No. 89901-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69300-0

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.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE BRUCE HELLER

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners Davis Wright Tremaine LLP, Seattle Deposition Reporters, and James Grant were Defendants in the trial court and Respondents in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals' decision condones Respondent Jason Dillon's effort to exact revenge on Petitioners—including the attorneys who exposed his fraud, spoliation and fabrication of evidence in a federal lawsuit—by suing them for "recording" telephone interviews because they transcribed them. The federal court dismissed the suit, rejecting the same claim made here and dashing Dillon's hopes of earning the "fee" his former boss promised if he "supported" the case. When Dillon sued in state court, the court held the Washington Act Limiting Strategic Lawsuits Against Public Participation (anti-SLAPP law), RCW 4.24.525, bars his claim. The Court of Appeals reversed in an opinion (Appendix A) that has serious implications not only for Petitioners, but for the public at large.

The Legislature directed that the anti-SLAPP statute be "construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." The Court of Appeals ignored this mandate, finding Petitioners' gathering of evidence was outside the law's protections for acts "in connection with judicial proceedings," or "in furtherance of the exercise of the constitutional right of petition." The court adopted a narrow, strained interpretation of the

law, holding it does not protect individuals who exercise First Amendment rights nor conduct in furtherance of the right to petition courts for redress. This reading is contrary to the statute's language and history, this Court's decisions, and a decision by the Court of Appeals just three weeks ago.

The Court of Appeals also found the trial court erred in granting summary judgment, even though undisputedly Dillon contacted Petitioners to "clear his conscience" and provide information to "resolve" the federal lawsuit and agreed the lawyers could take notes and use his statements. The Court of Appeals held that a declaration Dillon submitted in federal court presented a fact issue, even though the federal court found Dillon "wholly incredible" and ruled after an evidentiary hearing that Petitioners did not violate the Privacy Act. The federal court was correct. The Court of Appeals should have prevented Dillon from re-litigating the issue. It instead rewarded him for filing a retaliatory lawsuit.

Because this case implicates the fundamental constitutional right of petition, this State's policy discouraging abusive use of the courts, and the scope of the anti-SLAPP law, Petitioners ask the Court to grant review.

III. ISSUES PRESENTED FOR REVIEW

1. **Protected Conduct Under Anti-SLAPP Law.** Whether the Court of Appeals misinterpreted the anti-SLAPP law, RCW 4.24.525, by ruling its protections for claims targeting "public participation and petition" do not protect First Amendment rights or lawful conduct in furtherance of the right of petition for redress from a court, contrary to the

statute, its legislative history, other Court of Appeals' decisions, and this Court's decisions, meriting review under RAP 13.4(b)(1),(2), (3) and (4).

2. **Proper Inquiry Under Anti-SLAPP Law.** Whether the Court of Appeals erred by accepting the plaintiff's allegations rather than considering the evidence, as the anti-SLAPP law requires, undercutting the act's protection for constitutional rights. RAP 13.4(b)(3) and (4).

3. **Expectation of Privacy Under RCW 9.73.030.** Whether the Court of Appeals erred in reversing summary judgment of a claim under the Washington Privacy Act, RCW 9.73.030, when the undisputed facts dispelled any contention that transcribed interviews were "private" communications, but the court ignored and contradicted another of its decisions and relied on a perjured declaration. RAP 13.4(b)(2) and (4).

4. **Collateral Estoppel for Federal Judgment.** Whether the Court of Appeals erred by refusing to accord collateral estoppel to a federal court's judgment (after an evidentiary hearing) that the transcription did not violate the Privacy Act. RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

A. Dillon, Former Vice President of a Plaintiff in a Federal Suit, Contacted Petitioners to "Clear His Conscience" and Provide Information to "Resolve" Ongoing Litigation in Which He Had Destroyed and Fabricated Evidence.

Dillon is the former vice president of NetLogix, CP 156:3, a company that sued T-Mobile in federal court (the Federal Action), seeking $28 million, even though T-Mobile paid $4.3 million, the full amount NetLogix had invoiced, *see* CP 155 & 180. On August 24, 2011, as the

case was ongoing, Dillon emailed Petitioner Davis Wright Tremaine LLP (DWT) that he had left NetLogix and believed "it would be beneficial to T-Mobile/DWT if we had some time to talk about the facts in this case." CP 175; CP 271-74. DWT scheduled a call for the next day, CP 194 ¶ 44, and arranged for a stenographer, Thad Byrd, from Petitioner Seattle Deposition Reporters (SDR) to take verbatim notes. CP 205-33. At the outset, Petitioner James Grant, a DWT attorney, told Dillon that he was on speakerphone, another DWT attorney and an assistant named Thad were present, and Thad would be "writing stuff down" so the lawyers would not have to take notes. CP 205 at 2:8-15. Dillon said "Okay." *Id.* Grant also told Dillon not to discuss legal advice or attorney communications, but only facts, "who did what" and "what happened." CP 205 at 2:18-25.

Dillon did not say the conversation was private. In fact, he made clear he knew T-Mobile would use the information, stating he thought it would "resolve" the Federal Action and "clear my conscience." CP 205 at 3:25-4:1; CP 211 at 27:6-9. He acknowledged DWT would disclose the information and said he expected NetLogix's CEO, Scott Akrie, would "be pissed" and "try to sue me." CP 211 at 27:10-13. But he proceeded anyway, saying "it's the right thing to do," CP 221 at 68:24, and should cause Akrie to "drop the case," CP 206 at 7:12-16. He only asked that DWT wait to tell NetLogix's lawyers until the next week so he could collect money Akrie owed him. *See* CP 206 at 7:4-15; 213 at 36:25-37:2.

Dillon also confirmed he had told other NetLogix personnel he planned to call DWT, including five employees, "pretty much the entire

team," who were "all on board with ... giving you the guys the information you need, which I think would be beneficial to resolve this thing pretty quickly." CP 205 at 3:21-4:1; *see also*; CP 273 at 12-13 (stating "most of my old team would like to speak to you as well").

Dillon then revealed NetLogix had spoliated and fabricated evidence. He said Akrie decided to sue T-Mobile three months after the contract began, when the parties agreed to lower pricing. CP 206 at 9:24-10:2. Akrie told personnel to "keep a paper trail," including two sets of files—one showing revised prices, and the other containing higher prices. CP 207 at 10:3; 209 at 19:11-17. Akrie directed Dillon and others to destroy documents reflecting lower pricing. CP 210 at 24:15-19. Dillon also destroyed his handwritten notes about T-Mobile work and created a new set to support NetLogix's claims. CP 214 at 33:5-12; 39:10-40:22; CP 215 at 45:5-16. Dillon said he was "coached" to make false statements. CP 213 at 34:18-20. He admitted that half of NetLogix's claims were for "work that was not done or is just made up." CP 219 at 58:2-9. Finally, Dillon said Akrie "offered me 10 percent of the profit of this lawsuit to support him," saying "I just need you to support this," and "we're going to be rich." CP 215 at 43:13-22.

Dillon agreed to put the information he shared in a declaration, CP 213 at 36:25-37:1. Grant prepared a draft, and another call took place September 16, 2011. CP 199-200 ¶ 61; CP 253 at 3:8-18. A stenographer again took verbatim notes, *see* CP 224-33. Dillon said the declaration was accurate except one revision, and agreed to sign it. CP 224 at 4:15-19. Grant sent a revised version to him the next day. CP 200 ¶ 61.

Nine days later, Dillon emailed DWT that he would not sign the declaration, claiming it was "incomplete" (not inaccurate). CP 200 ¶ 61; CP 235. He copied his email to Akrie, *see id.*; CP 237 & 448 ¶ 4, and when he later told Akrie about his refusal to sign, Akrie thanked him and said he would "not forget" what he had done. CP 87:15-16; CP 237.

B. Judge Martinez Dismissed the Federal Action for Spoliation and Fraud, Finding Dillon's Attempt to Disavow His Statements "Wholly Incredible."

DWT had learned separately through discovery and forensic analyses that NetLogix had destroyed and fabricated evidence. *See, e.g.*, CP 180 at ¶¶ 6, 8. On October 6, 2011, T-Mobile filed a motion to dismiss the Federal Action. *See* CP 154. It showed NetLogix created and backdated thousands of documents, supposedly proving T-Mobile approved work that NetLogix performed at the "original contract prices." CP 180 ¶ 8-183 ¶ 18. NetLogix also made countless changes to a database (changing prices, adding, deleting and altering records), and created fake reports. CP 188 ¶ 25-192 ¶ 36.

Dillon's interviews corroborated this evidence. With its dismissal motion, T-Mobile provided (among other things) portions of the verbatim notes of the interviews. CP 124 ¶ 44, 198 ¶ 59. NetLogix responded with a declaration from Dillon asserting the transcripts did not "accurately depict the conversation." CP 242 ¶ 9. NetLogix and Akrie also sued in Superior Court against Petitioners, T-Mobile, and Kennan, *Akrie v. Grant*, No. 11-2-37695-8SEA, asserting the calls were recorded in violation of RCW 9.73.030.

At an evidentiary hearing in federal court, Dillon admitted the

transcripts were accurate, CP 252:10-12, CP 252:25-253:3, but he insisted his statements were "exaggerated" or "made out of frustration." *E.g.*, CP 256:17-19; CP 259:24-CP 260-5; CP 278:14-21. T-Mobile's counsel asked him to identify statements he claimed were untrue, but he "stifled that effort," testifying in an "objectively vague, evasive, and inconsistent" manner. CP 161:3-4.

The federal court found Dillon "was telling the truth" when he spoke to DWT, did "not [tell] the truth during his subsequent testimony" and was "wholly incredible," CP 164:7-9; 166:12, writing: "Dillon has deliberately and repeatedly lied to both [DWT] and the Court in the form of informal communications, sworn declarations, and in-court testimony." CP 168:13-15. It found Dillon and Akrie "complicit" in a "pattern of dishonesty" and "willful spoliation." CP 168:19-20. Dillon showed "a breathtaking lack of respect for ... this Court, and the judicial process," and "continue[d] spinning a web of lies," leaving him "no credibility whatsoever." CP 168:16; 169:19-22. The court dismissed the claims with prejudice. CP 171:17-18; *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp. 2d 1327 (W.D. Wash. 2012) (Appendix B). NetLogix appealed; the Ninth Circuit affirmed (Appendix C).

In opposing the spoliation motion, NetLogix argued the transcripts were inadmissible under RCW 9.73.030 as illegal "recordings." CP 338-40; 351-52; *see* 240 ¶¶ 3-4; CP 361 ¶ 3. Judge Martinez ruled otherwise:

> Dillon clearly understood that Defendant's counsel intended to use the information he was providing in connection with these [the federal] proceedings, and Dillon even offered to provide them with a sworn declaration

> regarding his statements. As such, those statements were not intended to be, and were not in fact, "private."

CP 170 n.7.

C. The Superior Court Dismissed Both *Akrie v. Grant* and this Action Under the Anti-SLAPP law, But the Court of Appeals Reversed the Second Dismissal.

Before Judge Martinez issued his order, Superior Court Judge Andrus dismissed *Akrie v. Grant*, finding it was a SLAPP prohibited by RCW 4.24.525. CP 429-30. The court held that Akrie and NetLogix had no standing because they were not parties to the interviews and filing the transcripts in federal court could not be a basis for liability. CP 423:15-23; CP 423:11-14. Akrie and NetLogix initially appealed but then dropped their appeal, and the Court of Appeals held on Petitioners' cross-appeal that the statutory damages should have been $10,000 per defendant, or $50,000 total.

Shortly after dismissal of *Akrie v Grant* and the notice of appeal in the federal case, Dillon filed this suit (represented by NetLogix's counsel), asserting again that Petitioners illegally "recorded" the interviews. CP 1-7; CP 154-71. Petitioners moved to dismiss under RCW 4.24.525 and Rule 56, arguing the case was another SLAPP. CP 120-43. The court granted the motions and found Dillon had no expectation of privacy in the interviews, *see* CP 842 at 44:6-45:10; CP 807-08, 964-67, 1120-29. It awarded Petitioners a portion of their fees and $10,000 each. CP 807-08; 1155-57.

Division I of the Court of Appeals reversed, concluding there were fact questions regarding whether Dillon had an expectation of privacy in the interviews and holding that the anti-SLAPP statute does not apply.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. By Misinterpreting "Public Participation and Petition," the Court of Appeals' Decision Jeopardizes Constitutional Rights the Anti-SLAPP Statute Is Designed to Protect.

The Legislature enacted RCW 4.24.525 to curb SLAPPs, *i.e.*, "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). The trial court found Dillon's lawsuit was a SLAPP because it targeted "lawful activity in connection with a judicial proceeding." CP 1127:10-18. The Court of Appeals disagreed, narrowly parsing the law to find it does not protect conduct in petitioning a court for redress and does not apply to federal constitutional rights. This interpretation is inconsistent with the statute's language and history. And, by helping a party who lied to a court to cover up a fraud, it does the ***opposite*** of what the Legislature intended, *i.e.*, ***encourages*** "reprisal through abuse of the judicial process," *see* Laws of 2010, ch. 118 § (1)(d) (legislative findings and purpose). The decision raises significant constitutional issues of substantial public interest, which this Court should review. RAP 13.4(b)(3), (b)(4).

The Court of Appeals found the trial court erred because the phrase "lawful activity in connection with a judicial proceeding" "improperly combines language from two separate subsections" in the anti-SLAPP law. Op. at 24-25. In fact, RCW 4.24.525(2) does not limit the definition of protected conduct but states that "an 'action involving public participation and petition' ***includes***" "any claim, ***however characterized***," involving "[a]ny oral statement made, or written statement or other document submitted, ***in*** ...

a judicial proceeding," § 2(a), or "***in connection with*** [a] ... judicial proceeding," § 2(b), or "[***a***]***ny other lawful conduct ... in furtherance of the exercise of the constitutional right of petition***," § 2(e) (emphasis added). Petitioners transcribed witness interviews for use in a "judicial proceeding" or (at a minimum) "in connection with" such a proceeding, which is also conduct in furtherance of the right of petition. RCW 4.24.525(2)(a), (b), (e).

