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No. 69300-0

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

JASON DILLON, an individual;
Plaintiff,

vs.

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;
Defendants.

On Appeal from King County Superior Court
The Honorable Bruce Heller

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Privacy Act, RCW 9.73.030 is based on the State Constitutional Right to Privacy, Article 1 §7. In Washington, telephone conversations between two parties are legally presumed to be private, and the Privacy Act prohibits the recording of any and all private conversations without the consent of all the parties to the conversation. Washington is one of only 11 States with the "all party consent" rule and our Supreme Court has characterized it as one of the most restrictive, privacy protective, anti-recording statutes in the nation.

All this got tossed out the window when a guy named Jason Dillon stumbled into a clandestine recording program at the Davis, Wright, Tremaine law firm in Seattle (DWT). Mr. Dillon was a witness in a case between his former employer and a DWT client, Bellevue based TMobile. DWT asked Mr. Dillon to call into its Seattle offices for a telephonic witness interview, at a pre-arranged time. Mr. Dillon agreed, on the express condition that the DWT attorneys keep the call private and confidential. They agreed.

On August 25, 2011 at 2:14 pm, Mr. Dillon called DWT from his home in California, as requested, and over the course of an 82 minute telephone call, Mr. Dillon told the DWT attorneys about the bribery and

kickback scheme TMobile was running out of its California contracting offices in 2009 and 2010. DWT secretly recorded 76 minutes of that call and about a month later, DWT secretly recorded 44 minutes of a 46 minute follow up call. About a month after that, Mr. Dillon discovered he had been secretly recorded *by reading about it on the internet*. He wrote to the DWT attorneys, expressing outrage at them for breaking their promise. The lead DWT attorney, Jim Grant, wrote back to Mr. Dillon explaining that it was perfectly permissible for DWT to record the interviews because they had Mr. Dillon's "consent" to do so. When it became apparent that Mr. Dillon was not going to let the matter drop, the DWT defendants changed their story, claiming they did not need his consent because Mr. Dillon had no "expectation of privacy" in the telephone conversations.

Dillon did not let the matter drop. He sued the DWT defendants under the Privacy Act for recording the telephone conversations without his knowledge or consent. His complaint sought the specific damages specified in RCW 9.73.060 of the Privacy Act. DWT responded by claiming witness interviews are not "private conversations" and DWT had a constitutionally protected right to make clandestine recordings under the First Amendment's "right to petition."

In a stunning blow that virtually eliminates the all-party consent

rule, the King County Superior Court agreed, essentially creating a *common law* exception to the Privacy Act that allows attorneys in litigation to secretly record whomever they want, whenever they want, regardless of consent.

This is a common law rule of first impression and one that has devastating impacts to both personal privacy and the practice of law in Washington. Until now, no court anywhere has created a *common law* exception to the "all party consent" rule for witness interviews. On the contrary, two Federal Circuits have held that it is *per se* ethical misconduct for attorneys to secretly record witness interviews. *Parrot v. Wilson*, 707 F.2d 1262, 1271 (11th Cir.), *cert denied*, 464 U.S. 936, 104 S.Ct.344, 78 S.Ed.2d 311 (1983); *Chapman & Cole v. Itel Container Int'l B.V.,* 865 F.2d 676, 686 (5th Cir.), *cert denied*, 493 U.S. 872, 110 S.Ct 201, 107 L.Ed.2d 155 (1989). Now, according to the Superior Court's ruling in this case, the all-party consent rule does not apply to attorneys and it is open season for attorneys to secretly record virtually any telephone call. Secret recording will be the rule rather than the exception. The DWT lawyers have brought the 1972 Nixon White House ethics into 2012 Seattle. They even included their own version of the 18 minute gap; the Dillon recording has a missing 6 minutes.

Attorneys and witnesses have private *and* non-private

conversations all the time. Whether a particular conversation is, or is not "private" is a decision for a reasonable jury based on the facts of the particular situation. *Lewis v. Department of Licensing* 157 Wn.2d 446, 458 (2006) (citing *State v. Clark*, 129 Wn.2d 211, 255 (1996)(citing *Kadoranian v. Bellngham Police*, 119 Wn.2d 178, 190 (1992)). Here, the witness and the defendants expressly agreed in advance of the conversation that the telephone conversation would be private, and the plaintiff would not have consented to the interview without this express agreement with the defendants. *CP 581:6-582:5*. A reasonable jury could easily find from this evidence, that Mr. Dillon reasonably expected the telephone conversations to be private. Nevertheless, the Superior Court ruled that Mr. Dillon had no legal expectation of privacy, on summary judgment no less. *CP 842 (p.44:6-45:10)*. In doing so, the Superior Court created a new, common law exception to the Privacy Act that apparently cannot be overcome even by an attorney's express agreement to keep the interview private and confidential, as was the case here.

The Superior Court created another "first" when it gave the DWT clandestine recording practice Constitutional protection merely because the attorneys intended to use it to advance their position in a private lawsuit. This was contrary to both the Privacy Act and existing anti-SLAPP law. *Saldivar v. Momah*, 145 Wn.App 365 387 (Div. 2 2008)

(conduct in private lawsuits within the anti-SLAPP protective umbrella because private lawsuits seek redress from a court rather than petition for official government action.) The Superior Court then levied an enormous anti-SLAPP penalty against the plaintiff for filing his RCW 9.73.060 Privacy Act claim in the first place.

II ASSIGNMENTS OF ERROR

A. The trial court erred as a matter of law in its orders of June 28, and August 17, and August 31, 2012. *(CP 1130-1146)* by dismissing the plaintiffs RCW 9.73.030 Privacy Act claims as a matter of on summary judgment. The trial court erroneously determined, as a matter of law on summary judgment, that the witness interviews secretly recorded by the defendants, without the plaintiff's knowledge or consent, were not "private" conversations within the scope of RCW 9.73.030 because the plaintiff had "no subjective expectation of privacy." *CP 842 (p. 44:6-19, June 15, 2012 hearing transcript).*

B. The trial court erred as a matter of law by conducting the RCW 4.25.525(4)(b) anti-SLAPP hearing on June 15, 2012 in the exact opposite order of that which is specified in the statute, RCW 4.24.525 (4)(b). *CP 832 (p. 4:10-20, June 15, 2012 hearing transcript).* The statute requires that the trial court <u>first</u> put the defendants to their proof, to show by a preponderance of the evidence that specific claims in the complaint

(the RCW 9.73.060 Privacy Act claims) were "claim[s] based on an action involving public participation and petition" within the meaning of RCW 4.24.525(b). Only after the court finds the defendants carried this burden does the court proceed to rule on the merits of the plaintiff's claims. The trial court did not follow this procedure. The trial court created its own "hybrid" procedure that reversed the order.

