No.89961-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69300-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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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.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE BRUCE HELLER

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION AND RELIEF REQUESTED

The Washington Court of Appeals Division I in *Dillon v. Seattle Deposition Reporters et al.*, 316 P.3d 1119 (2014) made the right decision when it found that a lawyer taping a conversation with a witness without first obtaining permission from the witness is not protected activity under the anti-SLAPP statute (RCW 4.24.525), nor does it further the right to free speech or to petition the government for redress. Instead it is potentially criminal conduct, just as it is for any other person that violates the Privacy Act (RCW 9.73.030). However, because of the vehement arguments Petitioners (hereafter "Davis Wright") has put forth seeking to justify this behavior in spite of the clear language of RCW 9.73.030 requiring all party consent, the implication is that this is not an isolated incident but instead is likely a pattern and practice that the firm seeks to protect and continue. Consequently, this Court may consider using this case to both reaffirm the law as set forth by the state legislature and also to set the standard for lawyer conduct that apparently the Federal Court and trial court did not want to discuss.

Davis Wright provides four different legal theories for why this court should accept review and each argument will be answered in kind. The four "arguments" raised by Davis Wright put into the contexts of the

facts of this case are (1) If Davis Wright lawyers can be held accountable for secretly recording a witness interview, the then the right of the public to petition and the premise of the anti-SLAPP statute will have been gutted. *See* Petition for Review pages 9-13; (2) the Appellate Courts refusal to allow Davis Wright to turn the plain language of Dillon's complaint into an anti-SLAPP claim, eliminates the protections of the act; (3) Dillon is a bad actor and therefore there must be a lawyer's exception to the Privacy Act i.e., the ends justify the means; and (4) collateral estoppel will cease to exist if Davis Wright is held to the same standard of lawyer conduct as everyone else.

Cutting to the chase, this case is now about whether there is one rule for Davis Wright in pursuit of litigation and another rule for every other person, business or industry that uses the telephone to speak with people. Davis Wright continues to try and shift the analysis from their conduct to that of Mr. Dillon. Again, this case is about whether or not it is legal in Washington for attorneys to secretly record witness interviews, period. Davis Wright made the recordings so this case is about its conduct. Furthermore, the public at large, and most likely every other lawyer in this state understands that you cannot tape witness interviews without getting their permission. Davis Wright, through its conduct knew it was pushing the bounds of ethical conduct, but proceeded anyways in

order to secure an advantage in litigation. The ends should not justify the means in the legal system, at least in the state courts of Washington. Frankly the fact that Davis Wright insists that secretly recording to a witness (after lying to them) is protected activity under the SLAPP statute and the first amendment should actually be deemed frivolous, but respondents recognize that at least some judges were loath to penalize the Davis Wright firm and acquiesced to the conduct – merely stating that Davis Wright should not be proud of itself.

Respondent understands that the right to privacy is a big issue in society today, it is discussed on the news virtually every day with the government wiretapping phones, reading emails etc.. The Court of Appeals Division I had the fortitude to stand up to illegal conduct that strikes to the core of our legal system – there is not one rule for certain lawyers, and another for everyone else. If the message sent by the Court of Appeals is not loud enough to end certain litigation practices, by all means this Court should determine whether the rights to privacy are going to be incrementally eroded by lawyers who deem themselves above the law.

II. STATEMENT OF FACTS

The following facts are in the record and undisputed: Mr. Dillon

told Ms. Keenan that he would only speak to them if the telephone calls would be "private and confidential." CP 581:6-18. Davis Wright attorney, Ms. Keenan, told Mr. Dillon that she and her law partner Jim Grant would keep the conversations private and confidential. CP 581:6-18-582:4. "But for" the expressed DWT agreement to keep the conversations private and confidential, Mr. Dillon would not have engaged in the conversations in the first place. CP 581:19-582:4. Grant chose not to tell Dillon of the fact that he was recording the conversations at any time in either of the telephone conversations. CP 586-643; 645-716. Grant lied about "Thad," Thad was not Grant's "assistant." CP 648. In the second conversation, September 19, 2011 when Grant followed up with Dillon, trying to get Dillon to sign a declaration, Grant still concealed the fact that he had recorded the prior, August 25 conversation. CP 586-623. After the recordings hit the internet, and Dillon exploded at Grant for making them, Grant's first response was not to claim that the conversations were not private. Instead, he wrote an email back to Dillon saying Dillon "consented" to the recording. CP 629. A reasonable inference from this was that Grant knew that the Privacy Act required "consent" for recordings because the Grant knew the conversations were "private," he knew that he was violating it without consent, so he was trying to dupe Mr. Dillon into believing that he had given consent in an