The Court of Appeals' interpretation is strained. First, it did not even discuss that the explanation of "an 'action involving public participation and petition' ***includes***" the examples in subsections (2)(a) through (2)(e). "[T]he statute's use of the term 'includes,' denotes a non-exclusive exemplary listing." *State v. Hall*, 112 Wn. App. 164, 169, 48 P.3d 350 (2002) (citing 2A Norman Singer, STATUTES & STATUTORY CONSTRUCTION § 47.07 at 231 (6th ed. 2000) ("includes" is usually a term of enlargement, not limitation)). Second, the opinion contorts subsection (2)(e), which protects "[***a***]***ny other lawful conduct*** ... in furtherance of the exercise of the constitutional right of petition." The term "other" indicates the preceding examples, *e.g.*, actions in or in connection with judicial proceedings, also are conduct in furtherance of the exercise of the constitutional rights of free speech and petition.

But the Court of Appeals went on to hold that subsection (2)(e) does not encompass conduct in judicial proceedings. The Court reasoned as follows: (1) RCW 4.24.525(2)(e) refers to only one constitutional right (because of the word "the"); (2) that must be the state constitutional right of petition in Article 1, section 4; (3) while the First Amendment right of petition encompasses access to the courts, some Washington cases have

suggested Article 1, section 4 "is a political right that does not encompass ... the right to access courts," Op. at 32; and (4) therefore, the reference to "the right of petition" in the anti-SLAPP law does not protect against retaliatory lawsuits attacking lawful conduct in judicial proceedings. Op. at 28-36.

The Court of Appeals' view undermines the anti-SLAPP law. The federal ***and*** state constitutions recognize the right of petition and access to the courts.[1] Nothing suggests that, in using the terms "the constitutional right of free speech" and "the constitutional right of petition," the Legislature intended the anti-SLAPP act's protections to apply only to state rights. To the contrary, the Legislature found that "SLAPP suits are designed to intimidate the exercise of ***First Amendment rights*** and rights under Article I, section 5 of the Washington state Constitution." Laws of 2002, ch. 232, § 1 (emphasis added). The House report for the bill that became RCW 4.24.525 states: "The First Amendment to the ***United States Constitution*** provides the right 'to petition the government for a redress of grievances," which "covers any peaceful, legal attempt to promote or discourage governmental action at any level and ***in any branch***," including "filing complaints" or "reporting violations of the law." House Bill Report SSB 6395 (Appendix E). And the Legislature directed that RCW 4.24.525 be "construed liberally to effectuate its general purpose of protecting participants in public controversies from an

[1] "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." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 815, 83 P.3d 419 (2004) (citing *Richmond v. Thompson*, 130 Wn.2d 368, 381, 922 P.2d 1343 (1996)). The Court of Appeals stated that *Richmond* and *Grant County* were not "controlling." Op. 34 n.28.

abusive use of the courts," Laws of 2010, Ch. 118 § 1.

This Court and others have consistently interpreted the anti-SLAPP act to protect the exercise of First Amendment rights. *See, e.g., Segaline v. State*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010) ("The purpose of the statute is to protect the exercise of individuals' ***First Amendment rights under the United States Constitution*** and rights under article 1, section 5 of the Washington State Constitution.") (citing RCW 4.24.510 statutory notes) (emphasis added). Indeed, three weeks ago, the Court of Appeals—and two of the same judges in this case—wrote: "Because the legislature's intent in adopting RCW 4.24.525 was to address 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,' ***this court looks to First Amendment cases to aid in its interpretation***." *City of Seattle v. Egan*, 317 P.3d 568, 2014 WL 390416, at *1 & n.8 (Wash. App. Feb. 3, 2014) (citing Laws of 2010, ch. 118, § 1 and Laws of 2002, ch. 232, § 1) (emphasis added).

Read sensibly, "the constitutional right of petition" in RCW 4.24.525(2)(e) refers to individuals' general right to petition for redress from government, including through the courts—a right secured by and which predates the federal and state constitutions. *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985) ("The historical roots of the Petition Clause long antedate the Constitution."). The Court of Appeals' view not only lacks support, it would undermine the anti-SLAPP law's purpose. A disgruntled party in litigation could file a baseless lawsuit against his opposing party and its attorneys based on lawful conduct in the litigation, and the anti-SLAPP law

would provide no protection. This Court should correct this misreading, which conflicts with its decisions and the Court of Appeals' decisions and raises issues of public interest. *See* RAP 13.4(b)(1), (b)(2), and (b)(4).

B. The Court of Appeals' Failure to Analyze the Circumstances of the Lawsuit Guts the Anti-SLAPP Law's Protections.

Based on Dillon's complaint, the Court of Appeals found "the principal thrust of [his] claims" to be "SDR's acts of transcribing Dillon's telephone calls ..., not [the] subsequent submission of the transcripts ... to the federal court." Op. 26. It concluded "SDR's acts of transcription are not statements" under RCW 4.24.525(a) or (b), and "Dillon's claims are not 'based on an action involving public participation or petition," Op. at 26, 40-41. This is a grave departure from the anti-SLAPP law and its spirit and risks converting it to a mere requirement of pleading niceties.

The anti-SLAPP law requires courts to look beyond a plaintiff's allegations to determine whether a claim is a SLAPP. It applies to claims, "however characterized," targeting public participation and petition. RCW 4.24.525(2). It provides that "the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c). The Court of Appeals failed to do this, accepting Dillon's allegations and characterizations, ignoring the suit's context, and scolding Petitioners for arguing that "notwithstanding the language of Dillon's complaint, he must truly be [challenging] the act of filing the transcripts." Op. 27.

In reaching this conclusion, the Court of Appeals relied on

California cases, but overlooked that they have "adopted a fairly expansive view of what constitutes litigation-related activities within the scope of" the anti-SLAPP law's protection. *Kashian v. Harriman*, 98 Cal. App. 4th 892, 908, 120 Cal. Rptr. 2d 576 (2002). "[C]ommunications that are intimately intertwined with, and preparatory to, the filing of judicial proceedings qualify as petitioning activity for the purpose of the anti-SLAPP statute." *Cabral v. Martins*, 177 Cal. App. 4th 471, 482-83 (2009) (attorney's revision to a will was protected by the statute); *see also Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784 (1996) (law applied to lawyer's allegedly libelous letter sent while investigating a potential complaint).[2]

Dillon's lawsuit plainly targets Petitioners' public participation and petition. Dillon contacted DWT for the purpose of providing information for use in the Federal Action. CP 205 at 3:21-4:1. He agreed to provide a sworn declaration to be filed in court. CP 205 at 2:14-15, 213 at 36:25-37:3. Shortly after T-Mobile filed its spoliation motion, NetLogix and Akrie filed the first SLAPP, alleging the filing of the transcripts had harmed them. They sought to amend the complaint to add Dillon as a plaintiff and remove references to the transcripts, CP 429-445, but the

[2] To reach this result, the Court relied on a narrow exception recognized by some California cases that anti-SLAPP protections may not apply to conduct that is "illegal as a matter of law." Op. at 39-42; *see Flatley v. Mauro*, 39 Cal. 4th 299, 317 (2006) (giving as examples "robbing a bank to obtain money for campaign contributions" and "money laundering activity ... in furtherance of the[] constitutional right of free speech"). No court has found Petitioners' conduct "illegal as a matter of law." To the contrary, the only three courts to decide the issue have found it was not. CP 170 n.7, 429-30, 420-29.

Superior Court dismissed the case, CP 463. When Judge Martinez dismissed the Federal Action, NetLogix filed a notice of appeal and Dillon, represented by NetLogix's counsel, brought this action ten days later. CP 1-7. Plainly, Akrie, NetLogix, and Dillon filed the state suits in retaliation for the spoliation motion and to deter use of the transcripts. Just as clearly, Petitioners' acts of interviewing Dillon, transcribing the interviews, and using them to show fraud on the court, are intertwined.

The Court's approach of divorcing the "acts of transcription" from the context of collecting and filing evidence in court not only prejudices Petitioners but poses significant risks for all SLAPP victims. Courts must not allow plaintiffs to evade the anti-SLAPP law through artful pleading—California courts reject such maneuvers. *See, e.g.*, *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 166 (2003) (applying anti-SLAPP law to claim that reporters secretly recorded and broadcast private patient consultations); *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, __ F.3d __, 2014 WL 449045, at *5-6 (9th Cir. Feb. 5, 2014) (rejecting effort "to elude the scope of the anti-SLAPP statute" with "attempts to frame [the] action as targeting CNN's 'refusal to caption its online videos' rather than 'CNN's presentation ... of the news'").

This is for good reason. Under the Court of Appeals' decision, a clever plaintiff need allege only that a defendant committed an unlawful act—no matter the circumstances—to evade the anti-SLAPP law. Given that SLAPP plaintiffs by definition seek to abuse the judicial process, they are likely to tailor their pleadings to avoid the law's requirements. Thus,

the Court of Appeals' decision effectively guts the law's protection, contravening the Legislature's intent and undermining constitutional rights, meriting review under RAP 13.4(b)(3) and (4).

C. By Reinstating Dillon's Privacy Act Claim, the Court of Appeals' Decision Conflicts with Another of Its Decisions and Undermines the Public Interest Because it Relies on Dillon's Perjured Declaration.

The Court of Appeals reversed the trial court's decision that the interviews with Dillon were not private as a matter of law, even though Dillon agreed Petitioners could take notes, indicated he expected the information would be disclosed, and provided no evidence (except a perjured declaration) that he believed the calls were private. The decision presents an issue of substantial public interest and conflicts with *State v. Slemmer*, 48 Wn. App. 48, 738 P.2d 281 (1987). *See* RAP 13.4(b)(2), (4).

The Washington Privacy Act, RCW 9.73.030, "appl[ies] only to ***private*** communications or conversations." *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). "Private" means "secret," *i.e.*, where information is "intended only for the persons" conversing, or includes a "secret message." *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). A plaintiff must manifest a "subjective intention" and prove a "reasonable expectation" that his communication would be private. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2005). As this Court recently observed, "[w]hether a particular conversation is private is a question of fact, ***but where the facts are undisputed ... the issue may be determined as a matter of law.***" *State v. Kipp*, __ P.3d __, 2014 WL

465635, at *3 (Wash. Feb. 6, 2014) (quotation omitted) (emphasis added).

Neither the trial court nor the federal court found any indication Dillon considered his conversations with Petitioners secret. Undisputedly, he "knew that he was talking to lawyers who would be taking notes," "had reason to believe that the lawyers would be talking to other people about what they heard," "had indicated to others that he was going to have the meeting," and "told others after the meeting ... what had occurred." CP 842 at 44:10-11, 44:13-20. Yet, the Court of Appeals found it "disputed whether Dillon manifested a subjective intention that the conversations were private," Op. at 13, based on a declaration in the Federal Action claiming he told one DWT attorney "he intended for the conversations to be private." *Id.* But Dillon testified, and the federal court found, ***this was a lie***,[3] suggesting that, under the Court of Appeals' interpretation, a party may always pursue a Privacy Act claim if he is willing to commit perjury.

The Court of Appeals also found that if Dillon expected privacy, that could have been reasonable, Op. at 14-17, ignoring *Slemmer*, 48 Wn. App. 48. There, a conviction was based partly on statements made at an investment club meeting that were recorded without the defendant's knowledge. *Id.* at 51. The court held the statements were not private because the defendant knew minutes were being taken and "the substance of their conversation" could be disclosed to others. *Id.* at 52-53. Here too,

[3] *See* CP 319:15-21 ("Q. [Ms. Kennan] says in ... her declaration that she never told you that either call would be private or confidential? A. She never mentioned that."); CP 168:13-15 ("Dillon has repeatedly lied" in "sworn declarations and in-court testimony").

Dillon agreed it was "okay" that someone was taking notes, CP 205 at 2:8-15, and could not have had any reasonable expectation the interviews would be secret. *See also Clark*, 129 Wn.2d at 226.

Further, the Court of Appeals' decision creates an impossible quandary for an attorney who learns about a fraud on the court. The court opined that "[s]imply because Dillon was divulging information pertinent to a civil suit does not mean that Dillon's expectation of privacy was unreasonable as a matter of law." Op. at 16. Dillon's disclosures were not just "information pertinent to a civil suit," they were admissions of spoliation and fabrication of evidence—*i.e.*, fraud on the court. If one can allege a claim under the Privacy Act premised merely on the taking of verbatim notes of a witness interview,[4] counsel who learns of fraud cannot disclose it to a court if the witness later claims the disclosures were private. This nonsensical result merits review. RAP 13.4(b)(2), (b)(4).

D. The Court of Appeals Undermined the Public Interest by Giving Deference to Dillon's Perjured Declaration Rather Than the Judgment of the Federal Court.

The Court of Appeals also erred by failing to respect the federal court's judgment and findings that Petitioners did not violate the Privacy Act, instead relying on Dillon's perjured declaration in that case. The failure to affirm on this alternate basis undermines the public interest.

The Court of Appeals agreed collateral estoppel requires: "(1)

[4] Petitioners are aware of no authority that manually transcribing a conversation is recording "by any ***device*** electronic or otherwise ***designed to record and/or transmit said conversation***," as the Privacy Act requires. RCW 9.73.030(1)(b) (emphasis added).

identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom [it] is to be applied." Op. at 18 (quoting *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998) (quotation omitted)). But it refused to find collateral estoppel because, it wrote, Judge Martinez's opinion was "not a final judgment on the merits" and there was no indication "the separation of the suits was the product of some manipulation or tactical maneuvering," for the doctrine to apply to a party in privity with a prior litigant. *See Garcia v. Wilson*, 63 Wn. App. 516, 521, 820 P.2d 964 (1991); Op. at 19.

