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SUPREME COURT NO. 89820-1

Court of Appeals No. 68345-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT AKRIE, et al.,

Plaintiffs/Appellants,

v.

JAMES GRANT, et ux, et al.,

Defendants/Appellees.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

This Answer to Petition for Review is filed on behalf of Respondents James Grant; Cassandra Kennan; Davis Wright Tremaine, LLP; Seattle Deposition Reporters, LLC; and T-Mobile USA, Inc. ("Grant, et al."). The Respondents in this Court were Defendants in the trial court and Appellants in the Court of Appeals, with respect to the decision challenged by Petitioners Akrie and Netlogix ("Akrie").

II. RESPONSE TO STATEMENT OF ISSUES

1. In response to Issue 1:

    a. Akrie now seeks affirmative relief modifying the decision of the trial court, but any such relief was waived because Akrie did not seek review of the decision by way of a timely-filed Notice of Appeal. RAP 2.4(a).

    b. All five Defendants in the trial court collectively filed an anti-SLAPP motion and the court found that "Defendants have shown [...] that the claims herein are based on an action involving public participation and petition." Akrie cannot now challenge this conclusion. RAP 2.4(a).

2. In response to Issues 2 and 3:

    a. Akrie did not raise these issues at the trial court and they were was not briefed at the Court of Appeals;

    b. Application of the clear language of the anti-SLAPP statute in this case to award statutory damages to five moving

parties, each of whom Akrie chose to name as a defendant, does not constitute error, let alone manifest error;

c. In any event, there is no basis in the record to support Akrie's new arguments.

III. RESPONSE TO STATEMENT OF THE CASE

Akrie's Statement of the Case is argumentative and misleading. To the extent Akrie actually discusses the trial court record, he continues to make the same misstatements of fact that the trial court rejected. (Akrie did not seek review of that decision.) The actual record is clear.

The claims in this action arose in the context of a federal court lawsuit between Akrie's company, Netlogix, and T-Mobile: *Volcan Group, Inc. d/b/a Netlogix v. T Mobile USA, Inc.*, 2:10-cv-00711 RSM (W.D. Wash.) ("the Federal Litigation"). Defendants Grant and Kennan of Davis Wright Tremaine LLP ("DWT") represented T-Mobile in the Federal Litigation.

Akrie's claims arose from the fact that T-Mobile (represented by DWT, Grant, and Kennan) filed a motion and supporting papers in the Federal Litigation seeking to dismiss the case on the basis of spoliation and fabrication of evidence. *See* Clerk's Papers ("CP") 1 – 12 (Summons and Complaint); CP 15 – 26 (Motion to Strike SLAPP Claims and Dismiss); CP 177 – 78 (Order Granting SLAPP Motion). On March 14, 2012, Judge Martinez dismissed that federal case with prejudice, concluding that Akrie and his employee Jason Dillon were "complicit in

[a] pattern of dishonesty," engaged in "willful spoliation of evidence" and "elected to continue spinning a web of lies." *Volcan Group, Inc. d/b/a Netlogix v. Omnipoint Communications, Inc., dba T-Mobile; T Mobile USA, Inc.*, 940 F. Supp. 2d 1327, 1337 (W.D. Wash. 2012). The Ninth Circuit has since affirmed the dismissal. 2014 U.S. App. LEXIS 451 (9th Cir. Wash., Jan. 9, 2014).

Akrie filed this action while the spoliation motion was pending in the Federal Litigation before Judge Martinez. CP 1-12 (Summons and Complaint). Shortly after the Complaint in this matter was filed, all five Defendants brought a motion under the anti-SLAPP statute (RCW 4.24.525) to dismiss the claims and to award statutory damages and attorneys' fees. CP 15-26 (Motion). Both the context of the claims alleged in the Complaint and the allegations in the Complaint, themselves, made it clear that Akrie's claims were based on Defendants' "public participation and petition" and were subject to Washington's Anti-SLAPP statute (RCW 4.24.525). CP 177-78 (Order), Report of Proceedings 51 (Judge Andrus' ruling from the bench). *See* discussion, *infra*.

