NO. 899161-4

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 69300-00

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JASON DILLON, an individual,

Appellant,

v.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company; DAVIS WRIGHT TREMAINE, LLP, a Washington company, JAMES GRANT and JANE DOE GRANT, individually and the marital community composed thereof if any,

Respondents.

ALLIED DAILY NEWSPAPERS OF WASHINGTON'S AMICUS MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

Judith A. Endejan, WSBA #11016
GARVEY SCHUBERT BARER
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
Telephone: (206) 464-3939
Facsimile: (206) 464-0125
Email: jendejan@gsblaw.com

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I. INTRODUCTION

"[A] broad anti-SLAPP statute is crucial to a democratic society."[1] In 2010, the Washington legislature amended the Washington Act Limiting Strategic Lawsuits Against Public Participation ("anti-SLAPP statute or law"), RCW 4.24.525 to broaden its application. This provides protection to citizens exercising their fundamental constitutional rights from abusive lawsuits that retaliate for such exercise.

Supreme Court review of this case is critical for several reasons. First, it provides this Court with the first opportunity to provide needed guidance to lower courts on how to apply this new statute.[2] Second, review and reversal is necessary to restore the full protection for the exercise of rights under the state **and federal** constitutions that the Legislature intended in enacting the anti-SLAPP law. Third, review and reversal will promote the anti-SLAPP law's policy to discourage abuse of the judicial system.

If the Court of Appeals decision stands the anti-SLAPP statute may become a toothless tool of little use to citizens who need protection when

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[1] Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495, 526 (2012).

[2] Fifteen cases regarding the anti-SLAPP statute have been decided by the Court of Appeals, with the most recent being *Davis v. Cox, et al.*, No. 71360-4-1, Division One, released April 7, 2014. There the Court sustained to application of the anti-SLAPP law to activity "involving public participation and petition."

sued for exercising core constitutional speech and petition rights. Therefore, Amicus urges the court to grant the Petition for Review.

II. INTEREST AND IDENTITY OF AMICUS

Allied Daily Newspapers of Washington, Inc. ("Amicus" or "Allied") is a Washington not-for-profit trade association representing 23 daily newspapers serving Washington and the Washington bureaus of the Associated Press.

Amicus' interest stems from its view that Washington needs a strong anti-SLAPP statute to protect the exercise of the rights of freedom of speech and petition for the redress of grievances under the state and federal constitutions. While the instant case concerns the latter, Amicus' fears that the former may be impacted adversely if the Court of Appeals decision stands, because both rights may be subject to the same constitutional analysis for purposes of the anti-SLAPP statute

Amicus was a key supporter of the legislation that led to the anti-SLAPP law because it is essential that baseless lawsuits brought against the media and others, who write or speak on matters of public concern, be discouraged. The Legislature found in enacting the anti-SLAPP law, that SLAPP lawsuits over such speech can cause great harm to media members

who must pay to defend themselves in cases that are nothing but an abuse of process.[3]

Under RAP 13.4(b)(4), review will be accepted if a petition "involves an issue of substantial public interest that should be determioned by the Supreme Court." The petition for review in this case presents such an issue.

The interest of the public and Amicus in this case is to preserve the robust protections in the anti-SLAPP statute for those who exercise fundamental constitutional rights, including members of the media. Review is required because the *Dillon* decision seriously erodes those protections.

III. DISCUSSION

A. The Court of Appeals Did Not Apply a Broad Interpretation to Keep Portions of the anti-SLAPP Statute

The Legislature directed that RCW 4.24.525 be "construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of courts."[4]

The anti-SLAPP legislation directs that it receive a "liberal construction". This means an interpretation which produces broader coverage or more inclusive application of statutory concepts: "What is called a liberal construction is ordinarily one which makes a statute apply

[3] *See* Section (b) on the Findings–Purpose–Laws of 2010 c.118.
[4] Laws of 2010, Ch. 118 § 1.