But the federal court ***had*** to decide the merits of Dillon's claim, (*i.e.*, whether Petitioners violated RCW 9.73.030) to consider the transcripts evidence of spoliation and dismiss the lawsuit ***with prejudice***. CP 170 n.7. This issue was uniquely within the federal court's purview. Moreover, it is generally established that "the employer/employee relationship is sufficient to establish privity." *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995). Regardless, there was ample evidence of manipulation. Dillon, Akrie, and NetLogix filed suit while the Federal Action was pending, represented by the same lawyer, advancing the same arguments (based on the same perjured testimony). Akrie and NetLogix admit they sued in state court suit so that "some court would not ignore" them as they had "little hope" of prevailing in federal court. *See Akrie v. Grant*, No. 68245-4-1, Pet. for Review at 5-6.

The issue decided in the Federal Action was the same as in this case, and was fully and fairly litigated based on the same evidence, Dillon was represented by the same counsel, was called as a witness and testified about the interview transcripts, and was fully involved and interested in the Federal Action, both because he stood to benefit if NetLogix prevailed, and because he was the central witness in that case. If collateral estoppel does not apply here, it has lost its significance. The Court of Appeals' refusal to give collateral estoppel effect to the federal court decision warrants review under RAP 13.4(b)(4).

VI. CONCLUSION

"It is a rule of evidence, as old as the law itself... that a party's fraud in the preparation or presentation of his case, such as the suppression or attempt to suppress evidence by the bribery of witnesses or the spoliation of documents, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth." *State v. Constantine*, 48 Wash. 218, 221, 93 P. 317 (1908). Ignoring this principle, the Court of Appeals sent a message that a litigant may allege a Privacy Act claim based on lies, obtain relief in state court he cannot get in federal court, and evade the anti-SLAPP statute through artful pleading. This Court should accept review.

DATED this 20th day of February, 2014.

BYRNES KELLER CROMWELL LLP

By Ralph E. Cromwell Jr.

Ralph E. Cromwell, Jr., WSBA #11784
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing pleading was served upon the following individuals via email and U.S. mail:

Dennis Moran
William A. Keller
Moran & Keller Law Firm
600 - 108th NE, Suite 650
Bellevue, WA 98004-5110

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 20th day of February, 2014.

Ralph E. Cromwell Jr.

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Appendix A

IN THE COURT OF APPEALS 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, Defendants.	)	DIVISION ONE No. 69300-0-I (Linked with No. 68345-4-I) PUBLISHED OPINION FILED: January 21, 2014

DWYER, J.—Washington's anti-SLAPP[1] statute protects persons who engage in "action[s] involving public participation and petition" from having to defend against a claim based on those actions.[2] The recording of telephone conversations is not such an action. This is so even when such recording is designed to gather evidence for a lawsuit between private parties. The anti-SLAPP statute does not operate to transform unprotected activity into protected activity simply because it is undertaken during the course of a lawsuit.

[1] Washington Act Limiting Strategic Lawsuits Against Public Participation.
[2] RCW 4.24.525(2).

In the matter before us, Jason Dillon filed suit against Seattle Deposition Reporters, LLC, Davis Wright Tremaine, LLP, and James Grant (collectively SDR), alleging certain violations of the privacy act[3] for having recorded Dillon's telephone conversations with Grant and Cassandra Kennan without his knowledge. SDR moved for dismissal on summary judgment, asserting that the conversations were not private and that Dillon's claims were barred by collateral estoppel. SDR also moved to strike the claims pursuant to the anti-SLAPP statute. The trial court ruled that Dillon had no expectation of privacy in the telephone conversations and granted the motion for summary judgment. The trial court further found that the anti-SLAPP statute applied, and awarded to SDR statutory damages of $10,000 per defendant plus attorney fees of $40,000. Judgment in the total amount of $70,000 was entered against Dillon.

Dillon contends that the trial court erred by granting summary judgment, asserting that genuine issues of material fact exist as to whether the telephone conversations he had with Grant and Kennan were private. Dillon also avers that the anti-SLAPP statute does not apply to his claims. Because Dillon presented triable issues of fact, and collateral estoppel does not apply to preclude his privacy act claims, the trial court erred by entering summary judgment in favor of SDR. Furthermore, the anti-SLAPP statute does not apply to Dillon's claims, as SDR's actions did not involve public participation or petition. Thus, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

[3] Ch. 9.73 RCW.

I

Dillon is the former vice-president of NetLogix, a company headed by Scott Akrie and based in San Diego, California. NetLogix contracted with T-Mobile to "perform services in connection with the build out of [T-Mobile's] cellular phone network in California." In 2010, NetLogix sued T-Mobile in the United States District Court, Western District of Washington, for breach of contract. Grant and Kennan represented T-Mobile in the federal court lawsuit. On August 24, 2011, Dillon e-mailed Grant and Kennan at their law firm, Davis Wright Tremaine (DWT), stating that he would like to "talk about the facts" in the pending federal court action. Kennan arranged for Dillon to call the next day.

Dillon telephoned DWT offices as planned on August 25, 2011. At the start of the conversation, Grant told Dillon,

> I wanted to point out something before we get started because we have you on the speaker phone because Cassi and I are both here. And I've got my assistant Thad, who's writing stuff down so that we don't have to worry about taking notes while we're talking to you.

Thad Byrd was not, in actuality, Grant's assistant. Rather, he was a certified court reporter employed by Seattle Deposition Reporters. DWT had previously made arrangements with Seattle Deposition Reporters to have a court reporter sit in on and transcribe the telephone conversation. Byrd set up his stenographic equipment in the room with Grant and Kennan and transcribed their conversation with Dillon. Neither Grant, Kennan, nor Byrd apprised Dillon of this information.

Before revealing any information, Dillon told Grant,

> 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.

Grant responded, "Okay, understood. At this time, we just want to hear what you have to say." Dillon also stated, "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."

Nonetheless, Dillon continued the conversation with Grant and Kennan. Dillon proceeded to describe various instances of misconduct by both parties to the federal court action, including a kickback scheme instituted by T-Mobile employees, falsification of records committed by NetLogix employees, and willful destruction of unfavorable evidence committed by Akrie or at Akrie's direction. Dillon also stated that Akrie "offered me 10 percent of the profit of this lawsuit to support him," and that he did not "have a problem writing a declaration for you guys."

Dillon telephoned DWT again on September 16, 2011. This telephone call was also transcribed by an employee of Seattle Deposition Reporters.[4] Again, Dillon was not apprised of the presence of the court reporter, or even of anyone there to "take notes" during this call. During this call, Dillon confirmed, with one small change, the written declaration Grant and Kennan had previously prepared

[4] Mark Hovila was the court reporter for the second telephone call. Neither Byrd nor Hovila is a party to this action.

and sent to him. The following exchange occurred between Grant and Dillon during the call:

> Q. [Grant]. I had thought of actually putting something in the declaration saying that that's your concern and that's why you approached us, that your concern is that you had been told, instructed to provide information that was inaccurate. Is that something that you'd be comfortable saying, or that just between us at this point?
> A. [Dillon]. Sure.
> Q. Okay.
> A. Well, actually I talked with a friend who's an attorney, and he said just to protect myself from Scott is–Scott and Bill, I guess, mainly, is, you know, for you guys to take my deposition again and ask these questions, so I'm under oath and they can't come back and say that, you know, that I'm trying to maliciously hurt Scott. I'm not.

Dillon also elaborated on information he had revealed during the first call, and informed Grant and Kennan that Akrie had coached NetLogix employees on what to say in connection with the lawsuit. However, 10 days later, Dillon e-mailed Grant and Kennan stating that he was "unable to sign" the declaration they had prepared.[5]

On October 6, 2011, T-Mobile filed a motion for dismissal in the federal court action alleging spoliation of evidence, based largely on statements uttered by Dillon in the telephone conversations. Given that Dillon refused to sign the proffered declaration, T-Mobile filed portions of the transcripts of both calls in support of the motion. After Dillon learned of this, he sent an e-mail to Grant and Kennan expressing his "outrage" at them for having "deceivingly record[ed]" the conversations. NetLogix and Dillon then requested copies of the transcripts in

[5] Dillon also sent the e-mail to Akrie.

their entirety. DWT refused NetLogix's request, asserting that the transcripts were protected by the work product privilege.[6]

On February 2 and February 16, 2012,[7] the federal court held an evidentiary hearing to determine whether NetLogix had willfully destroyed evidence and if dismissal was warranted as a result. The court called Dillon to testify as a witness at that hearing. Dillon disavowed a number of statements from both the August 25 and September 16 telephone calls, and repeatedly testified that he had made various previous statements "out of frustration." The court requested briefing from both parties prior to making a credibility determination as to Dillon's testimony.

The federal court issued its ruling on March 14, 2012. The court found that Dillon's statements in the telephone conversations were credible, and that Dillon's testimony at the evidentiary hearing was "wholly incredible." The court further found that the transcripts presented "overwhelming evidence of spoliation," and concluded that dismissal of the case was "the only appropriate remedy" given the egregious misconduct committed by the plaintiffs. In its written opinion, the court stated, "[T]he Court does not believe that Defendant's counsel violated Washington law by recording their discussions with Dillon." Volcan Grp., Inc. v. T-Mobile USA, Inc., 940 F.Supp.2d 1327, 1338 (W.D. Wash. 2012). In a footnote to its opinion, the court stated:

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[6] The federal court later determined that DWT had waived any privilege by filing portions of the transcripts with the court, and ordered that DWT produce the transcripts in full.

[7] The federal court truncated the hearing on February 2, continuing the matter until February 16 to allow Dillon time to review the transcripts of the telephone calls.

> Although Dillon clearly did not consent to a transcription of his conversation with Defendant's counsel, that is not to say that he intended the call to be "private." On the contrary, Dillon clearly understood that Defendant's counsel intended to use the information he was providing in connection with these proceedings, and Dillon even offered to provide them with a sworn declaration regarding his statements. As such, those statements were not intended to be, and were not in fact, "private."

Volcan Grp., 940 F.Supp.2d at 1338 n.7. The court granted the motion to dismiss, but not before admonishing both parties and their counsel for their unprofessional behavior.[8]

Dillon filed suit against SDR in King County Superior Court, alleging that the various defendants violated the privacy act by recording the telephone conversations of August 25 and September 16. SDR moved for summary judgment, asserting that the conversations were not private and that collateral estoppel barred Dillon's claims. SDR also moved to strike Dillon's claims pursuant to Washington's anti-SLAPP statute. In opposition to SDR's motions, Dillon submitted a declaration, wherein he asserted that he "specifically told [Kennan] that I did not want anything I told them in the telephone conversations

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[8] As to T-Mobile's and DWT's behavior, the court stated:

> Neither Defendant nor its counsel should be proud of this result. While the Court does not believe that Defendant's counsel violated Washington law by recording their discussions with Dillon, it is clear that the representations they made to Dillon at the outset of those discussions led him to adopt the mistaken belief that his statements were not being transcribed. The Court believes that Defendant's counsel knew of Dillon's misunderstanding, but intentionally did nothing to correct it. The Court questions whether such conduct can be squared with [the] demanding standards of a lawyer's professional responsibilities under RPC 4.1(a).

Volcan Grp., 940 F.Supp.2d at 1338 (footnote omitted). The court further noted, "The Court has no doubt that Defendant initially redacted the Transcripts in order to conceal Dillon's statements regarding the kickback scheme." Volcan Grp., 940 F.Supp.2d at 1338 n.8.

RPC 4.1 states, in relevant part, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."

to be part of the public record" and that he agreed to speak with Grant and Kennan only after they assured him that the conversations would be kept private.[9] Dillon moved to bifurcate the anti-SLAPP hearing in order to address the two steps of the statutory inquiry separately,[10] and moved to compel outstanding discovery. The trial court denied both of Dillon's motions.

The trial court heard both of SDR's motions on June 15, 2012. The trial court heard argument and issued its ruling on the summary judgment motion before it considered the anti-SLAPP motion. In ruling on the summary judgment motion, the trial court declined to apply collateral estoppel to preclude Dillon's claims. However, relying on State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996), and State v. Mankin, 158 Wn. App. 111, 241 P.3d 421 (2010), review denied, 171 Wn.2d 1003 (2011), the trial court ruled that Dillon had no subjective expectation of privacy when he telephoned Grant and Kennan. This was so, the trial court explained, because:

> Now, he may have had an . . . expectation of privacy that his words would not be transcribed word by word, but he certainly knew that he was talking to lawyers who would be taking notes. There's no reason why he didn't think otherwise.
>
> And he also had reason to believe that the lawyers would be talking to other people about what they had heard in the meeting, that they would be drafting a declaration. And . . . so there was no

[9] Dillon originally submitted his declaration in the federal court action. An exact copy thereof was submitted in this action as an attachment to the declaration of Dennis Moran.

[10] "A moving party bringing a special motion to strike a claim under this subsection 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. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b).

> expectation of privacy with respect to what was said in that meeting.
>
> Mr. Dillon had indicated to others that he was going to have the meeting. He, in fact, told others after the meeting . . . what had occurred.

The trial court then went on to consider the anti-SLAPP issue. The trial court began by saying, "It seems like the Court's already ruled on the second part of that, because . . . at this point, Mr. Moran[11] won't be able to show . . . by clear and convincing evidence a likelihood of prevailing on the merits . . . ." After argument by both parties, the trial court asked counsel for SDR whether "the fact that this Court has already made a ruling on the summary judgment motion enter[s] into" the analysis of whether SDR could show that its conduct fell under the ambit of the anti-SLAPP statute. SDR's counsel replied,

> Yes, because I've shown you by a preponderance of the evidence and, indeed, more than by. I've shown you as a matter of law in the undisputed facts that the activity that gave rise to this claim is other lawful conduct in furtherance of this right to participate in governmental functions.

The trial court agreed, deciding the anti-SLAPP issue as follows:

> [T]he issue before the Court is whether or not the petitioner under the SLAPP statute has shown by a preponderance of the evidence that this action or this lawsuit is based on an action involving public participation.
>
> And . . . 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. And so . . . that brings us to the next question, which is[,] was this lawful conduct[?] And . . . that's where we get to I think the California case where we had a rogue investigator who had been found to have engaged in criminal conduct in wiretapping

[11] Counsel for Dillon.

numerous telephones.[12]

And the California Court said – first they pointed out – that these activities were found to be criminal extortion as a matter of law, and then they go on to say when a defendant's assertedly protected activity may or may not be criminal activity, the defendant may invoke the anti-SLAPP statute unless the activity is criminal as a matter of law.