C. The trial court erred as a matter of law by concluding, as a matter of law, that the plaintiff's RCW 9.73.030 and 060 Privacy Act claims were protected by anti-SLAPP set forth at RCW 4.24.525(2)(e) "lawful conduct.....in furtherance of the exercise of the constitutional right of petition." The Superior Court erroneously applied the following test: "The Court needs only find that the activity that is the subject of the privacy act claim was lawful activity in connection with a judicial proceeding." *CP 850 (p.77:11-15, June 15, 2012 hearing transcript).*

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. Whether reasonable minds could conclude, from the facts in the record, that the telephonic conversations between Mr. Dillon and Mr. Grant were "private."

YES. Whether a conversation is private is a question of fact. *Lewis v. Department of Licensing* 157 Wn.2d 446, 458 (2006) (citing *Kadoranian v. Bellingham Police*, 119 Wn.2d 178, 190 (1992).

Telephone conversations are presumed private. *State v. Modica*, 164 Wn.2d 83, 89 (2008). Here, when viewing the material facts and reasonable inferences in the light most favorable to the plaintiff under a proper CR 56 summary judgment standard, a reasonably jury could easily determine that the conversations were "private."

B. Whether RCW 4.24.525(4)(b), the anti-SLAPP hearing statute, requires the defendants to first prove by a preponderance of the evidence that the plaintiff's claims are "based on" "an action involving *public* participation and petition" before putting the plaintiff to its proof on the claims themselves.

YES. The trial court reversed the order and did not require the defendants to carry their burden before putting the plaintiff to its proof on the merits of the Privacy Act claims.

C. Whether, as the Superior Court held, "lawful activity in connection with a judicial proceeding" is the same as "lawful conduct in furtherance of the exercise of the constitutional right of petition." *RCW 4.24.525(2)*(e). (Emphasis added).

NO. The phrase in the anti-SLAPP statute "constitutional right to petition" refers only to the US Constitutional First Amendment prohibition against Congress abridging the public right "to petition the Government for a redress of grievances." It protects the right to petition the government

for official government action. Lawful conduct in furtherance of the exercise of the "constitutional right to petition" means things like the act of throwing medals at the capitol, or the act of marching in a protest parade or the act of burning a flag to petition official Government conduct. A civil lawsuit seeking private relief from a court is not within the umbrella of anti-SLAPP because a lawsuit for *private* relief from a court is not First Amendment *public petition* seeking official governmental action. *Saldivar v. Momah*, 145 Wn.App 365, 387 (Div. 2 2008). Secretly recording phone calls may be an act designed to get ahead in litigation, but it is not one in furtherance of the "constitutional right of petition." RCW 4.24.525(2)(e).[1]

IV STATEMENT OF CASE

A. Facts in the court record relevant to the issues on appeal.

1. The two August 25, 2011 conversations.

On the morning of August 25, 2011 Seattle based DWT attorney Kennan called Mr. Dillon at his home in California to discuss a case that was in litigation. *CP 312:22-315:21 (Dillon 2/14/2012 sworn testimony).*

[1] *See* also, (unpublished), *Townsend v. WSDOT*, 2012 Lexis 2221 (Div.2, Sept 2012)("The filing of a lawsuit does not constitute protected communication under the anti-SLAPP statute because "a plaintiff who brings a private lawsuit for private relief is not seeking official government action, but rather redress from the court."(Citing *Saldivar*, 145 Wn.App. at 387).

Mr. Dillon had recently quit his job at Netlogix and was angry with his former boss and the company, which was adverse to DWT's client (TMobile) in a contract dispute. *Id.* During this first conversation, Ms. Kennan tried to wind up Mr. Dillon against his former boss by telling him nasty things about his former boss, Scott Akrie. *Id.* The defendants *apparently* did not record this call. *CP 315:24-316:25.*[2] Kennan used it to set up a second call, which was the one the defendants intended to secretly record. Keenan did not tell Mr. Dillon that she intended to record the second call, however. In fact, Mr. Dillon expressly conditioned his participation in the second phone call on Ms. Keenan's promise that the conversation be "informal" and would be kept "private and confidential." *CP 319:15-22.* Mr. Dillon explained this in detail in the sworn declaration submitted to the trial court on summary judgment:

> "When I was contacted by Ms. Keenan by telephone in August, I specifically told her I did not want anything I told them in the telephone conversations to be part of the public record because I was afraid of any repercussions about what we discussed...Ms. Keenan informed me that my telephone calls would remain private and confidential, and she acknowledged my concerns about

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[2] Plaintiff is not aware of a recording of the recording of the first call *(CP 319 10-14)* but given the fact that the DWT lawyers Grant and Keenan admittedly lied in a sworn declaration stating that "no audiotape or audio recording of any kind was made of either calls" (*CP 324:17-325:19*), a lie Ms. Keenan at least admitted *(CP 635:25-636:4*), we really don't know because the defendants have never been subject to deposition nor have they responded to any of the outstanding discovery on these points.

> the information I would provide being used against me in a future proceeding. That is why I agreed to continue speaking with them."
>
> *Dillon Declaration, CP 581:6-18.*

The DWT lawyers agreed to Mr. Dillon's conditions, as Mr. Dillon explained in his declaration:

> "Once we had agreed that my conversations with Mr. Grant and Ms. Keenan would not be made public, we agreed to a time for me to call Ms. Keenan and Mr. Grant to discuss the facts of the Netlogix breach of contract case. After Grant and Keeenan agreed to keep our future conversations private and confidential, they set up a conference call to occur on August 25, 2011. I expected that the phone call between Mr. Grant, Ms. Keenan and myself would remain private. I never expected that it would be recorded.....I was never told that the conversation was being recorded verbatim, nor would I have ever agreed to provide a recorded statement without the benefit of counsel..."
>
> *Dillon Declaration, CP 581:19-582:4.*

Based upon these expressed assurances, Mr. Dillon called in from California to the DWT offices at the appointed time, 2:14 p.m. *CP 585.* His call was switched to a conference room and put on speaker phone. *CP 648:7-11(Recorded August 25, 2011 call).* Ms. Kennan started out the call by putting Mr. Dillon at ease in the beginning, unrecorded part of the conversation and continued into the recorded portion, underscoring the informality by asking Mr. Dillon about how his job interview went. *CP 648:5-7.* Then Mr. Grant told Mr. Dillon that Grant's "assistant Thad"

was also in the room at DWT, just "writing stuff down" so that Mr. Grant and Ms. Keenan "don't have to worry about taking notes while were talking to you." *CP 648:12-14.*