... in more situations than would be the case under a strict construction." 2A C. Sands, *Statutory Construction* § 58.02 (4th ed. 1984). *Clam Shacks of America, Inc. v. Skagit County*, 45 Wn. App. 346, 349, 725 P.2d 459 (1986).

In *Henne v. City of Yakima*, 177 Wash. App. 583, 596, 313 P.3d 1188 (2013) the Court of Appeals liberally, or broadly, defined the term "person" in the anti-SLAPP statute to include a city government sued by a police officer who alleged retaliatory use of internal investigations, in keeping with the Legislative's directive.

In contrast, the Court of Appeals in *Dillon* interpreted the anti-SLAPP statute to limit its application to preclude coverage for the petitioners. The Court of Appeals narrowly construed the gravamen of Dillon's complaint as an attack on "SDR's acts of transcribing Debtor's telephone calls without his knowledge" (Slip. Op. p. 26) rather than on Petitioner's use of the transcription as key evidence that Dillon participated in evidence spoliation in the collateral federal case.[5] The

[5] At no time did the Court of Appeals explain how it determined that the act of transcription fell within the meaning of the Privacy Act, RCW 9.73.030 *et seq.* This requires proof that a private communication was "intercepted" by a "device designed to record and/or transmit." *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004), *rev. granted*, 175 Wn.2d 1022, 291 P.3d 253 (2012). The act of transcription may be the equivalent of note-taking. Reporters frequently take notes when conducting interviews over the phone, without telling the person interviewed. Could that person sue the reporter for a Privacy Act violation for the failure to disclose the note-taking when he or she is really upset about the story that the reporter wrote? This could be the unintended consequence of the Court of Appeals' conclusion that the act of transcription could violate the Privacy Act. Amicus takes no position on the appropriateness of Petitioners'

Court of Appeals then used this crabbed interpretation to conclude that the Petitioners' acts were not covered by the anti-SLAPP statute because they did not constitute "other lawful conduct in furtherance of the exercise of ... the constitutional right of petition." This assumes that the Petitioners engaged in unlawful conduct--by violating the Privacy Act-- even though the decision remanded that determination, on the basis that Mr. Dillon had raised a question of fact.[6] The Court of Appeals then erroneously narrowed the coverage of the anti-SLAPP statute further by finding that it only applied to the state constitutional right to petition, which does not cover the right to access courts. What is clear from *Dillon* is the Court's desire, at every turn, to interpret every fact, and the language of the anti-SLAPP statute, as narrowly as possible to preclude its application. Amicus urges this Court to correct this interpretation and instruct lower courts to follow the Legislature's command for liberal construction of the anti-SLAPP law.

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failure to disclose the presence of a court reporter to Dillon, except to note that disapproval of this conduct appears to have flavored the Court of Appeals' analysis.

[6] It defies the record, logic and common sense for the Court of Appeals to find that whether Dillon's expectation of privacy was reasonable raised a question of fact, based on the same affidavit Dillon filed in federal court where Judge Martinez found it to be incredible after an evidentiary hearing. CP 164:7-9; 166:12. *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp.2d 1327 (2012). Dillon initiated two calls to attorneys adverse to his former company after he told others he intended to make the call. CP 205 at 3:21-4:1. He agreed in those calls to sign a declaration with facts from the conversations that would be filed in court. He talked with a friend *before* the second call about the declaration. (Slip. Op. p.5.). These undisputed facts prove that Dillon could not reasonably have expected his conversations with two adverse attorneys to be private.

B. The Court of Appeals erred by interpreting the right to petition as excluding the federal constitutional right to petition and misapplying the right to petition under the Washington Constitution.

The Court of Appeals ignored the clear legislative history of the anti-SLAPP statute when it concluded that this statute only protected rights under the Washington Constitution and not under the First Amendment to the federal constitution. U.S. CONST. amend. I. It then found the Washington "right to petition" did not guarantee access to courts, unlike the federal constitution. This finding concerns Amicus because it could deprive its members of First Amendment protection when exercising free speech rights. That is because the (same) Court of Appeals in *Akrie v. Grant*, 178 Wash. App. 506, n.8, 315 P.3d 567 (2013) said "Generally, the first amendment right to petition and the first amendment right of free speech are subject to the same constitutional analysis."