Well, this Court has already found as a matter of law that the activity was not criminal, and therefore, the Court finds that the Gerbosi case is distinguishable.

And . . . I do agree with Mr. Cromwell[13] that the analysis is fairly straightforward here. The Court needs to only find that the activity that is the subject of the privacy act claim was lawful activity in connection with a judicial proceeding, and that was, I think, quite clearly the case. And . . . this only needs to be established by a preponderance of the evidence, and I think that the petitioners have satisfied that burden.

And the burden, then, of course shifts to the other side to show by clear and convincing evidence 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.

Dillon filed a motion for reconsideration, which the trial court denied in all substantive respects.[14] Pursuant to the anti-SLAPP statute, the trial court awarded to SDR the statutory damage amount of $30,000 ($10,000 for each defendant) and $40,000 in attorney fees and costs.

Dillon appeals.

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[12] Gerbosi v. Gaims, Weil, West & Epstein, LLP, 193 Cal.App.4th 435, 122 Cal.Rptr.3d 73 (Cal.App. 2011).

[13] Counsel for SDR.

[14] The trial court granted the motion with respect to its failure to comply with the five day notice requirement of CR 54(f)(2) before issuing its order. The court reissued its order, without substantive amendment, on August 31, 2012.

II

Dillon first contends that the trial court erred by granting summary judgment in favor of SDR on his privacy act claims. This is so, he asserts, because triable issues of fact exist as to whether the telephone conversations between Dillon, Grant, and Kennan were private. We agree.

In considering this contention, we employ a familiar standard of review.

> We engage in a de novo review of a ruling granting summary judgment. Anderson v. Weslo, Inc., 79 Wn. App. 829, 833, 906 P.2d 336 (1995). Thus, we engage in the same inquiry as the trial court. Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). All reasonable inferences from the evidence must be construed in favor of the nonmoving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

Green v. Normandy Park Riviera Section Cmty. Club, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007).

Washington's privacy act provides, in relevant part:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1). Violation of the privacy act is a gross misdemeanor, and is also actionable in tort. RCW 9.73.060, .080. "We engage in a four-pronged analysis to determine whether an individual has violated the Act." State v. Roden, 169 Wn. App. 59, 64, 279 P.3d 461 (citing State v. Christensen, 153 Wn.2d 186, 192, 102 P.3d 789 (2004)), review granted, 175 Wn.2d 1022, 291 P.3d 253 (2012). There must be proof of, "(1) a private communication transmitted by a device, which was (2) intercepted by use of (3) a device designed to record and/or transmit, (4) without the consent of all parties to the private communication." Christensen, 153 Wn.2d at 192.

Here, only the first element, whether the conversation was private, is at issue. "[T]he question of whether a particular communication is private is generally a question of fact, but one that may be decided as a question of law if the facts are undisputed." Townsend, 147 Wn.2d at 673 (citing Clark, 129 Wn.2d at 225). Although the privacy act does not define "private," our Supreme Court has "adopted the *Webster's Third New International Dictionary* (1969) definition of '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 v. Dep't of Licensing, 157 Wn.2d 446, 458, 139 P.3d 1078

(2006) (alterations in original) (internal quotation marks omitted) (quoting Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992)). A communication is private within the meaning of the privacy act only "'(1) when parties manifest a subjective intention that it be private and (2) where that expectation [of privacy] is reasonable.'" State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008) (quoting Christensen, 153 Wn.2d at 193). A court will "generally presume that conversations between two parties" over the telephone "are intended to be private." Modica, 164 Wn.2d at 89.

Here, it is disputed whether Dillon manifested a subjective intention that the conversations were private. Dillon stated repeatedly during the August 25 call, and again during the September 16 call, that he was concerned about protecting himself from Akrie. Dillon later submitted a declaration to the trial court asserting that he intended for the conversations to be private, and would not have called Grant and Kennan had he thought otherwise. Given that Dillon later told Akrie about the conversations, it is possible that Dillon did not actually intend for the conversations to be private.[15] However, on summary judgment, the facts must be viewed in the light most favorable to Dillon, the nonmoving party. Mountain Park Homeowners Ass'n, Inc. v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Therefore, a triable question of fact exists as to whether Dillon subjectively intended the conversations to be private. The trial court erred by ruling as a matter of law that Dillon had no such intent.

[15] Significantly, and militating in Dillon's favor, "[t]he relevant time for assessing the [plaintiff's] intent and reasonable expectations is at the time of the conversation," not afterward. Clark, 129 Wn.2d at 228.

However, summary judgment would still have been appropriate if Dillon's subjective intent was not reasonable as a matter of law. See Modica, 164 Wn.2d at 88 (A "'communication is private where . . . that expectation [of privacy] is reasonable.'" (quoting Christiansen, 153 Wn.2d at 193)). Factors bearing on the reasonableness of an expectation of privacy include "(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party." Lewis, 157 Wn.2d at 458-59 (citing Clark, 129 Wn.2d at 225-27).

Here, the second factor weighs in favor of Dillon. Dillon spoke with Grant and Kennan over the telephone and had no way of knowing if the conversation was being transcribed without being so told. Grant and Kennan were speaking from DWT offices, a place where one would not expect third parties to be present. Although Grant informed Dillon that "Thad" was present during the first call, Grant disingenuously introduced Byrd as if he were a DWT employee "taking notes," not a third party transcribing the conversation. Even worse, Grant and Kennan never told Dillon about the presence of another person during the second call.

The third factor, on the other hand, weighs in favor of SDR. Grant and Kennan represented T-Mobile, the party adverse to Dillon's former employer in the federal court action. Dillon was aware of the ongoing litigation and Grant's and Kennan's role in it, and purposely divulged information that he knew would benefit T-Mobile.

As to the first factor, the aspect of the subject matter is in dispute.[16] Dillon urges this court to distinguish between the conversation itself and the content of the conversation when determining whether a conversation is "private" for purposes of the act. SDR, citing Modica, asserts that this distinction only matters when one party uses the other as a "private messenger." However, Modica says nothing about "private messengers." To the contrary, the Modica court specifically stated that "the mere fact that a portion of the conversation is intended to be passed on does not mean a call is not private." 164 Wn.2d at 89-90. Instead, privacy "must be determined from the totality of the circumstances." Modica, 164 Wn.2d at 90. The Modica court held that although Modica and his grandmother might have intended their conversation to be private, that intent was not reasonable. 164 Wn.2d at 88. This was so, the court held, because Modica was in jail at the time and both parties "knew they were being recorded and that someone might listen to those recordings." Modica, 164 Wn.2d at 88.

The State in that case asserted that because Modica intended for his grandmother to relay messages to his wife, Modica's conversations with his grandmother could not be private. Modica, 164 Wn.2d at 89. The court explicitly rejected this argument. Modica, 164 Wn.2d at 89. In doing so, the court contrasted Modica's conversation with the conversation in State v. Forrester, 21 Wn. App. 855, 587 P.2d 179 (1978). Forrester called the police and confessed to a murder, then stated that unless he was given $10,000, he would kill again.

[16] The duration of the calls weigh in Dillon's favor. The first conversation lasted approximately 80 minutes and the second lasted approximately 50 minutes. These were not merely brief exchanges on the street, as in Clark, 129 Wn.2d at 230-31.

Modica, 164 Wn.2d at 89 (citing Forrester, 21 Wn. App. at 861-62). In Forrester, the court had found that the conversation was not private because "the caller was using the telephone to attempt the commission of a crime and to threaten the commission of other murders if his demands were not met." 21 Wn. App. at 862. Notably, the Forrester court had contrasted its case with State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977), in which the court found that even where the caller reported the commission of a crime, the conversation was private.[17] Forrester, 21 Wn. App. at 862.

Dillon's situation is not comparable to that set forth in Forrester. Dillon did not make any threats or demand money; rather, he described T-Mobile's and NetLogix's attempts to do so. Nor is Dillon's situation comparable to that of Modica, who was an inmate at the time of his conversation[18] and knew that he was being recorded. Modica, 164 Wn.2d at 88. Simply because Dillon was divulging information pertinent to a civil suit does not mean that Dillon's expectation of privacy was unreasonable as a matter of law. Unlike in criminal cases, the parties to a civil suit may take the deposition of any potential witness.[19] CR 30(a). Additionally, attorneys may and, indeed, in this case did,

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[17] The legislature has since amended the privacy act to exempt telephone calls wherein someone reports a crime. RCW 9.73.030(2)(a).

[18] Inmates automatically have a reduced expectation of privacy. Modica, 164 Wn.2d at 88.

[19] For this reason, State v. Mankin, 158 Wn. App. 111, 241 P.3d 421 (2010), cited by SDR, is inapposite. In Mankin, the defendant's attorney attempted to interview three police officers involved in his client's criminal case. 158 Wn. App. at 115. When the officers refused to allow defense counsel to record them, defense counsel terminated the interviews. Mankin, 158 Wn. App. at 115. Mankin moved to depose the officers, asserting that because the interviews were not private, the officers had no basis under the privacy act for their refusal. Mankin, 158 Wn. App. at 115. The trial court ruled that the conversations were not private and granted

ask someone with personal knowledge of relevant facts to sign a written declaration attesting to those facts. GR 13(a). Given these alternate, legitimate means of obtaining relevant evidence, it is not, as a matter of law, unreasonable for a potential witness to expect that his initial conversation with a party's attorneys would be private. Thus, the first factor in its entirety also favors Dillon.

With the balance of the three factors in Dillon's favor, triable questions of fact exist as to whether Dillon subjectively and reasonably believed that his conversations with Grant and Kennan were private. The trial court erred by holding, as a matter of law, that the conversations were not private.

III

SDR contends that we should affirm the trial court's grant of summary judgment on the basis of collateral estoppel. This is so, they assert, because the federal court in Volcan Grp. held that the conversations were not private and that no violation of the privacy act had occurred. 940 F.Supp.2d at 1338. We disagree.

Collateral estoppel, otherwise known as issue preclusion, "'prevents relitigation of an issue after the party estopped has had a full and fair opportunity

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Mankin's motion. Mankin, 158 Wn. App. at 116. On appeal, Division Two of this court held that the officers had no reasonable subjective expectation of privacy in their interviews. Mankin, 158 Wn. App. at 118. In so holding, the court stated that "the communications involved defense investigation of actions by public employees . . . performing their jobs, which investigation led to the public criminal prosecution of Mankin" and that defense counsel's "notes and interview summaries could 'be subject to disclosure at trial if counsel or the investigator should be called as a witness by the defense for the purpose of impeaching the testimony given by a previously interviewed prosecution witness.'" Mankin, 158 Wn. App. at 118 (quoting State v. Yates, 111 Wn.2d 793, 796, 765 P.2d 291 (1988)). Unlike in civil matters, depositions are permitted in criminal matters only in one of three circumstances and only upon order of the court. CrR 4.6(a). Moreover, the Mankin court explained that "the public nature of the officers' role was an important factor" in its holding. 158 Wn. App. at 120. This factor is not present in this case.

to present its case.'" Lemond v. Dep't of Licensing, 143 Wn. App. 797, 803-04, 180 P.3d 829 (2008) (internal quotation marks omitted) (quoting Barr v. Day, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994)). In order for collateral estoppel to apply, the following four elements must be present:

> "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."

Reninger v. Dep't of Corrs., 134 Wn.2d 437, 449, 951 P.2d 782 (1998) (quoting Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wn.2d 413, 418, 780 P.2d 1282 (1989)). The party seeking the application of collateral estoppel has the burden of proof and "[f]ailure to establish any one element is fatal to the proponent's claim." Lopez-Vasquez v. Dep't of Labor & Indus.,168 Wn. App. 341, 345, 276 P.3d 354 (2012).

The primary issue in the federal court action was whether evidence had been destroyed and, if so, whether such spoliation warranted dismissal of NetLogix's contract claim. See Volcan Grp., 940 F.Supp.2d at 1328. As such, the focus of the federal court's evidentiary hearing was on the substance of the telephone conversations. In its opinion, the federal court stated that it "does not believe" that SDR violated the privacy act. Volcan Grp., 940 F.Supp.2d at 1338. The court's belief is not a final judgment on the merits. The issue in this case was not fully and fairly litigated in the federal court action.

Nor is this a case in which the party against whom collateral estoppel is asserted was in privity with a party to the prior adjudication. Dillon was not a

party to the federal court action. Moreover, at the time of the conversations at issue, Dillon was no longer employed by NetLogix.

Nevertheless, SDR asserts that Dillon was in privity with NetLogix because he was a participant in NetLogix's "fraud" and stood to benefit financially from an outcome favorable to NetLogix in the federal court lawsuit. SDR cites to Garcia v. Wilson, 63 Wn. App. 516, 820 P.2d 964 (1991), for the proposition that Dillon, despite his nonparty status, was "virtually represented" by NetLogix in the federal court action. In Garcia, however, we listed a number of factors to consider when determining whether the doctrine of virtual representation applies: (1) "whether the nonparty in some way participated in the former adjudication, for instance as a witness"; (2) "[t]he issue must have been fully and fairly litigated at the former adjudication"; (3) "the evidence and testimony will be identical to that presented in the former adjudication"; and (4) "there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene but presents no valid reason for doing so." 63 Wn. App. at 521.

The fourth factor is notably missing in this case. The separation of Dillon's state court privacy act suit and the federal court suit was not the product of manipulation or tactical maneuvering. The federal court suit was a contract dispute between two companies; Dillon lacked a basis to seek to intervene as a party.[20] Moreover, Dillon lacked standing to challenge the federal court's

[20] Additionally, the defendants in the two cases are completely different, and the alleged privacy act violation did not occur until well after the federal court lawsuit was filed.

determination that his conversations were not private. Cf. Olympic Tug & Barge, Inc. v. Dep't. of Revenue, 163 Wn. App. 298, 303, 259 P.3d 338 (2011) ("A party may not be denied the chance to litigate an issue if it was statutorily denied an opportunity to appeal."), review denied, 173 Wn.2d 1021 (2012); State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 309, 57 P.3d 300 (2002) (same). Accordingly, SDR failed to establish that Dillon was in privity with NetLogix, such that collateral estoppel would bar Dillon's privacy act claims. The trial court properly declined to apply collateral estoppel so as to bar Dillon's claims.