effort to get Dillon to drop the issue. Grant later said he told the court reporter, Thad, to stop the tape recording and to erase the tape. CP 635:25-636:4. Davis Wright lied about the tape recording in declarations they drafted before they believed anybody might find out about the tape or that they erased it. Mr. Grant then claimed the conversations were subject to his work product privilege, and he even refused to turn over the transcript of the conversation to Dillon unless Dillon consented to a protective order. CP 629, 633. Attorneys must have a good faith basis for making legal claims. "Under the law of privileged communications, a spoken conversation between two persons is not confidential if it is made in the presence and hearing of a third party." *State v. Clark*, 129 Wn.211, 226 fn 14 (1996). Mr. Grant presumably knew the rules of privilege, so it is reasonable to infer from this fact that Grant subjectively believed the conversations were not public; they were private and confidential. In fact, Grant believed the conversations were so private that he refused to turn over his recording to Dillon unless Dillon consented to a protective order so that he would not provide them to anyone else! Grant, by signing his name to his work product claims demonstrated that he held the good faith belief that the conversation was private and confidential work product. *See* CR 11.

It is professional misconduct for an attorney to make a clandestine

recording of a witness interview, without the witness' knowledge or consent. It is reasonable to infer that a non-lawyer has a reasonable expectation that attorneys like Grant and Keenan, will themselves know and follow the rules of professional ethics. RPC 4.1(a) prohibits lawyers from lying to witnesses. It was reasonable for Mr. Dillon to assume that Davis Wright attorneys would comply with the ethical rules and not lie to him about keeping the conversations private and confidential.

Furthermore, where is the missing 6 minutes from the August 25, 2011 recording and why did Grant and Keenan first lie about, then destroy the tape of it? A reasonable inference from this spoliation is that there was something on the missing 6 minutes "unhelpful" to DWT. *See, e.g. Ellwein v. Hartford Accident and Indemnity*, 142 Wn.2d 766, 783 fn.14 (citing Jeffrey S Kinsler and Anne R. Keyes MacIver, Demystifying Spoliation of Evidence, 34 Tort & Ins. L.J. 761, 775 "In its strictest form, the "spoliation inference" establishes prima facie the elements of the injured party's claim that cannot be proven without the missing evidence." All these facts and the facts set forth above in the briefing, viewed in a light most favorable to Mr. Dillon, permitted the reasonable inference that Mr. Dillon subjectively and objectively believed that the conversations were private; that the Davis Wright attorneys and even the court reporters knew that the conversations were private and should not have been

recorded.

The conversations were private. The Washington Court of Appeals finally enforced the standard of conduct required under the Privacy Act, and ended the fallacy that clever attorneys are above the law.

III. LEGAL ANALYSIS

A. The Anti-SLAPP Statute Was Not Designed To Provide An Exception to the Privacy Act For Lawyers.

Davis Wright asks this Court to reward its conduct. What lawful activity did Davis Wright engage in? Here, the record establishes the fact that Jim Grant made the secret recording after he expressly agreed with Mr. Dillon that the conversations were private. Again, there aren't two sets of rules for agreements, one for agreements with likable witnesses which attorneys have to keep, and a different one for unlikeable people that attorneys don't have to keep. There is one rule that applies to everybody. Dillon expressly told Grant that he would only speak to them if the conversations were private and confidential. Grant expressly told Dillon that the conversation was private and confidential. Then they engaged in the conversations. The Petition for Review completely ignore these facts in the apparent hope that this Court will overlook them too. Davis Wright had a court reporter from Seattle Deposition Reporters record verbatim a witness conversation without telling Mr. Dillon. The