This statement by Mr. Grant was cleverly misleading. "Thad" was not Mr. Grant's "assistant," he was certified Court Reporter Thad Byrd, an employee of Seattle Deposition reporters. *CP 626.* "Thad" was not just "writing stuff down, "in the sense that he was taking notes (which would be consistent with the promise to keep the conversation private), he was recording the conversation verbatim with his stenographic recording machine and a tape recorder. The very fact that Grant tried to mislead Dillon, shows that *Grant knew* that Mr. Dillon believed the conversation was private, and *Grant knew* that Dillon would hang up if he thought the call was being recorded. Further, the mere reference to "Thad" shows that Grant was trying to fabricate some kind of plausible "consent" defense if he got caught. (RCW 9.73.030(b)). ("Consent" must include both a statement in the recording that the conversation is being recorded, and the statements of consent by all parties). [3]

---

[3] Indeed, when the storm broke on October 8, 2012 and Dillon discovered he had been secretly recorded, Grant did, in fact, claim "consent." *CP 629* (Email from Grant to Dillon). Grant later abandoned this frivolous claim because the alleged "consent" was obviously obtained through fraud, by Grant lying to Dillon about who "Thad" was.

According to Keenan, shortly after DWT started recording the call with the transcription machine, they noticed that the Thad was also recording the call with a tape recorder. Though Keenan and Grant initially denied this fact in sworn declarations, about three months later they admitted it once evidence of the tape recording was about to come out publicly. Further, Keenan claim in her second, revised, sworn version of events, that when she and Grant saw the dictaphone recording the call on tape, Grant immediately instructed Thad to turn it off and erase it. *CP 635-636.*

> [Keenan] "2. In my prior declaration, referring to the two interview calls with Mr. Jason Dillon, I stated that "[n]o audiotape or audio recording of any kind was made of either call." As explained by my partner James C. Grant in his supplemental declaration, in the August 25, 2011 call, the court reporter used a dictaphone during the first few minutes of the call, until Mr. Grant noticed this, and instructed the reporter not o audiotape the call and to erase the tape."

CP 635:25-636:4 (Keenan second sworn declaration dated January 11, 2012).[4]

[4] Curiously, the instruction Grant gave to Thad, to turn off the tape recorder and erase the tape, seems to have been erased from the final recording. Maybe it was in the missing 6 minutes? Maybe Grant took it out when he edited the recording? Plaintiff was not able to investigate this because DWT and Seattle Deposition Reporters refused to respond to discovery and the Superior Court stayed the plaintiff's motion to compel, pending the anti-SLAPP hearing. *CP 464-471.*

If, during the phone call on August 25 Keenan and Grant subjectively believed the conversation was not private, thus it was ok to record, then why did Grant tell the Thad to turn off the tape? Was it to save on the DWT electricity bill? If they thought it was ok to record because the conversation was not private, as they now claim, then why did they feel the need to lie in their earlier sworn declarations, by denying it was tape recorded? Why did Grant tell Thad to erase the tape? The answers are fairly clear: Both Keenan and Grant knew they were having a private conversation with Dillon; they knew it was illegal to tape record it without Dillon's consent and they thought that if they admitted that any part of the conversation was tape recorded that they would be admitting a violation of RCW 9.73.030. They both showed conscious acknowledgement of guilt by lying and erasing evidence to cover up what they thought was a crime. [5]

The recording went on to capture Mr. Dillon's reiteration of his concerns that his former employer or TMobile might come after him, and

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[5] For whatever reason, they apparently thought at the time of the conversation, that a transcription machine recording was not covered by the Privacy Act. This conduct, however, shows that they were acutely, subjectively, aware that they should not have been recording the conversation with a tape recorder, *ipso facto* they were subjectively aware that the conversation was "private."

his desire that nobody even know he was talking to Grant and Keenan at all, at least for the time being.

> [Dillon to Grant]…I wanted to talk to you guys just briefly and let you know I wasn't with Netlogix, and I wanted,--you know, I wanted to talk to you guys kind of about, you know, some things that had happened while we worked on the contract kind of going back from the beginning. You know, my only concern is I just need to make sure that I'm protected as well if Scott tries to come after me, or I don't want you guys trying to come after me or T-Mobile. I want to make sure I'm protecting myself, but I did want to speak with you guys. …
>
> *CP 649:10-20.*
>
> [Grant to Dillon] Okay, understood. At this time, we just want to hear what you have to say[6]….
>
> *CP 650:5-6.*
>
> [Dillon to Grant]...you know, I just want to make sure—you know, I don't know exactly where this is going to go with Scott [Akrie,-Dillon's former boss]. You know, he owes me some money from back pay. And if he knows I'm talking to you guys, right away of course, he's going to not give me any money at all, so that's a concern."
>
> *CP 653:3-8.*
>
> …[Grant to Dillon]…I can't represent—my firm can't represent somebody who's adverse as a witness on the other side. But as I said at the outset, there's nothing wrong with us talking with each other.[7] It kind of depends upon what all you have to say…

---

[6] Grant fails to tell Dillon that he is also recording the conversation.

[7] Again, Grant keeps up the deception and chooses not to tell Dillon that he also recording him.

CP 653:18-22.

> [Dillon]..Just so I protect myself, maybe it's better that I actually just get my own attorney, talk to them about kind of what—you know, about the information and get some advice from them and then call you guys back."
>
> [Grant] That's absolutely fine. I mean, if you want to talk to a lawyer, you should do that.[8]

CP 655:3-10.

At this point, Grant should have terminated the call and disclosed the true facts to Mr. Dillon, namely the fact that he had been secretly recording everything up to this point. Ethically, Grant should have never initiated the recording at all,[9] but by this point it was absolutely clear that Grant should not have ethically, legally continued. Instead, Grant chose to continue the deception for another 45 minutes or so, to continue clandestine recording. By the time it was done, Grant pushed Dillon to

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[8] Grant still keeps up the deception by not telling Dillon that he is recording the conversation. Dillon has now made it clear that he thinks ne needs attorney advice, at which point Grant should immediately terminate the call and refuse to discuss anything further with Mr. Dillon without an attorney present.

[9] "[S]ecret, clandestine recording" by an attorney, of any witness without his or her affirmative knowledge and consent, is *per se* professionally unethical conduct. *Parrot v. Wilson*, 707 F.2d 1262, 1271 (11th Cir.), *cert denied*, 464 U.S. 936, 104 S.Ct.344, 78 S.Ed.2d 311 (1983); *Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 686 (5th Cir.), *cert denied*, 493 U.S. 872, 110 S.Ct 201, 107 L.Ed.2d 155 (1989).

initiate a new deception, by asking him to sign a declaration for "not the whole story" but "maybe pieces or something."[10] [Grant to Dillon], *CP 682:2-4*.