Akrie filed a notice of appeal shortly after entry of the judgment (CP 181-87), and Grant, et al. filed a notice of cross-appeal on February 29, 2010 (CP 188-96). Akrie then filed an amended notice of appeal on March 13, 2012 to correct the caption (CP 197-203), but subsequently withdrew this appeal. By letter dated April 9, 2012 from Court of Appeals Administrator/Clerk Richard D. Johnson, the cross-appellants (Grant, et al.) were re-designated as Appellants and Akrie and Netlogix as

Respondents. After they were re-designated as Respondents, Akrie and Netlogix never attempted to cross-appeal the trial court's decision.

IV. ARGUMENT: NONE OF THE PURPORTED "ISSUES" IN THE PETITION MEETS THE CRITERIA IN RAP 13.4

The Petition for Review does not specifically address any of the RAP 13.4 criteria that govern review by this Court, although it alludes to a recent decision in a "linked" case, *Dillon v. Seattle Deposition Reporters* ("*Dillon*"), 2014 Wash. App. LEXIS 123 (Jan. 21, 2014) and mentions the Eighth Amendment and Article I, section 14 of the Washington Constitution, concerning cruel and unusual punishment. To the extent these are Petitioners' asserted grounds for review, they are wrong on both counts.

A. There Is No Conflict Between The Decision Here And That In *Dillon*

Akrie's argument, that there is a conflict between the decision of the Court of Appeals here and that in *Dillon*, is remarkable. First, Akrie did not seek review of the trial court's holding in this case that all of the Defendants had established that Akrie's claims were based on their actions involving public participation and petition. CP 177-78, RP 51.

RAP 2.4(a) provides that:

> [T]he appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

Akrie withdrew his Notice of Appeal, so he clearly does not "seek[ ] review of the decision" by way of a timely-filed notice of appeal. Further, Akrie points to nothing in the record of this case that would justify treatment under subpart (2) of the rule. Indeed, there are no "necessities of the case" that require the Court to award affirmative relief to Akrie at this point. *See, e.g., Ortblad v. State*, 88 Wn. 2d 380, 561 P.2d 201 (1977) (respondent's argument that denial of damages was error would not be considered because respondent had not filed a notice of appeal); *Simpson Timber Co. v. Aetna Casualty & Surety Co.*, 19 Wn. App. 535, 576 P.2d 437 (1978) (trial court granted summary judgment as to some of plaintiff's claims but denied it as to others; on plaintiff's appeal, the court refused to consider defendant's argument that denial of summary judgment on certain claims was error because defendant had not filed for cross review); *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 680 P.2d 425 (1984) (appellate court refused to consider respondent's request to disallow certain offsets because it was a request for affirmative relief and the respondent had not filed a separate notice of appeal).

Second, in this case there is no dispute that Akrie's claims arose from Defendants' filing of a motion in the Federal Litigation, regardless of whatever Akrie argues now about an allegedly improper "recording." Neither Akrie nor Netlogix was a party to the conversations that were allegedly "recorded."[1] Thus, although the Complaint purported to allege

[1] Although it is not pertinent to this Petition, it should be noted that, contrary to Akrie's hyperbole, the "recording" at issue was actually a transcript of the phone calls

claims under RCW 9.73.060, no such claims were available to *these Plaintiffs* because it is well established that "[t]he right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded." Restatement (Second) of Torts, § 652I cmt a. "The cause of action is not assignable, and it cannot be maintained by other persons ..." *Id.*; *see also Jeckle v. Crotty*, 120 Wn. App. 374, 382, 85 P.3d 931, 936 (2004) (a physician cannot assert a right of privacy in his patients' records). The only conceivable injury to the Plaintiffs, in this context, arose when the transcripts were filed and used in the Federal Litigation.