The Court of Appeals' interpretation of RCW 4.24.525(2)(e) rests on the term "the" which precedes both "constitutional right of free speech" and " constitutional right of petition." The Court of Appeals' narrow, constrained interpretation of "the" in this case could apply in future anti-SLAPP cases where the exercise of free speech exercise is at issue and preclude any protection for the exercise of First Amendment free speech rights.

Moreover, the *Dillon* interpretation of the anti-SLAPP statute contradicts decisions of the same Court of Appeals. *Akrie, supra, City of Seattle v. Egan,* 317 P. 3d 568,570 (2014). Most important, it ignores the clear expression of legislative intent in the House Bill Report to SSB 6395 which became RCW 4.24.525:

> The First Amendment to the United States Constitutional provides the right "to petition the government for a redress of grievances." The right to petition covers any peaceful, legal attempt to promote or discourage governmental action at any level and in any branch. All means of expressing views to government are protected, including: filing complaints, ...

(emphasis supplied)

Clearly, given this legislative history, the Legislature intended the anti-SLAPP statute to apply to the exercise of state and federal rights.

By excluding the federal right to petition, the Courts of Appeals reasoned that the state constitution controlled the application of the anti-SLAPP statute. This meant, according to the Court, that the anti-SLAPP statute does not protect conduct in petitioning a court for redress under Washington's right to petition in Wash. Const. Art. 1, § 4, which does not include the right to access courts and related evidence gathering activity.[7]

[7] Whether this proposition remains true is questionable given this Court's statement in *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn. 2d 791, 815, 83 P. 3d 419(2004) :"The right to petition the government, article I, section 4 of the Washington State Constitution, is to be interpreted the same as the federal provision."

The Court of Appeals clearly erred by limiting the protections afforded by the new anti-SLAPP statute to the exercise of rights under the Washington constitution.

C. Dillon promotes an abuse of judicial process, contrary to the intent of the Anti-SLAPP statute.

The facts of *Dillon* are disconcerting-- telephone calls that provided pivotal evidence that disclosed deliberate spoliation of evidence by a party to a federal case. Because of this, a federal judge, who had choice words for all parties -- but particularly Mr. Dillon --, dismissed that case.[8]

Mr. Dillon's pursuit of Privacy Act litigation against the parties who gathered this evidence from him could well be viewed as a "claim, however characterized" that is based on an action involving "public participation and petition." RCW 4.24.525(2). The Court should have broadly construed the characterization of Mr. Dillon's claim as falling within the foregoing statutory definition. It did not do so, somehow, finding instead, that the *transcription* of the phone calls was not an act of gathering evidence.[9] Such an act was not protected by the Washington constitutional right to petition, the Court reasoned, because that right does not cover the right to access courts, which includes the right to gather evidence. Yet how else can the transcription of conversations, filed as

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[8] *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp.2d 1327,1337-38 (2012).
[9] Slip. Op. p. 38.

evidence in court, be viewed? This is protected activity under the federal constitution. *Kashian v. Harriman*, 98 Cal. App. 4th 892, 908, 120 Cal. Reptr. 576 (2002)

The Court then said that even if the federal right to petition [which includes the right to access courts and to gather evidence] applied, the anti-SLAPP statute offered no protection because the Petitioners' conduct was unlawful because they illegally *recorded* Mr. Dillon's conversation. The Court of Appeals relied on cases that involved clearly inapplicable illegal wiretapping or computer hacking. (Slip Op. pp 37-41). Because the Court earlier had concluded that the gravamen of Mr. Dillon's complaint was the "acts of *transcribing* Debtor's telephone calls without his knowledge" this conclusion, based on the act of *recording,* seems inconsistent, intended to characterize the Petitioners' conduct so as to avoid a different result under the federal right of petition. (Slip Op. p. 36-42)