The entire call lasted 82 minutes. *CP 585*. However, the DWT recording lasted only 76 minutes, purporting to begin at 2:15 p.m. (*CP 648:2)* and end at 3:36 p.m. *(CP 715)*. There is a missing 6 minutes.

2. The September 19, 2011 conversation; recorded.

During the days following the August 25 recording, Grant and Keenan sent draft, *sworn* declarations to Dillon and pestered him "on a daily basis" to sign. *CP 305:10-14*. Dillon did not, so on September 16, 2011 Kennan and Grant set up another call with Dillon in California. *CP 588*. They connected on the telephone at 2:39 p.m. This time they had certified court reporter Mark Hovilla secretly in the room at DWT with his transcription machine (and likely a tape recorder) and did not even tell Mr. Dillon that Hovilla was even there. *CP 582:9-5*. They did not even have the courtesy to make up the phony "just taking notes" story this time.

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[10] Though not relevant to this case, Grant was trying to figure a way to use Mr. Dillon's knowledge about the bribery and kickback scheme at TMobile, against his opponent in litigation, Netlogix, but at the same time, protect his TMobile from it's the ramifications of its illegal conduct.

Grant led off the conversation at 2:29 pm. *CP 588*. The conversation ended at 3:23 p.m. *CP 623*.[11]

On or about October 8, 2011 Mr. Dillon became aware that Grant had secretly recorded their conversations when he read about it on a website titled "Law360.com." *CP 584-585*. Dillon was outraged at the deception. He immediately contacted Grant, expressing his displeasure and demanding a copy of the recording.

> [Dillon to]Mr. Grant and Ms. Keenan: "I am absolutely OUTRAGED by the two of you deceivingly recording our telephone conversation without my consent on August 25, 2011 at 2:14 PM…California and Washington law both require mutual consent to recording a telephone conversation. I now...realize that YOUR represented "assistant Thad" taking notes for you was actually Thad Byrd, Certified Court Reporter No. 2052 a… and NOT your "assistant" or even an employee of Davis Wright Tremaine,….it was clearly a misleading lie on your behalf…..
>
> ..I made it VERY clear to Ms. Keenan that I would need to consult an attorney if the two of you needed something formal/documented..:"
>
> *CP 584-585*.

Grant refused, and explained that he had Mr. Dillon's consent to record the conversation:

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[11] Mr. Dillon never signed a sworn declaration for Mr. Grant, but Grant filed an unsigned Dillon declaration anyway, in the US District Court. This is background only and not an issue in this case, as this case only seeks RCW 9.73.060 damages for the act of recording on those two days, August 25 and September 19.

> [Grant to Dillon]...."First, there is no audio recording of our call with you on August 25, 2011, and certainly nothing was "illegally recorded." ..I told you at the outset of our call that Thad [the "assistant"] was present and taking down what we said. <u>You consented to that</u>....to suggest now that your "privacy has been blatantly violated" is , at the least, disingenuous."
>
> *CP 629.* (Emphasis added).

Grant went on to demonstrate that, at the time the recording was made, he even thought the conversations were "private" because he, Grant, was claiming a confidential privilege over the recordings. *CP 629; 633 (Stipulated Court Order preserving DWT work product privilege, drafted by Grant and given to Dillon, which Dillon never signed).*

In any event, Mr. Grant abandoned the "Dillon manifested consent to record because he knew Thad was there and believed Thad was a third party" defense because a) he had obviously lied to Mr. Dillon on August 25 about who Thad was and b) it wasn't consistent with the defense he needed for the September 19 phone call because he didn't disclose Mr. Hovila during that conversation.

B. <u>Procedural history.</u>

Mr. Dillon filed the complaint on March 30, 2012. *CP 1-7 (Complaint).* Mr. Dillon plead his complaint narrowly, focusing only on the defendants' *conduct* that offended the Privacy Act, namely the clandestine, unauthorized *act of recording* of the conversations on the two

specific dates, August 25 and September 19, 2011. The Complaint narrowly requested only the damages specified in RCW 9.73.060, $100/day per violation, pain and suffering and attorneys' fees. Mr. Dillon scrupulously avoided alleging any claim against conduct arising out of defendants' subsequent *use* of those recordings as evidence in a lawsuit or otherwise, as both the content of the conversation and the use of the recording were irrelevant to Mr. Dillon's statutory RCW 9.73.030 and 060 claims. It was the *intentional act of recording* the conversation that was illegal; *Mr. Grant's subjective purpose* for the intentional act was irrelevant to the RCW 9.73.030 violation.

Defendants answered, denying the two conversations were private or that Mr. Dillon had any expectation of privacy. Defendants admitted they prepositioned the court reporters in the room unbeknownst to Mr. Dillon, and claimed that Mr. Dillon's RCW 9.73.030 claims were barred by RCW 4.24.510 (immunity for a person communicating to a public agency involved in securities regulation) and the anti-SLAPP statute 4.24.525. *CP 23-33* (*Answer p.8:4-6.*) The defendants also alleged that Mr. Dillon consented to the recordings, but then denied that Mr. Dillon's consent was necessary to record the conversations. *CP 24-33 (Answer, p. 4:22-5.).*

On May 18, 2012 Defendants automatically stayed the plaintiff's

outstanding discovery and other motions when they filed their combined anti-SLAPP and summary judgment motion.[12] *CP 140-149.* The Superior Court set a combined hearing for June 15, 2012 where it considered both motions with only the following evidence submitted by the parties: 1) The Moran Declaration (*CP 572-644; 645-716);* and 2) Second McWilliams Declaration *(CP 149-463). See Order Granting MSJ. CP 807-808; 809; 1120-1129.*

At the hearing on June 15, 2012 the Superior Court decided the summary judgment issue first. *CP 822.* The Court dismissed defendants' collateral estoppel arguments with the Judge Martinez order *CP 842 (p.45:20-46:2 June 15 hearing transcript).* Instead, the court focused on a single issue, whether Mr. Dillon had a subjective "expectation of privacy" in the two conversations. Based on the evidence, which included Mr. Dillon's sworn declarations about his conversations and intentions, and applying the summary judgment standard to that evidence, with all factual disputes and reasonable inferences in favor of Mr. Dillon, the court held:

> [Court] "I conclude that Mr. Dillon did not have a subjective expectation of privacy when he agreed to talk to Mr. Grant.....there was no expectation of privacy with respect to what was said in that meeting......

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[12] RCW 4.24.525 automatically stays discovery upon the filing of an anti-SLAPP motion.

> And – and so I don't really even think I need to get to the second prong of the analysis about whether his expectation was reasonable, because I—I find that he did not have an expectation of privacy, and therefore, I—I conclude that there was no violation of 9.73. "

CP 842. (June 15 hearing transcript, p. 44:6-19). (Emphasis added).