Indeed, Akrie ignores his own Complaint in the trial court, which confirms that it was the filing of the transcripts "through the federal court ECR (*sic*) and PACER system" that supposedly caused harm to his reputation and that of Netlogix. CP 8 (Complaint, ¶ 3.12); CP 20-21 (Motion to Strike, pp. 6-7). Akrie also ignores his own allegations that his claims were based on the *dissemination* of the transcripts. *See* CP 9-10 (Complaint, ¶¶ 4.3, 5.2). As the trial court properly concluded, the only "dissemination" of the transcripts was the filing in the Federal Litigation. CP 29 (Grant Decl. in Support of Defendants' Motion to Strike, ¶ 10).[2]

(which no court in any jurisdiction has ever found to be a "recording") and the conversation at issue clearly was not a "private conversation."

[2] Plaintiffs further alleged "[u]pon information and belief" that someone may have contacted media outlet Law360 and "alerted them" to the intention to file the transcripts. CP 8 (Complaint, ¶ 3.11); *see also* CP 38 (Opp. to Mot. to Strike, p. 7). But, there was no such conversation (CP 30 (Grant Decl. in Support of Mot. to Strike, ¶ 12)) and (had it occurred) it would likewise have been protected activity for purpose of the anti-SLAPP Statute. CP 20-21 (Mot. to Strike, pp. 6-7 n.7).

Thus, it is clear that the trial court's conclusion that the anti-SLAPP Statute applied here was correct. The anti-SLAPP statute "applies to any claim, *however characterized*, that is based on an action involving public participation and petition." RCW 4.24.525(2) (emphasis added). "An action involving public participation and petition" includes "any oral statement made, or written statement or other document submitted, in a legislative, executive *or judicial proceeding* or other governmental proceeding authorized by law." RCW 4.24.525(2)(a) (emphasis added). The Respondents here who are also parties in the *Dillon* case disagree with the Court of Appeals' decision in that matter (and have filed a petition for review with this Court), but there is no reasonable argument that the decision in that case conflicts with the decision in this one.

B. Akrie Cannot Raise A "Constitutional Issue" For The First Time In This Court

Akrie now argues that the statutory damages called for by the anti-SLAPP Statute violate his "right to petition" under both the Washington State and U.S. Constitutions and are an "excessive fine," in violation of the latter. Petition, pp. 1-2. Akrie never raised either issue at the trial court, nor were the issues briefed at the Court of Appeals. Indeed, while the Court of Appeals *sua sponte* raised a similar issue as a *hypothetical* question during oral argument, the panel in that Court clearly believed that the issue was not present on the record presented to it. "We are not called upon to address whether the mandatory statutory damage award may be unconstitutional as applied in a case involving a large number of

defendants." 315 P.3d at 571, n.8. That, the Court concluded, "is a question that we leave for another day." *Id.*

Of course, the general rule is that this Court will not consider an issue that is raised for the first time on appeal. RAP 2.5(a). The same rule provides an exception for a manifest error affecting a constitutional right, but "we construe the exception narrowly by requiring the asserted error to be (1) manifest and (2) 'truly of constitutional magnitude.' (citations omitted) RAP 2.5(a)(3) was not designed to allow parties "a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. WWJ Corp.*, 138 Wn.2d 595, 602 (1999).

Where, as here, "the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted." *Id.* Akrie's Petition offers no help in this regard. It is devoid of citations to the record in support of his newly-raised claims, containing only the hyperbolic argument of counsel.

And in fact, there is nothing in the trial court record to support Akrie's new arguments regarding his "right to petition" and "excessive fines." There is no evidence that an award of statutory damages to each of the Respondents would "chill the valid exercise" of Akrie's right to petition the courts. (Indeed, Akrie's track record leads to the opposite conclusion.)[3] Nor does the record contain any basis to show that the

[3] Even after Akrie was sanctioned for "overwhelming evidence of spoliation" and found to be "complicit in . . . dishonesty" by Judge Martinez (940 F. Supp. 2d at 1335, 1337) and after Judge Andrus awarded over $30,000 in statutory damages and fees, Akrie's accomplice Jason Dillon and Akrie's counsel herein filed yet another lawsuit against three of the five Respondents.

award of damages constitutes an excessive fine that is "grossly disproportional" to the underlying conduct of Petitioners, or any support for the new "Due Process" argument. *State v. WWJ Corp.*, 138 Wn. 2d at 602.