Privacy Act says that a conversation cannot be recorded without all party consent. Mr. Grant never told Dillon he was recording. The anti-SLAPP statute was not passed in order to make any activity of a lawyer protected from reprisal. Being hired to litigate a claim does not give a lawyer free reign to violate the rights of others and then claim protected status. Davis Wright's Petition for Review is disturbing in how it reeks of entitlement. Davis Wright thus far profited greatly by the illegal conduct, and now hopes to gain more by perverting both the Anti-SLAPP Statute and the Privacy Act in one fell swoop. If this Court wants to create one set of laws for Davis Wright, while at the same time telling Police officers and insurance agents and telemarketers that they must comply with the Privacy Act, then by all means the Petition for Review should be granted. Otherwise, the decision of the Washington Court of Appeals division I should stand unaltered.

B. Davis Wright's Claim That Its Right to Public Participation and Petition Have Been Gutted By the Court of Appeal's decision demonstrates Its Entitlement to Be Above the Law.

Nearly every person in this state has heard "this call may be recorded for quality assurance" or if they have been in an accident, the first words from the insurance adjuster are "and I have your permission to record this statement," and in depositions the witnesses is told that the court reporter

is taking down the testimony. These statements are made to the witneeses and callers because they are required by the law. Davis Wright wants this Court to carve an exception to that law, but such an exception should receive legal scorn, not acquiescence. The legislature didn't grant the exception, this court should not either.

The following is protected under anti-SLAPP RCW 4.24.525 :

> (2)(a): ..testimony and documents submitted to a court, etc.
> (2)(b): ..testimony and documents submitted in connection with an issue under consideration by a court, etc.
> (2)(c): ..testimony and documents likely to encourage public participation in legislative process, judicial process, etc.
> (2)(d)...statements made in an open public forum in connection with an issue of public concern, etc.
> (2)(d).....other lawful conduct...in furtherance of the constitutional right of free speech in connection with an issue of public concern or in furtherance of the exercise of the constitutional right of petition.

Noticeably absent from this list is "the act of secretly recording witness interviews, by lawyers, for their use in a private lawsuit." Secret recording for use in a private lawsuit is not speech, it is not a statement, and it is not an issue of public concern or the constitutional right of petition. Anti-SLAPP protects public speech and protest because they are necessary pillars of a free society. Wiretapping, secret recording, lying to witnesses to get them to talk angrily about their former bosses in order to get advantage in a lawsuit is criminal, dark, and ethical misconduct. There is a difference and the anti-SLAPP statute should not be interpreted so

blindly as to miss that difference.

Furthermore, Davis Wright again seeks to focus on the motives and activities and others, while claiming theirs are above reproach. Davis Wright again tries to make this case about Dillon, even requesting that this Court explore Mr. Dillon's motives and whatever other wild accusations they can think of, instead of simply reviewing the complaint. Petitioners argue that the Court is not limited to the pleadings, which seems to be a suggestion that the court or an opposing party can go ahead and make up whatever facts it thinks appropriate to support an anti-SLAPP claim. Here, the Complaint was very clear to not address anything having to do with court filings or witness testimony- it had nothing to do with the mechanism of the public judicial process. It dealt only with the act of the recording. Davis Wright, however, wants to essentially rewrite the complaint, add facts and add claims, then turn around and alleged that those added claims are subject to anti-SLAPP. The Court of Appeals saw the ruse and declined to engage in it.

Alternatively, and this is really what the defendants are asking, is that the defendants are claiming that they are entitled to make secret recordings of witness interviews, and this practice is protected by anti-SLAPP simply because it's part of their litigation strategy. What they are really arguing is that they can break any law or ethical rule, but so long as they are doing

it in litigation, it is permissible and protected under anti-SLAPP. Now they want the Supreme Court to approve of their litigation tactic because they have been successful at convincing others to acquiesce to it. This Court should decline to allow the arguments to go any further.

C. Davis Wright Grossly Misinterprets the Privacy Act and the Facts To Justify their Attempt to protect against "Fraud on the Court."

