARGO WALES (Ms. Wales) resides in KING County, Washington and is a City of Auburn, WA Council member;
2. The City of Auburn is a Washington municipality co-located in King and Pierce Counties;
3. Rob Roscoe was the City of Auburn Director of Human Resources and Risk Management during the period complained of; and

1
2 4. Nancy Backus is the Mayor of the City of Auburn, WA.
3

4 III. FACTUAL ALLEGATIONS
5

- 6 1. On or about September 2016, Rob Roscoe held a meeting with Ms. Wales on City property.
7 Said meeting was called by Rob Roscoe and attended only by he and Ms. Wales.
8
9 2. During said meeting Rob Roscoe complained about a statement, allegedly made by Ms. Wales
10 in an open, non-government, forum and advising Ms. Wales that her speech should be
11 attenuated.
12
13 3. Rob Roscoe reported directly to Mayor Nancy Backus during September 2016.
14
15 4. Whereas the Roscoe – Wales discussion was private any characterization of its ends and
16 means would be unknown and speculative. However, Nancy Backus’ Committee to Elect
17 Nancy Backus issued a campaign notice describing the Roscoe – Wales interaction as “The
18 City of Auburn chastised Largo Wales....”
19

20 COUNT I – Violation of Free Speech
21

- 22 1. The Rosco – Wales meeting was a violation Ms. Wales **State of Washington Constitution**
23 **Fifth Section right to free speech, to wit “Every person may freely speak, write and**
24 **publish on all subjects, being responsible for the abuse of that right.”**
25
26 2. Mr. Roscoe was acting under color of law for the City.
27
28 3. Mr. Roscoe’s meeting with Ms. Wales served no legitimate city business.
29
30 4. Any Roscoe complained of allegations against Ms. Wales was based on hearsay.
31
32 5. The later release of said meeting contents came from Rob Roscoe, ostensibly to Nancy
33 Backus, and finally the Committee to Elect Nancy Backus.
34
35 6. Ms. Wales ultimately suffered damage to reputation from the Roscoe meeting, which was
36 illegitimately released and ultimately intentionally misused.
37
38 7. Rob Rosco proximately caused Ms. Wales damages by infringing on her right to exercise free
39 speech.
40
41 8. Nancy Backus proximately caused Ms. Wales damages by releasing the Roscoe – Wales
42 meeting alleged content to her Committee to elect her as Mayor.
43

- 1 9. Nancy Backus, as Mayor of the City of Auburn, violated Ms. Wales right to free speech by
2 using her position to create unfavorable information on a political opponent and then releasing
3 said information that Backus would not have had in her possession but for her position as
4 Mayor.
5
6 10. The Committee to Elect Nancy Backus and its members proximately caused the damages to
7 Ms. Wales by using information it knew or should have known was ill gotten.
8
9 11. Defendants Roscoe, Backus, the City of Auburn, and the Committee to Elect Nancy Backus
10 and its members, are jointly and severally liable to plaintiff in an amount to be proved at trial.
11

12 **COUNT II – Violation of Right to Privacy**
13

- 14 1. The release of said meeting contents by and between Rob Roscoe and Ms. Wales was a
15 violation on Ms. Wales expectation of privacy, as enunciated by the Washington State
16 Supreme Court in *State v Afana* at paragraph 15, to wit:
17

18 “... our state constitution “clearly recognizes an individual's right to privacy with no
19 express limitations.” *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). In contrast
20 to the Fourth Amendment, article I, section 7 emphasizes “protecting personal rights
21 rather than ... curbing governmental actions.” *State v. Afana*, 169 Wn.2d 169, 233 P.3d
22 879, 2010 Wash. LEXIS 539, 169 Wn.2d 169, 233 P.3d 879, 2010 Wash. LEXIS 539
23

24 **Article 1, section 7 of the Washington State Constitution reads as follows, “No**
25 **person shall be disturbed in his private affairs, or his home invaded, without**
26 **authority of law.”** <http://leg.wa.gov/LawsAndAgencyRules/Pages/constitution.aspx>
27

- 28 2. There were no other attendees to the Roscoe – Wales meeting so anything said therein could
29 have been factually true or false.
30
31 3. Ms. Wales ultimately suffered damage to reputation from the Roscoe meeting when its
32 alleged substance was illegitimately released and ultimately intentionally misused.
33
34 4. Rob Rosco proximately caused Ms. Wales damages by infringing on her right to privacy by
35 releasing any version of the meeting substance.
36
37 5. Nancy Backus violated Ms. Wales right to privacy and proximately caused Ms. Wales
38 damages by releasing the alleged Roscoe – Wales meeting content to her Committee to elect
39 her as Mayor.
40
41 6. Nancy Backus, as Mayor of the City of Auburn, violated Ms. Wales right to privacy by using
42 her position to create unfavorable information on a political opponent and then releasing said
43 information Backus would not have had in her possession but for her position as Mayor.
44