IV

Dillon next contends that the trial court erred, in two respects, in granting SDR's motion to strike his privacy act claims pursuant to the anti-SLAPP statute. Dillon asserts, first, that the trial court erred when it conducted the SLAPP hearing in an order reversed from the requirements of the anti-SLAPP statute, and second, that the trial court erred by holding that SDR met its burden of proving that its conduct was protected by the anti-SLAPP statute. We agree with both assertions.

This appeal presents issues of first impression regarding Washington's anti-SLAPP statute. In 2010, the legislature amended the anti-SLAPP statute by adding RCW 4.24.525 to address "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Laws of 2010, ch. 118, § 1 (1)(a). Because the "costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out

on public issues," the statute provides "an efficient, uniform, and comprehensive method for speedy adjudication" with the available award of "attorneys' fees, costs, and additional relief where appropriate." Laws of 2010, ch. 118, § 1 (1)(c), (2)(b), (c).

Under the anti-SLAPP statute, a party may 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). In deciding an anti-SLAPP motion, a court must follow a two step process. A party moving to strike a claim has the initial burden of showing by a preponderance of the evidence that the claim targets activity "involving public participation and petition," as defined in RCW 4.24.525(2). U.S. Mission Corp. v. KIRO TV, Inc., 172 Wn. App 767, 782-783, 292 P.3d 137, review denied, 177 Wn.2d 1014 (2013). If the moving party meets this burden, the burden shifts to the responding party "to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). If the responding party fails to meet its burden, the court must grant the motion, dismiss the offending claim, and award the moving party statutory damages of $10,000 in addition to attorney fees and costs. RCW 4.24.525(6)(a)(i),(ii).

A

Dillon contends that the trial court erred when it shifted the burden of proof to him to show a probability of prevailing on his claims before SDR had met its initial burden. We agree.

The anti-SLAPP statute mandates that:

> All discovery and *any pending hearings or motions* in the action *shall be stayed* upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

RCW 4.24.525(5)(c) (emphasis added). Here, the trial court heard argument and ruled on the motion for summary judgment before it heard argument on the anti-SLAPP motion. SDR never attempted to establish, nor did the trial court find, good cause to lift the stay on all pending motions. Although the procedure for deciding anti-SLAPP motions is similar to that used in deciding a motion for summary judgment, "'[a] motion to strike under [the anti-SLAPP statute] is not a substitute for a motion for . . . summary judgment.'" Tichinin v. City of Morgan Hill, 177 Cal.App.4th 1049, 1062, 99 Cal.Rptr.3d 661 (Cal.App. 2009) (alteration in original) (quoting Wilbanks v. Wolk, 121 Cal.App.4th 883, 905, 17 Cal.Rptr.3d 497 (Cal.App. 2004)).[21] The trial court erred by failing to stay the motion for summary judgment pending determination of the merits of the anti-SLAPP motion.

[21] Washington's anti-SLAPP statute mirrors California's anti-SLAPP statute. Therefore, in most circumstances, California cases may be considered as persuasive authority when interpreting RCW 4.24.525. See City of Longview v. Wallin, 174 Wn. App. 763, 776 n.11, 301 P.3d 45, review denied, 178 Wn.2d 1020 (2013).; Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104, 1110 (W.D.Wash. 2010); compare RCW 4.24.525 with Cal. Civ. Proc. Code § 425.16.

B

i

The procedural error committed by the trial court does not warrant appellate relief if the error was harmless. In this case, the error would be harmless if SDR proved by a preponderance of the evidence that Dillon's claims were based on actions involving public participation and petition and if Dillon failed to show by clear and convincing evidence a probability of prevailing on his privacy act claim. See RCW 4.24.525(4)(b).

The anti-SLAPP statute defines "an action involving public participation and petition" as follows:

> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
>
> (d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
>
> (e) Any other lawful conduct in furtherance of the exercise 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.

RCW 4.24.525(2). The trial court found that SDR proved by a preponderance of the evidence that its actions were "lawful activity in connection with a judicial proceeding," and thus constituted actions "involving public participation and petition." See RCW 4.24.525(2)(b), (e). On appeal, SDR also asserts that its actions of recording Dillon's telephone calls were "in a judicial proceeding" and "in furtherance of the exercise of the constitutional right of petition." See RCW 4.24.525(2)(a), (e).

ii

We review the grant or denial of an anti-SLAPP motion de novo.[22] City of Longview v. Wallin, 174 Wn. App. 763, 776, 301 P.3d 45, review denied, 178 Wn.2d 1020 (2013). This case also involves issues of statutory interpretation, which we review de novo. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

iii

The trial court ruled that SDR's actions were "action[s] involving public participation and petition," because "the activity that is the subject of the privacy act claim was lawful activity in connection with a judicial proceeding." This was

[22] Our colleagues in Division Two recently explained why the de novo standard of review is appropriate for decisions on anti-SLAPP motions:

> No Washington court has explicitly stated the standard of review for the trial court's decision to grant or deny a special motion to strike under RCW 4.24.525. But because California has a similar statute, California cases are persuasive authorities for interpreting the Washington statute. See Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104, 1110 (W.D.Wash. 2010) (citing "California law as persuasive authority for interpreting" RCW 4.24.525). California courts review an order granting or denying a motion to strike under California's statute de novo. Flatley v. Mauro, 39 Cal.4th 299, 325, 139 P.3d 2, 46 Cal.Rptr.3d 606 (2006).

Wallin, 174 Wn. App. at 776 n.11. Additionally, anti-SLAPP motions are procedurally similar to summary judgment motions, Gerbosi, 193 Cal.App.4th at 444, which this court reviews de novo. Green, 137 Wn. App. at 681.

so, the trial court ruled, because "the meeting that took place in Mr. Grant's office was certainly in connection with a judicial proceeding" and SDR's activity was not criminal. "Lawful activity in connection with a judicial proceeding" is not explicitly part of the definition of "an action involving public participation and petition," but rather combines language from two separate subsections of the definition.[23] RCW 4.24.525(2)(b), (e). However, the trial court's ruling is not supported by either subsection.

With respect to subsection (2)(b), the trial court's ruling fails to account for the first clause of the subsection—"[a]ny oral statement made, or written statement or other document submitted." RCW 4.24.525(2)(b). "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." Martinez v. Metabolife Intern., Inc., 113 Cal.App.4th 181, 188, 6 Cal.Rptr.3d 494 (Cal.App. 2003) (citing Paul v. Friedman, 95 Cal.App.4th 853, 866, 117 Cal.Rptr.2d 82 (Cal.App. 2002)). Rather,

> it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected

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[23] RCW 4.24.525(2)(b) reads, "As used in this section, an 'action involving public participation and petition' includes: . . . (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law."

RCW 4.24.525(2)(e) reads, "As used in this section, an 'action involving public participation and petition' includes: . . . (e) Any other lawful conduct in furtherance of the exercise 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."

In its ruling on Dillon's motion for reconsideration, the trial court cited to RCW 4.24.525(2)(e), focusing solely on the phrase "[a]ny other lawful conduct."

> activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.

Martinez, 113 Cal.App.4th at 188 (citation omitted). Here, the principal thrust of Dillon's claims is SDR's acts of transcribing Dillon's telephone calls without his knowledge, not SDR's subsequent submission of the transcripts (or excerpts therefrom) to the federal court.

SDR's acts of transcribing Dillon's telephone calls cannot reasonably be categorized as protected "statements."

> "[F]reedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). Accordingly, not all conduct can be treated as a "statement." DCR, Inc. v. Pierce County, 92 Wn. App. 660, 671, 964 P.2d 380 (1998). Although there are numerous statements contained in the transcripts of the calls, this does not transform the act of transcribing the conversation into a statement as well.[24] The act of transcription does not express anything, nor is it intended to convey any sort of message. Simply put, SDR's acts of transcription are not statements. Cf. City of Seattle v. McConahy, 86 Wn. App. 557, 567-69, 937 P.2d 1133 (1997) ("sitting does not have inherent expressive value" and thus is not conduct protected by the First Amendment). As SDR's acts are not statements,

[24] Moreover, the majority of the statements made during the call were uttered by Dillon, not by Grant, Kennan, or a transcriptionist. Dillon's utterances are not SDR's actions. They are Dillon's.

subsection (2)(b) of RCW 4.24.525, defining "an action involving public participation and petition," is not applicable.[25]

iv

Nevertheless, SDR contends that the gravamen of Dillon's claim was actually SDR's act of filing the transcripts (or excerpts therefrom) in federal court. This is so, SDR contends, because Dillon requested "actual damages" in his complaint and he could not have been damaged without the act of filing. Therefore, SDR asserts, notwithstanding the language of Dillon's complaint, he must truly be claiming that the act of filing the transcripts constituted a violation of the privacy act.

SDR's assertion is factually incorrect. Dillon quite clearly alleged in his complaint that the violations of the privacy act were SDR's acts of transcribing the telephone calls without his knowledge. Dillon's complaint does not even mention that the transcripts were filed in federal court. Dillon's prayer for relief requests "[d]amages subject to the MAR $50,000 limits of mandatory arbitration and pursuant to the schedule specified in RCW 9.73.060 including one hundred dollars a day for each violation against each defendant, reasonable attorney's fees and costs, actual damages and general damages." This language simply

[25] SDR contends that the trial court's ruling may, in the alternative, be affirmed on the ground that their actions constituted "an action involving public participation and petition" as defined in subsection (2)(a) of RCW 4.24.525. However, subsection (2)(a) also includes the phrase "[a]ny oral statement made, or written statement or other document submitted." RCW 4.24.525(2)(a). SDR's actions are not covered by this subsection for the same reason that they are not covered by subsection (2)(b).

reiterates the remedies provided by RCW 9.73.060 and does not alter the nature of Dillon's complaint.[26]

The principal authority cited by SDR on this question, Kearney v. Kearney, 95 Wn. App. 405, 974 P.2d 872 (1999), does not dictate otherwise. The Kearney court did not address damages. Rather, Kearney addressed liability, holding that "RCW 9.73.050 does not create civil liability for filing information obtained in violation of the privacy act." 95 Wn. App. at 415. Furthermore, the defendants in that case disseminated private conversations that *someone else* recorded. Kearney, 95 Wn. App. at 411-12. Such is not the case herein. Kearney is inapposite and SDR's reliance upon it is unavailing.

v

The trial court's ruling is also not supported by subsection (2)(e) defining "an action involving public participation and petition." RCW 4.24.525(2)(e) defines "an action involving public participation and petition" as "[a]ny other lawful conduct . . . in furtherance of the exercise of the constitutional right of petition." SDR contends that their actions involved the right of petition because the right of petition includes the right to bring a lawsuit in court. For his part, Dillon asserts that SDR's actions do not fall under this definition because SDR's actions were not lawful. Relying on Gerbosi v. Gaims, Weil, West & Epstein, LLP, 193 Cal.App.4th 435, 445, 122 Cal.Rptr.3d 73 (Cal.App. 2011), Dillon avers that allegations of criminal activity bar application of the anti-SLAPP statute. We

[26] To the extent that SDR wished to strike the potential remedy of actual damages from the complaint, bringing an anti-SLAPP motion was not the proper method of doing so.

decide this contention on another basis, holding that SDR's actions did not constitute "the exercise of the constitutional right of petition."

Subsection (2)(e) of the anti-SLAPP statute refers to conduct "in furtherance of the exercise of *the* constitutional right of petition." RCW 4.24.525(2)(e) (emphasis added). The right of petition is referenced as a singular thing. "Use of a definite rather than indefinite article is a recognized indication of statutory meaning." Dep't of Ecology v. City of Spokane Valley, 167 Wn. App. 952, 965, 275 P.3d 367, review denied, 175 Wn.2d 1015 (2012). "'The rules of grammar . . . provide that the definite article, 'the', is used 'before nouns of which there is only one or which are considered as one.'" Dep't of Ecology, 167 Wn. App. at 965 (alteration in original) (internal quotation marks omitted) (quoting State v. Neher, 52 Wn. App. 298, 300, 759 P.2d 475 (1988), aff'd, 112 Wn.2d 347, 771 P.2d 330 (1989)). Thus, when RCW 4.24.525(2)(e) refers to "the constitutional right to petition," it is referencing a particular and singular right. The question for us, then, is where this singular right is found.

The first amendment to the United States Constitution contains a guarantee of a right to petition the government. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . to petition the government for a redress of grievances."). Similarly, the Washington Constitution provides, in article I, section 4 that, "The right of petition . . . for the common good shall never be abridged." WASH. CONST. art. I, § 4. Given that we have determined that RCW 4.24.525(2)(e), by its express language, applies only

to "*the* right to petition," the question is: does this statute reference the federal constitution or does it reference the state constitution?

We have only two choices. On the one hand, we may conclude that our state legislature sought to legislate with reference to the federal constitution—to the exclusion of the state constitution. On the other hand, we may conclude that the state legislature sought to legislate with reference to the state constitution—to the exclusion of the federal constitution.

In reaching our decision, we must consider the context of the legislation. The anti-SLAPP statute is a state statute, not a federal statute. The anti-SLAPP statute limits access to state courts, not federal courts. The Washington legislature is a creature of the state constitution, not the federal constitution. WASH. CONST. art. II, § 1. The Washington legislature's power to legislate is derived from the state constitution, not the federal constitution. WASH. CONST. art. II, § 1.

On balance, it is illogical to assume that, in passing RCW 4.24.525(2)(e), the Washington legislature sought to legislate by reference to the federal constitution, to the exclusion of the state constitution. On the contrary, it is logical to assume that the Washington legislature chose to legislate with reference to the state constitution, to the exclusion of the federal constitution. Indeed, it is more logical that the Washington legislature sought to vindicate a state constitutional right in limiting access to Washington's courts than it is to conclude that it sought to vindicate a federal right—to the exclusion of the state constitutional right—in limiting access to Washington's courts. Congress, of

course, can pass laws designed to vindicate federal constitutional rights. The Washington legislature would be well aware of this. But only the Washington legislature can pass such laws designed to vindicate Washington state constitutional rights. The Washington legislature is presumably also well aware of this.