That holding, in the face of the evidence that both parties to the conversation intended the conversation to be private, with the summary judgment burden taking all facts and inferences in favor of the plaintiff, essentially establishes an absolute, common law exception to the Privacy Act for witness interviews.

Then the court went on to entertain argument and finally decide the outcome of the anti-SLAPP motion, holding:

> [Court] "I'm going to start where I think we need to start, and that's with the statute itself. And the statute—subsection 2, defines public participation and petition as A, any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding. And—and then Subsection B uses similar language, but uses the word in connection with a judicial proceeding.
>
> And the issue before the Court is whether or not the petitioner under the SLAPP statue has shown by a preponderance of the evidence that this action or this lawsuit is based on an action involving public participation.
>
> And it--it seems clear to the Court that the meeting that took place in Mr. Grant's office was certainly in connection with a judicial proceeding, which brings us to the next question, which is was this lawful conduct….The Court needs to only find that the activity that is the subject of the

> privacy act claim as lawful activity in connection with a judicial proceeding, and that was, I think, quite clearly the case. And the burden, then, of course shifts to the other side to show by clear and convincing evidence and that they're likely to prevail on the merits. And since I've already granted summary judgment for the SLAPP petitioners on that issue, I find that that burden cannot be met. And therefore, I conclude that the SLAPP petition should be granted.

CP 850. (Hearing transcript p. 76:1-77:25). (Emphasis added).

The DWT defendants requested an award of $110,000.00 attorney's fees and sanctions against the plaintiff and his counsel, for bringing his Privacy Act claims. *CP 985.* The Superior Court awarded $70,000 fees and sanctions against the plaintiff. *CP 1155-1158.*

The Superior Court stayed execution pending the outcome of this appeal. *Id.*

V. LEGAL ARGUMENT.

A. Summary Judgment Standard and Standard of Review.

When reviewing a summary judgment, the appeal court reviews "the facts and the law with respect to summary judgment *de novo*." *Viking Props. v. Holm*, 155 Wn.2d 112, 119 (2005). In reviewing the evidence, the appeal court "must consider the evidence and reasonable inferences therefrom in a light most favorable to the nonmoving party." *Viking Props.*, 155 Wn.2d at 119. "Summary Judgment is only appropriate when, after reviewing all facts and reasonable inferences in the light most

favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Viking Props.*, 155 Wn.2d at 119.

"The proper interpretation of a statute is a question of law" reviewed *de novo*. *Bank of America v. Owens*, 173 Wn.2d 40 49 (2011).

B. The Privacy Act.

"Washington's privacy act, chapter 9.73, places great value on the privacy of communications." *Lewis v. Department of Licensing*, 157 Wn.2d 446 457 (2006) *quoting State v. Christiansen*, 153 Wn.2d 186, 199-200 (2004). The act prohibits the recording of private conversations without the consent of all parties to the conversation. *Id.* Washington is among only 11 States with the "all party" consent rule. *State v. Christiansen*, 153 Wn.2d at 198-199. Washington's Privacy Act "is one of the most restrictive electronic surveillance laws ever promulgated." *State v. O'Neill*, 103 Wn.2d 853, 878 (1985). Since 1967 the Washington Legislature has twice amended the Privacy Act, without ever amending or lessening the "all party consent" requirement. *Christiansen* at 199. The Washington Court has repeatedly endorsed "Washington's long standing tradition of affording great protection to individual privacy" through the Privacy Act. *Id* at 200.

RCW 9.73.030 states in relevant part:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual...or the state of Washington, its agencies, and all political subdivisions to intercept or record any:
>
> (b) Private conversation, by any device electronic or otherwise, designed to record or transmit such conversation regardless of how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.
>
> (3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party is announced to all other parties engaged in the communication or conversation in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.060 states in relevant part:

> Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his or her business, or his or her person, or his or her reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him or her on account of violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorneys' fee and other costs of litigation.

(Emphasis added).

Here, it is undisputed that the defendants recorded two telephone conversations between the DWT attorneys in Seattle and Mr. Dillon in

California, on August 25, 2011 and September 19, 2011. It is undisputed that Mr. Dillon did not know of or consent to either of these recordings. The only issue, therefore, is whether the conversations were "private." If so, then the plaintiff is entitled to the full set of remedies specified under RCW 9.73.060.

> "[a] communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable."

*State v. Modic*a, 164 Wn.2d at 88 (citing *State v. Christianson*, 153 Wn.2d 186, 193 (2004) citing *State v. Townshend*, 147 Wn.2d 666, 673 (2002)).

"Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law." *Lewis v. Department of Licensing* 157 Wn.2d 446, 458 (2006) (citing *State v. Clark*, 129 Wn.2d 211, 255 (1996)(citing *Kadoranian v. Bellngham Police*, 119 Wn.2d 178, 190 (1992))). The Washington Court in *Kadorian*, 119 Wn.2d at 190, adopted the following definition of "private," which is repeated in *Lewis*, 157 Wn.2d at 458, from *Websters Third New International Dictionary* (1969):

> "Private" as "belonging to one's self…secret…intended only for the persons involved (a conversation)…holding a confidential relationship to something…a secret message: a private communication…secretly: not open or in public."

Lewis at 458 (alterations in the original, emphasis added).

When determining whether a particular conversation is private, the fact finder looks to the subjective intentions of the parties to the conversation. *Lewis* at 458, citing *Clark*, 129 Wn.2d at 255. The fact finder also looks at factors bearing at the reasonable expectations and intent of the parties. *Id.* It is generally understood that "a conversation," especially a telephone conversation is "intended only for the persons involved" in that conversation. Telephone conversations are presumed private.

> "Intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private."

State v. Modica, 164 Wn.2d 83, 89 (2008).

The *content* of a conversation may, on occasion, indicate that the parties do not subjectively intend the conversation to be private. However, "[T]he mere fact that a portion of the conversation is intended to be passed on does not mean a call is not private and must be determined from the totality of the circumstances." *Modica.* 164 Wn.2d at 89-90.

Notwithstanding the Privacy Act, clandestine recording of witness interviews is *per se* unethical attorney conduct. This is not a new rule and it is not really open to reasonable debate. The Eleventh Circuit explained

it in *Parrot v. Wilson* back as 1983:

> "In the instant case, the record clearly demonstrates that counsel for the appellant clandestinely recorded conversations with witnesses. While this practice violates no law,[13] the Code of Professional Conduct imposes a higher standard that mere legality. The American Bar Association's Committed on Ethics and Professional Responsibility has held that the recording of conversations of witnesses without their consent is unethical. *See* ABA Committee on Professional Responsibility, Formal Opinions, No. 337 (1974); *Id.*, Informal Opinions, No. 1320 (1975)(refusing to reconsider Formal Opinion No. 337). *See also* NYSBA Committee on Professional Ethics, Opinions No. 328 (1974)."