- 1 7. The Committee to Elect Nancy Backus and its members violated Ms. Wales right to privacy
2 and proximately caused the damages to Ms. Wales by using information it knew or should
3 have known was ill gotten.
4
5 8. Defendants Roscoe, Backus, the City of Auburn and the Committee to Elect Nancy Backus
6 and its members, are jointly and severally liable to plaintiff in an amount to be proved at trial.
7

8 V. DEMAND FOR RELIEF
9

10 Plaintiff requests that the court enter judgment against defendants Roscoe, Backus, the City of
11 Auburn and the Committee to Elect Nancy Backus and its member as follows:
12

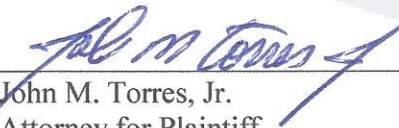
- 13 1. Awarding plaintiff special damages for lost potential future earnings.
14
15 2. Awarding plaintiff general damages for pain, suffering and mental anguish.
16
17 3. Awarding plaintiff her statutory costs and attorney fees incurred in this action.
18
19 4. Awarding plaintiff any additional or further relief which the court finds appropriate or just.
20

21 Dated: 9/19/19
22

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26 LARGO WALES, Plaintiff
27

28
29 Presented by:

30 AUBURN LAW OFFICES PLLC
31
32

33
34
35 
36 John M. Torres, Jr.
37 Attorney for Plaintiff
38 WSBA# 26287
39

40 220 1ST ST NE
41 Auburn, WA 98002
42 253-288-8015
43

44 main@auburnlawoffices.com

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF KING

9 LARGO WALES, a married woman,

10 Plaintiff,

11 v.

12 CITY OF AUBURN, WA, a Washington,
13 State municipality; NANCY BACKUS, as
14 Mayor of the City of Auburn, and
15 Individually and her marital community;
16 and The Committee to Elect Nancy
17 Backus and
its J. Doe committee members thereto; and
ROB ROSCOE and his marital
community,

Defendants.

No. 19-2-20274-2 KNT

[PROPOSED] ORDER GRANTING
DEFENDANTS CITY OF AUBURN,
ROB ROSCOE, AND MAYOR
NANCY BACKUS' CR 12(B)(6)
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT

18 THIS MATTER having come on regularly before this Court on Defendants City Of
19 Auburn, WA, a Washington, State municipality; Nancy Backus, as Mayor of the City of
20 Auburn, and Rob Roscoe and his marital community's CR 12(b)(6) Motion to Dismiss
21 Plaintiff's Complaint; the Court having considered the records and files herein, including:

- 22 1. Defendants City of Auburn, Rob Roscoe and Mayor Nancy Backus' CR
23 12(b)(6) Motion to Dismiss Plaintiff's Complaint;
- 24 2. Plaintiff's Complaint for Damages Violation of Freedom of Speech, Right to
25 Privacy (filed September 12, 2019);

26
27 [PROPOSED] ORDER GRANTING DEFENDANTS CITY
OF AUBURN, ROB ROSCOE, AND MAYOR NANCY
BACKUS' CR 12(B)(6) MOTION TO DISMISS
PLAINTIFF'S COMPLAINT - 1
19-2-20274-2 KNT
1002-01574/469102.docx

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PHONE: (206) 623-8861
FAX: (206) 223-9423

1 3. Plaintiff's Amended Complaint for Damages Violation of Freedom of
2 Speech, Right to Privacy (filed August 1, 2019);

3 4. Plaintiff's 2nd Amended Complaint to Correct Scriveners Error; Violation of
4 Freedom of Speech, Right to Privacy (filed September 19, 2019);

5 5. _____

6 _____

7
8 IT IS HEREBY ORDERED that Plaintiff's Second Amended Complaint and all
9 claims and causes of action therein are dismissed as a matter of law with prejudice.

10
11 **DONE IN OPEN COURT** this _____ day of December, 2019.

12
13
14 _____
15 Judge Nicole Gaines Phelps
16 King County Superior Court Judge

17 Presented by:

18 KEATING, BUCKLIN & McCORMACK, INC., P.S.

19
20 By: /s/ Jayne L. Freeman
21 Jayne L. Freeman, WSBA #24318
22 Attorney for Defendants City of Auburn,
23 Rob Roscoe, and Nancy Backus, in Her
24 Official Capacity as Mayor of City of Auburn

25 Approved as to form; Notice of presentation waived:

26 AUBURN LAW OFFICES PLLC

1 John Max Torres Jr., WSBA #26287
2 Attorney for Plaintiff

3
4 WAKEFIELD & KIRKPATRICK, PLLC

5
6 _____
7 Scott Wakefield, WSBA # 11222
8 Attorney for Defendant Nancy Backus, in Her Individual Capacity

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