Thus, it is the state constitutional right to petition, as set forth in article I, section 4, that is referenced in RCW 4.24.525(2)(e).

Further support for our conclusion that "*the* right of petition" referenced in the statute refers to the state constitutional right is found in the legislative history of the act. As previously noted, Washington's anti-SLAPP statute was modeled after that of California. California's statute, however, provides that it applies to actions "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution." Cal. Civ. Proc. Code § 425.16(b)(1). The California statute, thus, refers to *both* the federal and state rights to petition. In passing Washington's version of the act, however, our legislature referred only to "the constitutional right of petition." RCW 4.24.525(2)(e). We presume this difference to be intentional: "when the model act in an area of law contains a certain provision, but the legislature fails to adopt such a provision, our courts conclude that the legislature intended to reject the provision." Lundberg ex rel. Orient Found. v. Coleman, 115 Wn. App. 172, 177-78, 60 P.3d 595 (2002). Thus, we find further support for our conclusion that the legislature did not intend for the statutory phrase "the constitutional right to petition" to refer to both the state and federal constitutions.

This conclusion is significant to our decision today. The federal right of petition includes a right to access the courts. Borough of Duryea, Pa. v. Guarnieri, __U.S.__, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011); In re Primus, 436 U.S. 412, 426, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978); In re Addleman, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000). To the contrary, the article I, section 4 right of petition includes no such right.

This question has been extensively litigated before our Supreme Court. When first presented with the question, the Supreme Court suggested that article I, section 4 protects access to the courts. Carter v. Univ. of Wash., 85 Wn.2d 391, 398-99, 536 P.2d 618 (1975) (plurality opinion). One year later, however, our Supreme Court explicitly held to the contrary.

> Carter v. University of Washington, supra, should also be overruled insofar as it suggested that article 1, section 4, protects a right of access to the courts. This section reads: "The right of petition and of the people peaceably to assemble for the common good shall never be abridged." This provision obviously has reference to the exercise of political rights. The language of the constitution, like that of statutes, is to be given its common and ordinary meaning. It requires an awkward and unnatural construction of this language to make it applicable to the judicial process. Access to the courts is amply and expressly protected by other provisions.

Hous. Auth. of King County v. Saylors, 87 Wn.2d 732, 741-42, 557 P.2d 321 (1976).

Thus, our Supreme Court explicitly held that the right addressed in article I, section 4 is a political right that does not encompass within its purview the right to access courts.

Where, then, is the right to access courts guaranteed in the Washington Constitution? Our Supreme Court provided the answer in John Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 819 P.2d 370 (1991). In the John Doe case, the court noted that, "Plaintiff has a right of access to the courts" and attributed the existence of that right to article I, section 10 of the state constitution.[27] 117 Wn.2d at 780. In reaching its decision, the court explained:

> In Carter v. UW, 85 Wn.2d 391, 399, 536 P.2d 618 (1975), the plurality opinion held that the right of access to the courts was a fundamental right. The plurality opinion relied on Const. art. 1, § 4, the right of petition, and Const. art. 1, § 12, privileges and immunities. However, the court soon considered the question again in Housing Auth. v. Saylors, 87 Wn.2d 732, 557 P.2d 321 (1976). The Saylors court held that reliance upon the cited constitutional provisions was in error. However, the important point in Saylors is the statement that "[a]ccess to the courts is amply and expressly protected by other provisions." Saylors, at 742. Unfortunately, the court did not explore the rationale for its conclusion.

John Doe, 117 Wn.2d at 781-82.

Thus, the Supreme Court acknowledged that the right of petition, set forth in article I, section 4, does not encompass a right of access to the courts. Instead, it found that such a right is grounded in article I, section 10. John Doe, 111 Wn.2d at 780.

To summarize, in 1976, our Supreme Court determined that the right to petition did not include a right of access to the courts. Fifteen years later, in 1991, the existence of the right of access to the courts was attributed to article I, section 10.

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[27] "Justice in all cases shall be administered openly, and without unnecessary delay." WASH. CONST. art. I, § 10.

Eighteen years later, this position was reaffirmed. In Putman v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 216 P.3d 374 (2009), the court struck down RCW 7.70.150's requirement that a certificate of merit be filed in medical malpractice cases. In reaching its decision, the court noted:

> The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Putman, 166 Wn.2d at 979.

In Putman's discussion of the right of access to the courts, the Supreme Court's opinion cited Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803), once, while citing John Doe five times. No other authority was cited. Clearly, this reaffirms that our Supreme Court considers John Doe to still be "good law."

Thus, the right of access to the courts is found in article I, section 10, not in article 1, section 4. Accordingly, the right to petition, mentioned in RCW 4.24.525(2)(e), does not encompass a right of access to the courts.[28] Therefore,

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[28] We are aware that in two cases our Supreme Court has used very broad language to opine that the right to petition set forth in article I, section 4 should be interpreted consistently with the federal first amendment right to petition. See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 815, 83 P.3d 419 (2004); Richmond v. Thompson, 130 Wn.2d 368, 383, 922 P.2d 1343 (1996). We do not consider the broad statements in those cases as controlling this case for the following reasons:

1. Neither Grant County nor Richmond dealt with the question of the origin of the right of access to the courts. Grant County dealt with a dispute over an annexation petition and Richmond was a defamation case. Thus, the issue in this case was not present in either case.

2. Both Grant County (2004) and Richmond (1996) were decided after both John Doe (1991) and Saylors (1976). In neither Grant County nor Richmond did the Supreme Court even mention Saylors or John Doe. In neither Grant County nor Richmond does the Supreme Court purport to overrule Saylors or John Doe. We adhere to the principle that the Supreme Court does not overrule its own decisions on clear rules of law sub silentio. Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 280, 208 P.3d 1092 (2009).

the trial court erred by ruling that SDR's actions in filing the transcripts and excerpts therefrom with the federal court was protected activity encompassed within RCW 4.24.525(2)(e).

In addition, the language of the statute's subsections supports our conclusion. The legislature did not use the phrase "judicial proceeding" in subsection (2)(e) defining "action involving public participation and petition" as it did in subsections (2)(a) and (b). We presume that this omission was intentional. See Densley v. Dep't of Retire. Sys., 162 Wn.2d 210, 219, 173 P.3d 885 (2007) ("When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings."). Furthermore, "'[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" G-P Gypsum Corp. v. Dep't of Revenue, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (internal quotation marks omitted) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). If "[a]ny other lawful conduct . . . in furtherance of the exercise of the constitutional right of petition" encompassed all actions that occurred in or in connection with a judicial proceeding, then portions of RCW 4.24.525(2)(a) and (b) would be rendered superfluous. We should not read a statute in such a manner. Accordingly, we do not read RCW 4.24.525(2)(e) to encompass SDR's actions of recording telephone conversations, even though the transcripts (or portions thereof) of those

3. In the most recent case of all, Putman (2009), the Supreme Court reaffirmed the validity of its decision in John Doe.

conversations were later filed in court in connection with a judicial proceeding. The trial court erred by ruling to the contrary.

vii

But what if we are wrong, and our legislature *did* intend for the phrase "the constitutional right of petition" to refer to both the state and federal constitutional rights to petition? In that event, our decision would be the same.

The United States Constitution protects an individual's right "to petition the government for a redress of grievances." U.S. CONST. amend. I. As previously mentioned, the First Amendment right to petition includes the right to access the court system. Guarnieri, 131 S. Ct. at 2494; Primus, 436 U.S. at 426; Addleman, 139 Wn.2d at 753-54.

Under California law, which explicitly includes the federal constitutional right to petition within its ambit, "[t]he anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation," including the gathering of evidence. Kolar v. Donahue, McIntosh & Hammerton, 145 Cal.App.4th 1532, 1537, 52 Cal.Rptr.3d 712 (Cal.App. 2006) (citing Kashian v. Harriman, 98 Cal.App.4th 892, 908, 120 Cal.Rptr.2d 576 (Cal.App. 2002)). California courts have held that actions undertaken by attorneys when representing a client are in furtherance of the attorney's right of petition, as well as that of the client. See e.g., Dowling v. Zimmerman, 85 Cal.App.4th 1400, 1418-20, 103 Cal.Rptr.2d 174 (Cal.App. 2001); cf. Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106, 1116, 969 P.2d 564, 81 Cal.Rptr.2d 471 (1999) ("[T]he [anti-SLAPP] statute does not

require that a defendant moving to strike . . . demonstrate that its protected statements or writings were made *on its own behalf.*"). Furthermore, California courts hold that "public" does not modify "right to petition" as used in the anti-SLAPP statute, and therefore a lawsuit need not be on a public issue in order to trigger the statute. Navellier v. Sletten, 29 Cal.4th 82, 91-92, 52 P.3d 703, 124 Cal.Rptr.2d 530 (2002); Briggs, 19 Cal.4th at 1114.

Although gathering evidence may be an action "in furtherance of the right to petition" under California law, California courts nevertheless do not allow attorneys to gather evidence by any method they see fit. "Not all attorney conduct in connection with litigation, or in the course of representing clients, is protected by" the anti-SLAPP statute. Cal. Back Specialists Med. Grp. v. Rand, 160 Cal.App.4th 1032, 1037, 73 Cal.Rptr.3d 268 (Cal.App. 2008). "[A] lawyer may [not] employ the anti-SLAPP statute to strike [a] cause of action merely because he or she is a lawyer." Gerbosi, 193 Cal.App.4th at 445.

Here, SDR cannot meet its burden of proving that its actions were protected by the anti-SLAPP statute merely by showing that Dillon's complaint was filed after first amendment petitioning activity occurred or that his claims somehow relate to first amendment petitioning activity. Instead, the petitioning activity must actually give rise to and be the basis for the asserted liability. Equilon Enters. v. Consumer Cause, Inc., 29 Cal.4th 53, 66, 52 P.3d 685, 124 Cal.Rptr.2d 507 (2002) ("'[T]he act underlying the plaintiff's cause or the act which forms the basis for the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.'" (quoting

ComputerXpress, Inc. v. Jackson, 93 Cal.App.4th 993, 1003,113 Cal.Rptr.2d 625 (Cal.App. 2001))). Dillon did not sue SDR because they gathered evidence. Rather, Dillon's claims are based on SDR's method of gathering evidence: transcribing telephone conversations that Dillon avers were private.[29] The act of recording is not itself protected speech or petitioning activity. As such, Dillon's claims do not fall within the ambit of the anti-SLAPP statute, even if we were to assume that it encompasses first amendment petitioning activity.

Two California cases support our holding. In Gerbosi, an attorney, Gaims, hired a private investigator, Pellicano, to investigate the ex-girlfriend, Finn, of his client, Pfeifer. 193 Cal.App.4th at 440. Pellicano installed a wiretap on Finn's telephone, and was eventually indicted on conspiracy and wiretapping charges for doing so. Gerbosi, 193 Cal.App.4th at 441. Finn and her neighbor, Gerbosi,[30] filed suit against Gaims, Pellicano, Pfeifer, and the telephone company for multiple statutory violations and torts arising from the wiretapping. Gerbosi, 193 Cal.App.4th at 441. Gaims filed anti-SLAPP motions to strike both Finn's and Gerbosi's complaints. Gerbosi, 193 Cal.App.4th at 442. The trial court denied both motions. Gerbosi, 193 Cal.App.4th at 442.

With respect to Gerbosi's claims, the California Court of Appeals held that the claims did not arise from any protected activity on the part of Gaims.

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[29] Contrary to the trial court's analysis, the summary judgment ruling should not have had any bearing on the first step of the anti-SLAPP inquiry. SDR's claim that the conversations were not private, despite Dillon's assertions to the contrary, is "'more suited to the second step of an anti-SLAPP motion. A showing that a defendant did not do an alleged activity is not a showing that the alleged activity is a protected activity.'" Malin v. Singer, 217 Cal.App.4th 1283, 1304, 159 Cal.Rptr.3d 292 (Cal.App. 2013) (quoting Gerbosi, 193 Cal.App.4th at 446).

[30] Some of the telephone calls that Pellicano intercepted were private conversations between Finn and Gerbosi. Gerbosi, 193 Cal.App.4th at 441.

Gerbosi, 193 Cal.App.4th at 444. In so holding, the court stated, "Gaims's status as a lawyer, unrelated to any representation of any client in relationship to Gerbosi does not bring Gaims under the protective umbrella for acts in furtherance of protected 'petitioning' activity." Gerbosi, 193 Cal.App.4th at 444. With respect to Finn's claims, the court held that those claims which alleged criminal conduct were not subject to the anti-SLAPP statute, because wiretapping is not "'protected by constitutional guarantees of free speech and petition.'" Gerbosi, 193 Cal.App.4th at 445-46 (quoting Flatley v. Mauro, 39 Cal.4th 299, 317, 46 Cal.Rptr.3d 606, 139 P.3d 2 (2006)). The court compared the case to Flatley, which held that California's anti-SLAPP statute "'cannot be invoked by a defendant whose *assertedly protected activity* is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition.'" Gerbosi, 193 Cal.App.4th at 445-46 (quoting Flatley, 39 Cal.4th at 317). The Gerbosi court held that "wiretapping in the course of representing a client," unlike writing a letter or making telephone calls on behalf of a client, could not be considered to be protected under any scenario. 193 Cal. App. 4th at 446. Thus, the court did not need to hold that Gaims's and Pellicano's actions were "illegal as a matter of law" in order to hold that the anti-SLAPP statute did not apply. Gerbosi, 193 Cal.App.4th at 446-47.