Parrott v Wilson, 707 F.2d 262, 1271 (11th Cir 1983).

There are two "content" exceptions to the all-party consent rule: drug trafficking (RCW 9.73.200) and minor sexual abuse (RCW 9.73.210). Mr. Dillon's conversations with the DWT attorneys involved stories about an ongoing scheme of kickbacks, payoffs and possibly racketeering at TMobile, but these topics were not even arguably within the scope of these content based exceptions.

C. Construing all facts and reasonable inferences in a light most favorable to the plaintiff, a jury could have reasonably determined that the two telephone conversations were "private."

In addition to the legal presumption that the conversation was private (*Modica*, 164 Wn.2d at 89), at summary judgment they presented the following evidence that proved Mr. Dillon had a subjective and

[13] There was no "all party consent" statute in Georgia at the time.

objective expectation that the conversations were private.

Fact 1: 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.

Fact 2. Ms. Keenan told Mr. Dillon that she and Mr. Grant would keep the conversations private and confidential. *CP 581:6-18-582:4.*

Fact 3. "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.*

Fact 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.* A reasonable inference from this fact is that Grant knew that Dillon subjectively believed the conversations were private and thought if he told Dillon about the recording then Dillon would have stopped talking. Otherwise, why didn't Grant tell him?

Fact 5. Grant lied about "Thad," Thad was not Grant's "assistant." *CP 648.* A reasonable inference is that Grant did not want Dillon to know that Thad was really a court reporter, because if Dillon knew there was a court reporter in the room, Dillon would have surmised that Grant was recording the conversation, which would mean that DWT was breaking the agreement to keep the conversation private and recording it.

Otherwise, why did Grant lie about Thad?

Fact 6. 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*. There are several reasonable inferences from this. First, it suggests Grant knew that if he told Dillon about the first recording, Dillon would get mad at Grant for breaking his promise to keep the conversation private and confidential, and Grant did not want Dillon mad because he still held out hopes of getting Dillon to sign the declaration. Second, this suggests that Grant knew he was doing something illegal by recording the conversations and he did not want to let Dillon know because he was concerned that he was losing control of Dillon and Dillon might alert somebody to Grant's illegal recording scheme, before Grant had a chance to distract from this fabricating phony misconduct case against Dillon's former employer, Netlogix.

Fact 7: 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. It is evidence that Grant fabricated this "conversation was not private" story sometime after he had a chance to take a look at the case law, consult with other attorneys and concluded that his "consent" defense wasn't going to work and it looked like Dillon wasn't going to drop the issue.

Fact 8: Grant and Keenan said they told the court reporter, Thad, to stop the *tape recording* and to *erase the tape*. *CP 635:25-636:4.* They also lied about the tape recording in declarations they drafted before they believed anybody might find out about the tape or that they erased it. These are all acts manifesting a conscious knowledge of guilt. They show that Grant and Keenan subjectively believed – on August 28 and later when they drafted their first declarations, that the conversation was "private" and they were prohibited by the Privacy Act from making a "tape recording." These acts also manifest an admission that *they believed* it was illegal to tape record the conversation.

Fact 9: Mr. Grant claimed the conversations were subject to his work product privilege. *CP 629, 633*. Work product privilege cannot be claimed over a public conversation that is done in the open where anybody may hear it. "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.

Fact 10: 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. It is also reasonable for an attorney who knows that rule, to count on the witness to expect that the attorney will follow the rule and expect the attorney will affirmatively disclose any deviation from the rule in advance. Therefore, it is reasonable for a witness, (any witness) to presume that every conversation he or she has with an attorney will be private and will not be recorded, unless the attorney speaks up and says otherwise.

Fact 11: RPC 4.1(a) prohibits lawyers from lying to witnesses. It was reasonable for Mr. Dillon to assume that Grant and Keenan would comply with the ethical rules and not lie to him about keeping the conversations private and confidential.

Fact 12: 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, permit the reasonable inference that Mr. Dillon subjectively and objectively believed that the conversations were private; that Grant, Keenan and even the court reporters knew that the conversations were private and should not have been recorded.

The conversations were private. The Superior Court erred by ruling otherwise.

At the hearing, the defendants pointed out that Dillon intended to *convey information* to Grant, information which Grant could disclose to others. Defendants argued that this fact alone rendered the entire conversation "not private" as a matter of law. It was a nonsensical argument, because it fails to appreciate the difference between the

conversation (*the act* of talking) and the information discussed in the conversation (*the things* talked about). The Privacy Act protects *the conversation* from being recorded; it does not necessarily protect *the things talked about* from public disclosure.

Example A: A client talks to his attorney on the phone and tells the attorney what happened in the auto collision so the attorney can draft the complaint, which he intends to file in the public court file: The *conversation is private* and privileged but *the facts* are not. The Privacy Act applies and nobody may eavesdrop or record the conversation without consent of both parties in the conversation.

Example B: A mother talks to a daughter on the telephone. The topic is mundane, generally available gossip. T*he conversation* is private because the parties intend it to be private, regardless of whether or not the *facts discussed* in the conversation are private. The Privacy Act applies and neither party to the conversation nor anybody else may eavesdrop or record the conversation without informed consent of *both* mother and daughter.

Example C: A whistleblower calls attorneys on the phone, attorneys he knows are representing cancer victims in a lawsuit against the tobacco companies. He tells them that he intends to pass along *information* to the attorneys, knowing it will get used publicly in a lawsuit

at some point, but only on the condition that *the conversation* be kept private by all persons involved. Attorneys agree. *The conversation* is intended to be private though *the information* is not. The Privacy Act applies and nobody may eavesdrop or record *the conversation* without all party informed consent.

Example D. A police officer who arrested a suspect will be a witness in a criminal case. The defense attorney has a CrR 4.6(a) right to interview the police officer to determine what he will testify to publicly, in open court. The police officer knows, in advance, that the interview will be recorded by the defense attorney and may be used to impeach his public testimony, because the Court of Appeals, Division II has so ordered. Both the information and the conversation are *not private*. The Privacy Act does not apply. (*State v. Mankin*, 158 Wn.App 8, 11 (2010).

The defendants argued that there was no distinction between *the conversation* and *the information conveyed in the conversation*.

> [Mr. Cromwell (defendants' attorney) to the Court]: "That the conversation was private, but the content wasn't is not a distinction I've seen anywhere in Washington case law. Washington case law does not make the distinction he's trying to make, that I'm aware of."
>
> *CP 840, hearing transcript at p.37:3-7.*

The Superior court agreed and this was a clear error. The distinction exists in common sense and Washington case law. In *State v.*

Modica, 164 Wn.2d 83, 89 (2008) the Supreme Court explicitly rejected the State's argument that the fact that an inmate, who was having a conversation with his mother, told her facts in that conversation that he wanted her to pass along to others, did not render that conversation private. *Modica,* 164 Wn.2d at 89.