Remarkably, Akrie relies on *State v. WWJ Corp.* for the proposition that the record is sufficient to resolve their new arguments, but *WWJ* actually shows the opposite. Pet. for Review, pp. 16-17. In *WWJ*, this Court rejected an attempt to introduce new issues on appeal because the trial court record was "insufficiently developed to evaluate [the] merits" of the new claims. 138 Wn. 2d. at 603-04. In that case, as here, the record was grossly inadequate for this Court to resolve the newly-asserted claims.

WWJ also undercuts Akrie's argument that the new claims are "truly of constitutional magnitude." *Id.* at 602. As this Court recently affirmed, it is a "well-established principle that statutes are presumed constitutional." *League of Educ. Voters v. State*, 176 Wn. 2d 808, 818 (2013). As such, "[t]he party challenging a statute's constitutionality 'must prove that the statute is unconstitutional beyond a reasonable doubt.'" *Id.* at 820. Here, there is no showing, let alone proof beyond a reasonable doubt, that an award of statutory damages to the five defendants, as the Court of Appeals found was required under RCW 4.25.525(6)(a), denies Akrie meaningful access to the courts.

As for his other arguments, Akrie does not establish that the Excessive Fines Clause is applicable to the States, nor that it protects

corporations as well as individuals. This Court found that both of these questions were unresolved at the time of the *WWJ* decision and Akrie offers no authority that those questions have since been resolved in his favor. *WWJ,* 138 Wn. 2d at 604, n.6.

Akrie seems to be arguing that an award of $10,000 to each of five Defendants, each of whom he chose to sue, is on its face an excessive penalty. But in *WWJ*, this Court found that a civil penalty ten times higher – $500,000 – was *not* facially unconstitutional under a Due Process analysis. *Id.* at 606-07.

For all these reasons, the Court should refuse to consider Akrie's "constitutional" arguments relating to the "right to petition" and "excessive fines," which he raises for the first time in this Court.

V. CONCLUSION

None of the Issues identified in the Petition fit within the RAP 13.4(b) criteria for the acceptance of review by this Court. As to the first issue, Akrie seeks affirmative relief modifying the decision of the trial court, but he waived the right to such relief when he chose not to seek review of the decision by way of a timely-filed Notice of Appeal. RAP 2.4(a). Moreover, Akrie's argument that the decision here is in conflict with that in *Dillon* ignores at least two fundamental distinctions between the records in the two cases.

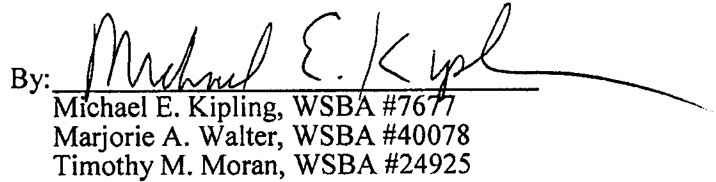
Nor should the Court accept review of the newly-asserted constitutional issues relating to the alleged "right to petition" and

"excessive fines." Akrie did not raise either of these issues in the trial court or the Court of Appeals. Petitioners have further failed to show that either of the asserted errors is (1) manifest and (2) "truly of constitutional magnitude." RAP 2.5(a)(3).

Respondents further request that the Court award them the reasonable attorneys' fees and costs incurred in responding to this Petition for Review as prescribed by RCW 4.24.525(6)(a)(i). RAP 18.1(j).

DATED this 21 day of February, 2014.

KIPLING LAW GROUP PLLC

By: 

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CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of February, 2014, I caused to be served a true and correct copy of the foregoing *Answer to Petition for Review* by method indicated below and addressed to the following:

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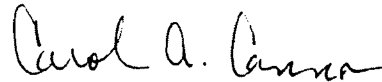

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Attached is Defendants/Appellees' *Answer to Petition for Review* for filing and service in the above-referenced matter.

Case Name:
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Case Number:
89820-1

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