The California Court of Appeals reaffirmed Gerbosi in 2013. See Malin v. Singer, 217 Cal.App.4th 1283, 1302, 159 Cal.Rptr.3d 292 (Cal.App. 2013). In Malin, Malin filed suit against Arazm and Singer, Arazm's attorney, alleging a violation of civil rights and intentional and negligent infliction of emotional

distress. 217 Cal.App.4th at 1289. Malin alleged in his complaint that Arazm and Singer had instructed unknown third parties to retrieve his private communications and e-mail messages through the use of wiretapping and computer hacking. Malin, 217 Cal.App.4th at 1290. Arazm and Singer filed an anti-SLAPP motion against Malin for bringing claims purportedly based on Arazm's constitutional right to petition. Malin, 217 Cal.App.4th at 1290. As SDR does here, Arazm and Singer argued that "'the *plaintiff* has the burden to establish that the conduct was illegal as a matter of law.'" Malin, 217 Cal.App.4th at 1302. The California Court of Appeals held that this was *not* the plaintiff's burden. Malin, 217 Cal.App.4th at 1302. Rather, the court held,

> Arazm and Singer fail to meet their threshold burden of showing that Malin's civil rights claim is based on an act that constitutes protected activity within the meaning of the statute. In an attempt to do so, they urge the gravamen of Malin's cause of action arises from acts in furtherance of their right to conduct prelitigation investigation. They are incorrect. The *acts* underlying Malin's civil rights and related emotional distress causes of action are computer hacking and wiretapping. Those acts do not fit one of the categories of protected conduct defined by the Legislature in [the anti-SLAPP statute], and Arazm and Singer do not contend otherwise. As a result, they are not entitled to relief under the anti-SLAPP statute.

Malin, 217 Cal.App.4th at 1303.

Similarly, Dillon's claims are based on the acts of recording telephone conversations, not on SDR's use of the transcripts thereafter. As in Gerbosi and Malin, it is of little moment that the purpose of SDR's actions was to gather

evidence.[31] The recording of telephone conversations is not an action protected under the First Amendment and, accordingly, is not an "action involving public participation and petition." RCW 4.24.525(4)(a). Therefore, Dillon's claims are not "based on an action involving public participation and petition." See RCW 4.24.525(4)(a).

Policy considerations support our holding. In enacting the anti-SLAPP statute, the legislature found that "[i]t is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process." Laws of 2010, ch. 118, § 1 (1)(d). The legislature also sought to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." Laws of 2010, ch. 118, § 1 (2)(a). If "[a]ny other lawful conduct . . . in furtherance of the exercise of the constitutional right of petition" covered all means of gathering evidence, the anti-SLAPP statute would not strike any sort of balance; rather, it would elevate an attorney's ability to gather evidence above the right of persons to file lawsuits. Interpreting the statute in this manner would not only run contrary to the legislature's intent, but would also likely raise issues

[31] See also Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 168, 691 N.E.2d 935 (1998) (In an action for breach of a nondisclosure agreement and breach of fiduciary duty, Massachusetts' anti-SLAPP statute did not apply to statements made during a deposition, when the plaintiff alleged that those statements were subject to a nondisclosure agreement and attorney-client privilege.).

about the statute's constitutionality.[32] Just as SDR has a first amendment right to petition for redress of grievances, so too does Dillon. The anti-SLAPP statute does not operate to negate the privacy act, or any other statutory protection, merely because the disputed conduct occurred during a separate lawsuit.

SDR has not met its burden under the anti-SLAPP statute because it has not shown that its actions involved public participation and petition. The trial court erred by ruling otherwise.

C

As SDR has not met its burden to show that Dillon's claims were based on actions involving public participation and petition, it is not strictly necessary for us to consider whether Dillon has met his burden to show, by clear and convincing evidence, a probability of prevailing on his claims. However, we take this opportunity to clarify the scope and manner of analysis to be utilized by trial courts in ruling on the inquiry presented in the second step of the anti-SLAPP motion procedure.

The anti-SLAPP motion procedure statute dictates that after the moving party has shown that the claims at issue are based on an action involving public participation and petition, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). "Clear, cogent and convincing evidence is evidence which is weightier and more convincing than a preponderance of the evidence, but which

[32] See Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 451, 641 A.2d 1012 (1994) ("A solution [to SLAPP suits] cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group.").

need not reach the level of 'beyond a reasonable doubt.'" In re the Disciplinary Proceeding Against of Deming, 108 Wn.2d 82, 109, 736 P.2d 639, 744 P.2d 340 (1987) (quoting Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 126, 615 P.2d 1279 (1980); Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963)). "It is the quantum of evidence sufficient to convince the fact finder that the fact in issue is 'highly probable.'" Tiger Oil Corp. v. Yakima County, 158 Wn. App. 553, 562, 242 P.3d 936 (2010) (quoting In re Welfare of Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)). This standard places a "higher procedural burden on the plaintiff than is required to survive a motion for summary judgment." Intercon Solutions, Inc. v. Basel Action Network, No. 12 C 6814, 2013 WL 4552782 at *15 (N.D.Ill., Aug. 28, 2013) (analyzing whether RCW 4.24.525 conflicts with Fed. R. Civ. P. 12 and 56).

California's anti-SLAPP statute does not utilize a clear and convincing evidence standard. Therefore, we do not find California law to be persuasive on this issue. See Lundberg, 115 Wn. App. at 177-78. Instead, we find Minnesota law to be persuasive. Minnesota's anti-SLAPP statute incorporates a clear and convincing evidence standard. MINN. STAT. § 554.02(3) ("[T]he court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability."). Minnesota also interprets the clear and convincing evidence standard in a manner similar to Washington. See Nexus v. Swift, 785 N.W.2d 771, 781 (Minn.App. 2010) ("Clear and convincing evidence 'requires more than a preponderance of the evidence but less than

proof beyond a reasonable doubt.' This standard is met when the matter sought to be proved is 'highly probable.'" (quoting Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978); State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998))).

In Nexus, the Minnesota Court of Appeals interpreted the clear and convincing evidence standard in Minnesota's anti-SLAPP statute. 785 N.W.2d at 780-82. The court recognized that the statute does not require that the plaintiff prove his or her claim in response to an anti-SLAPP motion, as such a requirement would violate the state "constitutional right to have the jury determine all triable issues of material fact." Nexus, 785 N.W.2d at 781. The court, therefore, held that the clear and convincing evidence standard must be viewed "*in light of the Rule 12 standard for granting judgment on the pleadings*" or "*in light of the Rule 56 standard for granting summary judgment*," depending on the stage in the litigation during which the motion is made. Nexus, 785 N.W.2d at 781-82. The court explained how this operates:

> Regardless of whether a motion to dismiss asserting immunity under [the anti-SLAPP statute] is made at the stage of litigation when judgment on the pleadings may be appropriate or when summary judgment may be appropriate, ultimate determinations of fact are not required by the clear-and-convincing standard . . . . These standards require that reasonable inferences be drawn in favor of the nonmoving party, which is unchanged by the anti-SLAPP statute. The test is merely whether, in light of those inferences and the view of evidence mandated by the standard for granting judgment on the pleadings or summary judgment, the plaintiff has shown that the defendant's speech or conduct was tortious or otherwise unlawful.

Nexus, 785 N.W.2d at 782. Additionally, the court held that "[t]he clear-and-convincing standard mandated by the anti-SLAPP statute" looks not only to

whether the plaintiff has demonstrated a prima facie claim, but "also requires consideration of the defenses raised by" the moving party. Nexus, 785 N.W.2d at 783; see also Phoenix Trading, Inc. v. Loops LLC, 732 F.3d 936, 942 n.6 (9th Cir. 2013). Courts in Washington should utilize a similar approach when assessing whether the plaintiff has met his or her burden under the second step of the anti-SLAPP motion to dismiss inquiry.

The role of the trial court in determining whether the plaintiff has met his or her burden under the second step of the anti-SLAPP motion to dismiss analysis is akin to the trial court's role in deciding a motion for summary judgment. The trial court may not find facts or make determinations of credibility. Gerbosi, 193 Cal.App.4th at 444; Ampex Corp. v. Cargle, 128 Cal.App.4th 1569, 1576, 27 Cal.Rptr.3d 863 (2005). Instead, "the court shall consider pleadings and supporting and opposing affidavits stating the facts" and may permit additional discovery upon a motion for good cause. RCW 4.24.525(4)(c), (5)(c). CR 56(e) similarly allows parties to submit affidavits in connection with motions for summary judgment, and the court may permit parties to submit "depositions, answers to interrogatories, or further affidavits" in support of the motion or response to the motion. Thus, when considering a motion to strike under the anti-SLAPP statute, the court should apply a summary judgment-like analysis to determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits.

Such an approach is necessary in order to preserve the plaintiff's right to a trial by jury.[33] Indeed, one purpose of the anti-SLAPP statute is to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." Laws of 2010, ch. 118, § 1 (2)(a). The right to trial by jury is inviolate under the state constitution. WASH. CONST. art. I, § 21. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). The summary judgment standard does not offend the constitutional right to trial by jury because "it was not the purpose of [article I, section 21] to render the intervention of a jury mandatory . . . where no issue of fact was left for submission to, or determination by, the jury." In re Brandon v. Webb, 23 Wn.2d 155, 159, 160 P.2d 529 (1945); see also Nave v. City of Seattle, 68 Wn.2d 721, 725, 415 P.2d 93 (1966).

Accordingly, the anti-SLAPP statute does not violate the right to trial by jury where the court utilizes a summary judgment-like standard in deciding the motion to strike. See Nexus, 785 N.W.2d at 782 (use of a summary judgment-like standard for deciding anti-SLAPP motions does not violate right to jury trial under Minnesota constitution because "[t]he constitutional right to a jury trial does not prevent all pretrial determinations by a judge; it provides parties with the right

[33] "'Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality.'" In re Pers. Restraint of Matteson, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (internal quotation marks omitted) (quoting Addleman v. Bd. of Prison Terms & Paroles, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986)); accord Lummi Indian Nation v. State, 170 Wn.2d 247, 264, 241 P.3d 1220 (2010).

to have triable issues of material fact decided by the jury"). Thus, in analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits, the trial court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff. Mountain Park, 125 Wn.2d at 341; Gerbosi, 193 Cal.App.4th at 444.

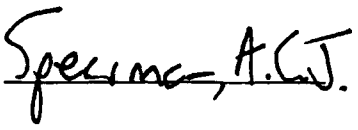
As RCW 4.24.525(4)(b) does not evince the intent to apply two different procedures in deciding motions to strike, this same summary judgment-like standard also applies to the trial court's analysis under the first step of the anti-SLAPP motion to dismiss procedure. Thus, when deciding whether the moving party has shown, by a preponderance of the evidence, that the claim was based on an action involving public participation and petition, the court also must view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Mountain Park, 125 Wn.2d at 341; Gerbosi, 193 Cal.App.4th at 444.

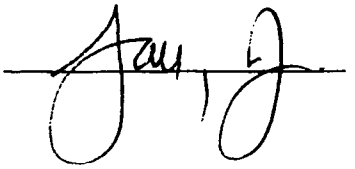
V

We reverse the judgment of the trial court, vacate the award of statutory damages and attorney fees and costs, and remand for further proceedings. SDR's request for an award of attorney fees and costs in connection with this appeal is denied.

Reversed and remanded.

We concur:





Appendix B

940 F.Supp.2d 1327
United States District Court,
W.D. Washington,
at Seattle.

VOLCAN GROUP, INC., d/b/a Netlogix,
a California corporation, Plaintiff,
v.
T–MOBILE USA, INC., a Delaware
corporation, as successor by merger to
Omnipoint Communications, Inc., Defendant.

Case No. 2:10–cv–00711–
RSM. | March 14, 2012.

Synopsis

Background: Plaintiff brought action against defendant for breach of contract, promissory estoppel, and unjust enrichment. Defendant moved to dismiss as a sanction for plaintiff's spoliation of evidence.

Holdings: The District Court, Ricardo S. Martinez, J., held that:

[1] plaintiff's discarding of old notebooks constituted spoliation of evidence;

[2] plaintiff's vice president's modification of his working notes constituted spoliation of evidence; and

[3] plaintiff's spoliation of evidence warranted the sanction of dismissal.

Motion granted.

Attorneys and Law Firms

***1328** Dennis Michael Moran, William Arthur Keller, Moran Windes & Wong, Seattle, WA, for Plaintiff.

Cassandra L. Kennan, James C. Grant, Stephen M. Rummage, Davis Wright Tremaine, Michael E. Kipling, Kipling Law Group PLLC, Seattle, WA, for Defendant.

Opinion

RICARDO S. MARTINEZ, District Judge.

This matter comes before the Court on Defendants' motion to dismiss as a sanction for Plaintiffs' spoliation of evidence. Dkt. # 58. The Court has reviewed the motion, Plaintiffs' response, Defendants' reply, Plaintiffs' supplemental response, Defendants' supplemental reply, along with additional supplemental briefing from ***1329** each party. The Court also conducted an evidentiary hearing at which counsel examined a relevant witness, Dkt. 158, 160, in addition to hearing oral argument. Having carefully reviewed and considered all of the foregoing, in addition to all documents submitted in support thereof, the Court hereby **GRANTS** the motion and **DISMISSES** this action **WITH PREJUDICE.**

I. *BACKGROUND*

A. *Legal Claims*

This case involves a contract dispute between Plaintiff Volcan Group, Inc., d/b/a Netlogix ("Plaintiff") and T–Mobile USA, Inc. ("Defendant"). Defendant hired Plaintiff to perform services in connection with the build out of Defendant's cellular phone network in California, and the parties entered into a written agreement covering that work. Although Plaintiff contends that Defendant breached the written agreement by failing to pay the amounts due thereunder, Defendant claims that the parties modified the written agreement with respect to pricing, and that pursuant to that modification Plaintiff has been paid all it was owed.

Specifically, even though the written agreement sets forth the amounts that would be due thereunder, the parties engaged in an extensive course of dealing that involved invoicing and payment for Plaintiff's services at rates that were lower than those specified in the contract. While Defendant claims that this course of dealing reflects an oral modification to the agreement, Plaintiff asserts that its agreement to charge lower rates was contingent upon Defendant awarding four additional contracts to it, and that Defendant's failure to do so warranted an upward adjustment to all of the bills previously issued.