> "The State also argues that these particular calls could not be private because Modica intended that messages be passed on to his wife. We do not find this argument persuasive. While in some circumstances the fact that the content of the call is intended to be passed to another may be relevant to whether it is private, it is certainly not determinative."
>
> ....
>
> .... "The mere fact that a portion of the conversation is intended to be passed on does not mean the call is not private and must be determined from the totality of the circumstances."
>
> *State v. Modica*, 164 Wn.2d at 89-90[14](*Emphasis added*).

Mr. Dillon intended, and the attorneys Keenan and Grant agreed, that the conversation would be confidential and private, it was a condition of even having the conversation in the first place, and the fact that the conversation might lead to a publicly filed declaration did not change that

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[14] The Supreme Court held that Modica had no expectation of privacy on other grounds, namely that he was an inmate and both he and his mother were made aware that the prison recorded the telephone calls because it was announced at the beginning of the call. *Modica*, at 86. Mr. Grant made no such announcement.

agreement or that intention with respect to the conversation. The conversation was still private. *CP 583:6-10.*

The "totality of the circumstances" means the jury may take this fact into account, along with all the other facts presented and make a finding of fact as to whether the conversation was private. This was clearly an issue for the jury to decide based upon all the facts, and not one fact, especially one presented by the defendants, rendered all the plaintiff's facts meaningless. All "facts and reasonable inferences" were supposed to be construed in favor of Mr. Dillon, not the Davis, Wright firm.

D. The Complaint is Not Subject to Anti-SLAPP.

The issue of whether a case is subject to the anti-SLAPP statute is an issue of statutory interpretation which is reviewed *de novo*. *Bank of America* v. Owens, 173 Wn.2d at 49.

1. The Superior Court did not conduct the anti-SLAPP hearing correctly.

RCW 4.24.525 allows an individual to bring a "special motion to strike any claim that is based on an action involving public participation and petition." RCW 4.24.525(4)(a). The moving party who brings the special motion has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. RCW 4.24.525(b)(4). If the moving party meets that

burden, the responding party must establish by clear and convincing evidence a probability of prevailing on the claim.

Here, the Superior Court reversed the order of the hearing. It did not put the defendants to their proof. The defendants did not, as the statute requires, prove by a preponderance of the evidence that the Complaint was based on public participation or petition. Had they done so, the defendants would not have carried their burden and the hearing would have ended.

2. The defendants would not have carried their burden on the first prong of the anti-SLAPP hearing because the Privacy Act claims were "based on" the act of clandestine recording, not constitutionally protected speech.

The Washington Legislature passed the anti-SLAPP legislation to protect individuals and organizations from lawsuits "designed to intimidate the exercise of First Amendment Rights. *Aronson v. Dog Eat Dog Films, Inc.* 738 F.Supp.2d 1104, 1109 (W.D. Wash. 2010); see also *Segaline v. Department of L&I,* 169 Wn.2d 467, 480 (2012) (Madsen, C.J concurring). "The purpose of RCW 4.24.510 is to 'help protect people who make complaints to the government from civil suits regarding those complaints." *Saldivar v. Momah*, 145 Wn.App 365, 388 (Div. 2 2008). It was not intended by the legislature to be used as a tool to cut back the Privacy Act, RCW 9.73 by creating an exception that allows clandestine recording of witness interviews, merely because the attorney making the

recording intends to, maybe, use it in a lawsuit; neither was it intended to suppress an individual's right to bring a Privacy Act claim when he or she found out that he or she had been a victim of illegal recording; neither did the legislature intend the anti-SLAPP legislation turn *per se* professional misconduct into constitutionally protected activity.

To prevail on an anti-SLAPP claim, a party must prove by a preponderance of the evidence that the claim is "based on an action involving public participation and petition." RCW 4.24.525(b)(4).

There are three reasons that the anti-SLAPP statutes do not apply to the plaintiff's Privacy Act claims: First, the Privacy Act claims are not "based on "an action involving public participation and petition" they are "based on" an attorney lying to a witness, agreeing to keep a conversation private and confidential, then breaking the law and rules of professional ethics by secretly recording the conversation.

Second, an act in furtherance of a private party's objective in civil litigation is not in furtherance of "the constitutional right to petition."

Third, allegations of criminal activity do not fall within the "protected" activity of anti-SLAPP.

a. The "based on" requirement is not synonymous with "related to." The Privacy Act Claims were "based on" the act of clandestine recording. The clandestine recording was "related to" DWT's objectives in a lawsuit.

The defendant does not prove the "based on" element by merely showing that the claims are related to, or incidental to, involved with or even in retaliation for, protected activities. *Gerbosi v. Gaims*, 193 Cal.App 4th, 435, 443-444 (Cal.App 2011). The claims must actually be "based on" those protected activities. *Id.* Here, the Privacy Act claims were "based on" conduct, namely clandestine recording of a private telephone conversation. That conduct was not traditional "free speech" or "right to petition" conduct, not even remotely. That this clandestine recording was intended by the DWT attorneys to create evidence for a litigant in a private lawsuit shows merely that the "claims" were "related to" a civil lawsuit because DWT was trying to create evidence or that lawsuit.

b. Not all speech or petition activity is *constitutionally* protected, so not all speech or petition activity is protected by anti-SLAPP.

The Superior Court's first prong test, that "any act related to a judicial proceeding" was automatically protected by anti-SLAPP, was dramatically wrong. Anti-SLAPP is intended to protect First Amendment speech and petition and only First Amendment speech and petition. It does not refer to attorney misconduct in private lawsuits.

The "right of petition" refers to the US Constitution's First Amendment's prohibition against Congress' abridging the right of the

people "to petition the Government for a redress of grievances." *See*, Michael Eric Johnston, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation*, 38 Gonzaga L.Rev 263, 268 (2002/2003)("*B. The Petition Clause and the Noerr/Pennington Doctrine*." This addresses things like citizens petitioning the government to change minimum wage law, change regulations regarding global warming, petitioning their city council to put more police cars on the street or enforce marijuana laws. "Lawful conduct in furtherance of the exercise of the constitutional right to petition" refers to things like walking in protest march for gay marriage rights, holding an anti-war protest sign, burning a US flag on the capital steps, etc. *See United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.ed.2d 287 (1990).