The Court of Appeals decision does not conflict with *State v. Slemmer*, 48 Wn. App. 48 (1987). In fact *Slemmer* simply demonstrates that facts matter when it comes to deciding privacy. In *Slemmer*, the defendant was in a conference room with a group of people. He could observe that the people in the group were taking notes and he knew that the minutes would be made available to everyone in the investment group and to anyone they were passed to. The Court looking at the facts determined he had no expectation of privacy and therefore could not stop the members of the group from testifying against him. In Mr. Dillon's situation, he specifically requested that the conversation remain private. He was concerned that his conversation could get him sued. Mr. Dillon was not in the room with the other people, he was not informed that there were third parties in the room that would disseminate information to others. In fact he was assured that the conversation would remain private. He was lied to. That is what Mr. Grant did - lie. If he thought what he was doing

was okay, why tell a court reporter to destroy an audio tape? Why lie to Dillon about who was in the room? Why assert work product privilege for the transcript if it was free to everyone? The contradictions and factual distinctions speak for themselves. Davis Wright is arguing that the ends justify the means. They do not. Lawyers don't commit fraud upon witnesses in order to protect the Court system.

D. Davis Wright Lawyers Lie to a Witness and Violate His Right to Privacy But Claim it Is Okay Because Judge Martinez Found Dillon not Credible in Court

Davis Wright's final argument is a collateral estoppel argument that does not warrant review under any of the requisites required by the Rules of Appellate procedure, so Davis Wright seeks to couch it in a public interest exception when none exists. Taken to its core, the final argument is that Dillon is a liar, so holding Davis Wright accountable under the Privacy Act undermines the Public Interest. Lying to liars is okay so long as you are an attorney. This is not a public interest argument requiring Supreme Court review. This case relates only to the conduct of Davis Wright, not the public at large. Nevertheless, the elements of collateral estoppel are not present as Dillon was not a party to the Federal litigation, and if Dillon were a party then Davis Wright's attorneys would have been guilty of *ex parte* contact with a represented party, in addition to their clandestine recording scheme and litigation tactic. In short Davis Wright

is arguing that it didn't break one Rule of Professional Conduct, it broke a different one, and at any rate it doesn't matter because rules do not apply to them.

Netlogix had no control over Dillon. There was no privity. Dillon was ordered to appear by Judge Martinez. Judge Martinez required Netlogix to produce Dillon, so Netlogix had to serve a subpoena on him. Dillon was represented by separate counsel at that hearing and his right to privacy under Washington law was not discussed or argued by him. Judge Martinez did not analyze the Privacy issue and in fact did his best to avoid the issue by claiming that the evidence of spoliation was prevalent without Dillon's testimony. The Ninth Circuit did not even discuss the Privacy Act at all either. The collateral estoppel argument has no merit and despite the hyperbole, the doctrine of collateral estoppel has not "lost its significance" merely because Davis Wright cannot use it to avoid accountability for illegal litigation tactics.

CONCLUSION

The Washington Court of Appeals did the right thing. Dillon will now have the right to litigate against Davis Wright in hopes of making them accountable for misconduct. Although the arguments made by Davis Wright misstate facts, and ignore their own conduct in favor of doing a hit piece on Dillon, if the Court is inclined to send a message that there is

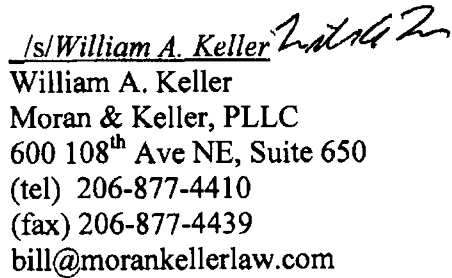
equality under the law, and not one rule for unethical lawyers, and another rule for everyone else, then maybe it is time to send a message that illegal conduct will not be rewarded.

Signed and dated this 24th Day of March, 2014 at Bellevue, Washington.

William A. Keller, WSBA #29361
Dennis Moran, WSBA #19999

CERTIFICATE OF SERVICE

I swear under penalty of perjury that on March 24, 2014, this document was filed by email with the Washington State Supreme Court, and also served to all counsel of record by email and by regular mail.



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Subject: Dillon v. Seattle Deposition reporters et al, Case Number 89961-4

Attached is Plaintiff/Appellant's Answer to Petition for Review for filing and service in the above-referenced matter.

Case Name:
Dillon v. Seattle Deposition Reporters et al.

Case Number:
89961-4

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