The Court's confused reasoning, in and of itself, provides a basis for review. More important, Amicus urges review because Dillon presents a solid example of abusive litigation targeted at a party that gathered evidence that harmed him in another case. This smacks strongly of retaliation. Allowing Mr. Dillon to proceed on questionable facts (to wit: his discredited declaration) against parties adverse to him in another case seems wrong, if the new anti-SLAPP statute is to have any force. A key

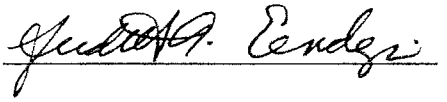
purpose of the new anti-SLAPP law is to prevent abuses of the judicial process through retaliatory lawsuits like Mr. Dillon's, if his claim "*however characterized*" is characterized broadly as required by the anti-SLAPP act.

Construing a plaintiff's pleading, as this Court did, out of context and narrowly, rewards a clever plaintiff's attorney who can draft a pleading to avoid the anti-SLAPP statute contrary to that statute's underlying policy.

IV. CONCLUSION

In sum, Amicus urges the Supreme Court to untangle the reasoning of *Dillon* to promote the underlying policy of the anti-SLAPP statute to protect the exercise of state and federal constitutional rights from retaliation through an abuse of the judicial process. Review should be granted.

Respectfully submitted this 21st day of April, 2014.

By: 

Judith A. Endejan, WSBA #11016
GARVEY SCHUBERT BARER
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
Telephone: (206) 464-3939
Facsimile: (206) 464-0125
Email: jendejan@gsblaw.com

CERTIFICATE OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below I served a copy of the foregoing document by emailing the same, pursuant to their agreement to receive service by email, to:

Dennis Moran
William A. Keller
Moran & Keller Law Firm
600 – 108th N.E., Suite 650
Bellevue, WA 98004-5110
Email: bill@morankellerlaw.com, dennis@morankellerlaw.com

Ralph E. Cromwell, Jr.
Byrnes Keller Cromwell, LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Email: rcromwell@byrneskeller.com

Bruce E.H. Johnson
Ambika K. Doran
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Email: brucejohnson@dwt.com, ambikadoran@dwt.com

Michael B. King
Carney BAdley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Email: king@carneylaw.com

Signed this 21st day of April, 2014 at Seattle, King County, Washington.

Judy Endejan

OFFICE RECEPTIONIST, CLERK

To: Lori Druss
Cc: Judy Endejan
Subject: RE: Jason Dillon v. Seattle Deposition Reporters, Davis Wright Tremaine, et al. Court of Appeals No. 69300-00

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From: Lori Druss [mailto:LDRUSS@gsblaw.com]
Sent: Monday, April 21, 2014 4:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Judy Endejan
Subject: Jason Dillon v. Seattle Deposition Reporters, Davis Wright Tremaine, et al. Court of Appeals No. 69300-00

Dear Supreme Court Clerk:

Attached please find two pleadings to be filed in the case of Jason Dillon, Appellant, v. Seattle Deposition Reporters, Davis Wright Tremaine and James Grant, Respondents, Case No. 69300-00 (Court of Appeals, Division 1).

Specifically, we are submitting a Motion for Leave to File Amicus Curiae Memorandum of Allied Daily Newspapers of Washington in Support of Petition to Review, along with the Allied Daily Newspapers of Washington's Amicus Memorandum in Support of the Petition for Review.

I am emailing the attached for filing on behalf of attorney Judy Endejan, WSBA No. 11016 of the firm of Garvey Schubert Barer, whose email address is jendejan@gsblaw.com. I work for the aforesaid law firm as a Legal Assistant.

I will look forward to your confirming email that the attached items have been filed. If you would be so kind, please provide said confirmation to both myself and Judy Endejan.

Lori A. Druss
Legal Assistant | 206.464.3939 x [1331] Tel | 206.464.0125 Fax | ldruss@gsblaw.com
GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ▶ GSBLaw.com