The constitutional right to petition is not the same as the right to file a private lawsuit to seek money damages. There is no first amendment right to file a lawsuit for money damages. "A plaintiff who brings a private lawsuit for private relief is not seeking official governmental action but rather redress from the court." *Saldivar v. Momah*, 145 Wn.App at 387. Put simply, a private lawsuit for damages is not a within the umbrella of the First Amendment. It may arise elsewhere in the Constitution or laws, but it is not in the First Amendment. Therefore acts

in furtherance of party's position in a lawsuit, like clandestinely recording a witness interview, are not within the First Amendment umbrella either. Since the right to clandestinely record the interview is not constitutionally protected by the First Amendment, it is not, and was never intended to be, within the protective umbrella of anti-SLAPP.

c. Allegations of criminal activity are not within the scope of anti-SLAPP under any circumstances.

The Dillon complaint alleged violations of RCW 9.73.030. RCW 9.73.080 makes it a gross misdemeanor to violate RCW 9.73.030. To the extent a complaint alleges criminal conduct, "there is no protected activity as defined by the anti-SLAPP statute." *Gaims v. Gerb*osi, 193 Cal.App 4th 435, 446 (2011). The California appellate addressed the issue of whether an allegation of illegal recording implicated anti-SLAPP, where the attorney who did it also claimed he was doing it as part of a protected "petitioning" activity, namely the representation of his client in a civil suit. The California Appellate Court said no, heck no:

> "The bottom line is this: [anti SLAPP] was not enacted to protect an attorney who allegedly hired an "investigator" like Anthony Pellicano to wiretap telephones so as to get an unfair advantage in a client's legal matters."
>
> *Gaims* at 446.

Anti-SLAPP was not enacted to protect DWT attorneys who want to get an advantage in private legal matters, from adverse consequences

when they commit professional misconduct, lie to witnesses and secretly record telephone conversations. That is not First Amendment protected speech. That is criminal and professional misconduct.

In *Gerbosi,* a group of lawyers at the law firm Gaims, Weil, were working on a case involving litigation with Sony Records. They hired an investigator to listen in, wiretap and record witness communications for them. Mr. Finn (a witness) and Mr. Gerbosi (his neighbor) discovered they were victims of the attorneys illegal wiretapping so they filed separate lawsuits against Gaims and his investigator, alleging causes of action for violations of California wiretapping and eavesdropping statutes. 193 Cal.App.4th at 441. Attorney Gaims argued that "all of Finn's causes of action arose from the firms acts in furtherance of its petitioning right *vis a vis* representing Pfeifer during the course of litigation that had transpired with Pfeifer and Finn in 2000 and 2001. 193 Call.App.4th at 442. (Emphasis added). The Court rejected this argument.

> "Gaims status as a member of the bar does not automatically confer the protections of the anti-SLAPP statute as to all of Finn's claims. To the extent Finn alleges criminal conduct, there is no protected activity as defined by the anti-SLAPP statute. (*Novartis Vaccines v. Stop Huntingdon Animal Cruelty, USA*, 143 Cal.App.4th 1284, 1289-1296). As a result, Finn's first cause of action for eavesdropping, and fourth cause of action for violation of the UCL (which is predicated on violations of the Pen.Code) are outside the protective umbrella of anti-

> SLAPP special motion to strike procedure. Each is based on alleged criminal activity."
>
> *Gerbosi*, 193 Cal.App. 4th at 444.
>
> "Here, to the extent that Gaims's anti-SLAPP motion sought to strike Finn's privacy related causes of action, the assertedly protected activity must be said to be wiretapping in the course of representing a client. Under no factual scenario offered by Gaims is such wiretapping activity protected by the constitutional guarantees of free speech and petition."
>
> *Gerbosi* at 446.

Here, the defendants make the same argument that was so clearly rejected in *Gerbosi*. They argue that the "petitioning" was their civil case. But that is not First Amendment petitioning and is, therefore, outside the anti-SLAPP umbrella.

3. Under the second prong of the anti-SLAPP analysis, the plaintiff carried his burden.

If the anti-SLAPP defendant carries his initial burden, and only if, then the statute shifts the burden to the plaintiff to prove his case. At this point the court applies a summary judgment like test to the plaintiff's case. *Gaims*, 193 Cal.App at 444. "A court may not weigh credibility or compare the weight of the evidence. The court's single task is to determine whether the plaintiff has made a prima facie showing of facts supporting his or her cause of action." *Gaims* at 444.

"Only a cause of action that satisfies *both* prongs of the

> anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit- is a SLAPP, subject to being stricken under the statute"

Soukup v. Law Offices of Herbert Hafif, 39 Cal 4th 260, 278-279 (2006).

As demonstrated above, the plaintiff produced plenty of evidence to prove that the two telephone conversations were private and the defendants recorded them without his consent.

VI. CONCLUSION

The Superior Court's ruling knows no thoughtful precedent in Washington or any other law in this nation.[15] This warped view of the Privacy Act and anti-SLAPP legislation runs contrary to the clear intention of Washington's Privacy Act to be the most protective in the nation and if upheld it will transform the Privacy Act into one of the least protective, least effective, privacy laws in the nation. If upheld, it will essentially

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[15] Except, it seems, by judge Martinez in the *TMobile v. Netlogix* case. *TMobile v. Netlogix*, was a diversity case venued in federal court where the Federal Court was charged interpreting RCW 9.73.060 according to how Washington Courts interpret it. Fed. R. Evid. 501; *Feldman v. Allstate*, 322 F.3d 660, 666-667(9th Cir. 2003) (applying California's privacy statute to exclude recordings of private conversations in a diversity case). Mr. Dillon was not a party to that case. At the June 15 summary judgment hearing in this case, the Superior Court properly concluded that the *TMobile* Order carried no collateral estoppel weight in this case. *CP 482 (hearing transcript p.45:20-46:2)*. That decision is unchallenged on appeal. Therefore the *Tmobile* order is irrelevant to this matter.

eliminate the Privacy Act as functional law that can protect a person's right to privacy in communications. If upheld, it will authorize a brave new world of civil litigation that permits, indeed even encourages, attorneys to make secret recordings of their conversations with witnesses, other attorneys, judges, etc. If upheld, it will send a message that anybody contemplating the exercise of their RCW 9.73.060 right to bring a claim under the Privacy Act will face the draconian anti-SLAPP penalties of RCW 4.24.525(6).

This Court should reverse the Superior Court with instructions to award the plaintiff prevailing party fees and costs pursuant to both RCW 9.73.060 and RCW 4.24.525(5)(b).

Signed and dated this 3rd day of December, 2012.

Dennis Moran, WSBA #19999

CERTIFICATE OF SERVICE

I swear under penalty of perjury that on December 3, 2012, 2 copies of the attached document was delivered to the Court of Appeals, Division 1, and served to all counsel of record.

_/s/*Marisa Testa*_______________

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