On June 8, 2009, Defendant informed Plaintiff that it intended to terminate the agreement between the parties. Plaintiff responded by re-issuing invoices to Defendant at the higher

rates specified in the agreement, asserting that Defendant had an outstanding balance, pursuant to the higher billing rates, of over $28 million. When Defendant refused to pay these re-issued invoices, Plaintiff initiated this action, asserting claims for breach of contract, promissory estoppel, and unjust enrichment.

B. *Phone Calls Between Jason Dillon and Defendant's Counsel*

On August 24, 2011, approximately a year and a half after Plaintiff commenced this action, Plaintiff's former Vice President, Jason Dillon ("Dillon"), contacted Defendant's counsel via email to inform them that he had recently resigned from Volcan, and to express his desire to speak with them regarding "the facts of the case." Defendant's counsel scheduled a phone call with Dillon for the following day, and arranged for a court reporter to transcribe the call. Although Defendant's counsel informed Dillon that an "assistant" would be "writing stuff down" in lieu of counsel "taking notes," Defendant's counsel did not explicitly inform him that a court reporter would be transcribing the conversation. During the call, which lasted approximately eighty-one (81) minutes, Dillon made various unsworn statements that, if true, demonstrate spoliation of evidence and other improper behavior.

The Court summarizes the most alarming portions of the call:

- *Plaintiff's Financial Condition:* T–Mobile employee Daniel Swaine told Plaintiff's principal, Scott Akrie, that T–Mobile would not award the contract at issue to a company that had less than $10–$20 million in assets. Although Plaintiff had "no money" at that time, Akrie and fellow Volcan employee Eric De Versa created "fake ***1330** books to make it look like they were a bigger company."

- *The Initial Contract:* Although Defendant initially told Plaintiff that it would not be awarded the contract at issue, Plaintiff ultimately secured the contract after delivering $7,500 to Swaine and fellow T–Mobile employee Jay Meyer. Dillon described the transaction in detail, including (1) Akrie's deposit of the money into Dillon's personal bank account, (2) Dillon's withdrawal of that money in cash, and (3) Dillon's subsequent meeting with Swaine and Meyer at a restaurant near Defendant's offices in Concord, CA, at which time Dillon "bought" the contract on Plaintiff's behalf.

- *The Additional Contracts:* The parties discussed entering into four additional contracts, and Swaine demanded that Plaintiff pay him an additional $25,000 to $30,000 in order to secure them. Although Dillon personally delivered $5,000 of this money to Swaine in order to secure one such contract, Defendant awarded it to another company. While Akrie and Dillon were in the process of discussing the possibility of additional payments to Swaine, Defendant terminated Swaine's employment and did not award Plaintiff any additional contracts.

- *The Notebook:* During Plaintiff's relationship with Defendant, Dillon created a set of handwritten notes reflecting, among other things, conversations with Swaine regarding the four additional contracts. At the direction of Akrie, Dillon copied certain information from those notes into a new notebook, and then threw away the old notes. Dillon told Defendant's counsel that Akrie "wanted nothing in [Dillon's notes] related to any other dealings other than what would support a lawsuit against T–Mobile," and that Dillon therefore omitted from the new notebook any notes that hurt Plaintiff's case, while including in the new notebook additional notes that helped Plaintiff's case.

- *Purged Emails:* Akrie reviewed Plaintiff's electronic documents, including emails, prior to Plaintiff's production of such documents in this case. When Plaintiff eventually produced electronic documents, Dillon noticed that certain emails were not included. Dillon stated, for example, that he and Akrie exchanged "quite a few" emails regarding Swaine's demand for a kickback. Although Dillon inquired about those documents, he was told by others at Volcan that the emails in question were "not there" anymore. In addition, although Plaintiff used a third-party web hosting company (Go Daddy) to host its emails during the pendency of the contract, Akrie cancelled that account because he "didn't want anybody to go back [to Go Daddy] and track the emails."

- *California Computers:* Through Craigslist, Akrie sold between three and eight computers used by Plaintiff in connection with its work for Defendant. Akrie sold those computers in October or November of 2009, after Plaintiff had begun contemplating a lawsuit against Defendant. Dillon stated that those computers, which

were kept in Plaintiff's northern California office, contained relevant information.

- *Maintenance of Separate Files; Merging of Files:* Plaintiff maintained two separate sets of files in connection with the T–Mobile account: one "active" file based upon the revised (lower) prices, and a separate file based upon the original (higher) prices. After commencement of the lawsuit, and at Akrie's direction, Plaintiff "merged" the two sets of files and ***1331** discarded documents reflecting the lower pricing.

- *Agreement Regarding Litigation Proceeds:* In June of 2009, Akrie offered Dillon "10 percent of the profit of this lawsuit" in exchange for his continued "support."

- *Miscellaneous:*

  * Dillon stated that Plaintiff began contemplating a lawsuit against Defendant in June of 2008.

  * Dillon estimated that Plaintiff never performed any work with respect to half of the $28 million that Plaintiff seeks to recover in this case, and that invoices ostensibly reflecting such claims are "just made up."

  * Dillon stated that, during his employment with Volcan, he was coached to say things that were not true in connection with this lawsuit.

  * In explaining why he had reached out to Defendant's counsel, Dillon stated that he "just felt it was best I call you guys and clear my conscience so you guys know truly what happened with everything. And, you know, Scott's going to be pissed, and I'm sure he's going to try to sue me, whatever, but he's already made a comment that if I contacted you guys, you know, that's going to be your choice."

During the August 25 call, Dillon offered to provide Defendant's counsel with a written declaration regarding the various statements he had made. On September 1, 2011, Defendant's counsel provided Dillon with such a draft declaration. Dkt. # 62–15, Ex. FF. [1]

Dillon and Defendant's counsel had a second phone call on September 16, 2011 that lasted approximately forty-five (45) minutes, and that call was also transcribed. [2] During the September 16 call, Dillon stated, among other things, (a) that although Meyer never promised Plaintiff contracts in exchange for money, he was nevertheless "supporting [Swaine's] bribery to us," (b) that Defendant "definitely didn't get the full story" regarding the claims at issue in the case, and that Defendant "only got the parts that we were kind of coached on telling," and (c) that Dillon and others were instructed to keep quiet regarding "documents and files and materials that [had been] thrown away," Akrie's promise to pay Dillon a portion of the litigation proceeds, and the true state of Plaintiff's financial affairs.

During the September 16 call, Dillon also confirmed that he had reviewed the draft declaration prepared by Defendant's counsel, and that it was accurate in all respects save for one. Specifically, as to the issue of document preservation, Dillon stated that "we were told by our attorneys to preserve everything, but it was [Akrie's] decision not to preserve everything." Dillon stated that if Defendant's counsel corrected the draft declaration with respect to that one inaccuracy, he would sign and return it to them within two days. Defendant's counsel made the requested changes and submitted the revised draft to Dillon later that day.

***1332** Dillon did not, however, sign and return the revised declaration as promised. Instead, on September 26, Dillon sent an email to Defendant's counsel, copied to Akrie, stating as follows: "After carefully reading the incomplete declaration your law firm prepared I am unable to sign it." Dkt. # 62–17, Ex. JJ. Although Dillon characterized the declaration as merely "incomplete," he sent a drastically different message to Akrie the following day, claiming that Defendant's counsel "completely changed our conversation to solely benefit T–Mobile and put blatant lies in the declaration and asked me to sign it." Dkt. # 115. Prior to that email exchange, the record reflects that Dillon and Akrie had already spoken on the phone and engaged in other email correspondence regarding the draft declaration. *See* Dkt. # 104, ¶ 4. In one email, Akrie told Dillon that he "will not forget" that Dillon had reached out to him regarding the draft declaration. Dkt. # 115.

C. *The Spoliation Motion*

On October 6, 2011, Defendant filed the instant motion to dismiss as a sanction for Plaintiff's spoliation of evidence. Dkt. # 58. The motion is based largely, although not entirely, upon the unsworn statements made by Dillon to Defendant's counsel during the August 25 and September 16 telephone calls. Defendant attached to its motion redacted excerpts from the Transcripts, [3] and the Court later ordered it to produce complete un-redacted versions.

In response, Dillon submitted a sworn declaration in which he stated that the Transcripts do not "accurately depict the conversation" he had with Defendant's counsel. Dkt. # 144, at 4. Dillon did not, however, identify any specific statement as being inaccurate. Given the relevance of the Transcripts to the pending spoliation motion, and given the apparent dispute regarding their accuracy, the Court scheduled an evidentiary hearing at which counsel would be given an opportunity to examine Dillon under oath as to whether he made the statements in question. Dkt. # 149.

D. *The Evidentiary Hearing*

The Court conducted an evidentiary hearing on February 2 and 16, 2012.[4] In advance of that hearing, Dillon provided counsel and the Court with a modified version of the Transcripts in which various statements he wished to "disavow" were shown in highlighting. While Dillon admitted that the Transcripts accurately reflect what was actually said during the two phone calls, he claimed that approximately half of the statements attributed to him—i.e., the ones shown in highlighting—were "made out of frustration," "taken out of context," "exaggerated," and/or "untrue." Dillon claimed that he made the statements in question because he was "frustrated" with Akrie over an ongoing dispute about money.

Although Defendant's counsel attempted to determine which statements were "untrue," as opposed to merely "exaggerated," "taken out of context," or "made out of frustration," Dillon stifled that effort by testifying in a manner that was objectively vague, evasive, and inconsistent. The following colloquy is illustrative:

> *1333 Q: So when you told Mr. Grant, on page 27, "Scott is going to be pissed. I'm sure he's going to try to sue me. But he's already made a comment that if I contacted you guys, you know, that's going to be your choice." So you made that up?
>
> A: Is it highlighted?
>
> Q: It's highlighted.
>
> A: Okay. So, comment made out of frustration.
>
> Q: When you say, "Comment made out of frustration," let me ask you, because that can mean a lot of things. I can be frustrated and tell the truth, or I can be frustrated and tell something that's false. Which is this?
>
> A: It is a comment made out of frustration that I made assumptions on, and comments on, that were not exactly accurate. I exaggerated the answer.
>
> Q: When you say you exaggerated the answer, did Scott say something like this, that you exaggerated, or did you make this up?
>
> A: It was a comment made out of frustration.
>
> Q: Yeah, I hear that. And that doesn't answer my question.
>
> A: You're going to get the same answer, so I wouldn't waste your time about getting upset.

Feb. 16 Hearing Tr., at 30:1–22.

Dillon was also examined regarding the draft declaration Defendant's counsel asked him to sign. According to Dillon, he told Defendant's counsel that he would sign the draft declaration only because he wanted them to stop calling and emailing him. Dillon testified that he never had any actual intention of signing the draft declaration, and that he had not even read the draft declaration at the time he purported to confirm its accuracy.

II. *ANALYSIS*

A. *Legal Standard*

[1] There are two sources of authority under which a district court may sanction a party who has despoiled evidence: the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37 against a party who "fails to obey an order to provide or permit discovery." *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337–38 (9th Cir.1985); Fed.R.Civ.P. 37(b)(2)(C). Because the misconduct at issue in this case encompasses more than mere discovery abuse, the Court will assess the propriety of sanctions under its inherent power. *See Tilton v. The McGraw–Hill Companies, Inc.*, Case No. C06–0098RSL, 2007 WL 777523, *6, 2007 U.S. Dist. LEXIS 17421, *19 (W.D.Wash. March 9, 2007).

[2] "It is well settled that dismissal is warranted where ... a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings: Courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Anheuser–Busch,*

Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir.1995) (internal citations omitted). One reason courts possess such inherent authority is because "[t]here is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result." *Valley Eng'rs Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1058 (9th Cir.1998).

[3] Before imposing the "harsh sanction" of dismissal, however, district courts are directed to consider the following factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of ***1334** prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* Although courts are obligated to carefully examine all of the factors set forth in *Anheuser–Busch,* "the list of factors amounts to a way for a district judge to think about what to do, not a series of conditions precedent before the judge can do anything, and not a script for making what the district judge does appeal-proof." *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir.1998). Because the first two of these factors will generally favor the imposition of sanctions, and the fourth factor generally cautions against dismissal, "the key factors are prejudice and the availability of lesser sanctions." *Wanderer v. Johnston,* 910 F.2d 652, 656 (9th Cir.1990).

[4] [5] While the district court need not make explicit findings regarding each of the *Anheuser–Busch* factors, *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 603 (9th Cir.1988), a finding of "willfulness, fault, or bad faith" is required for dismissal to be proper. *Anheuser–Busch,* 69 F.3d at 348 (citation omitted). "Due process concerns further require that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression 'threaten[s] to interfere with the rightful decision of the case.' " *Id.* (*quoting Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir.1983)). Additionally, although district courts must consider "less severe alternatives" than outright dismissal, *Wiltec Guam,* 857 F.2d at 604, "it is not always necessary for the Court to impose less serious sanctions first, or to give any explicit warnings." *Valley Eng'rs,* 158 F.3d at 1057. Indeed, "[i]t is appropriate to reject lesser sanctions where the court anticipates continued deceptive misconduct." *Anheuser–Busch,* 69 F.3d at 352.

B. *Discussion*

1. *Credibility Assessment*

Because Dillon has presented conflicting evidence regarding a wide range of highly relevant issues, resolution of the instant motion first requires the Court to make a credibility assessment as to which version of events it will believe: the one Dillon originally told Defendant's counsel, or the one Dillon and Plaintiff now tell the Court. For the reasons set forth below, the Court believes that Dillon was telling the truth during his conversations with Defendant's counsel, and that he has not told the truth during his subsequent testimony before the Court. As such, the Court credits the statements made by Dillon in the Transcripts.

Although Dillon initially declared that the Transcripts do not "accurately depict the conversations" he had with Defendant's counsel, Dillon conceded on cross-examination that the Transcripts do, in fact, accurately reflect the statements he made. Dillon nevertheless testified that the statements he made to Defendant's counsel are "exaggerated" and "taken out of context" because he was either not telling the entire truth or simply lying when he made them. In other words, Plaintiff asks the Court to accept the truth of what Dillon says in this instance because he was not telling the truth before. The Court declines to do so.

Dillon has had every opportunity to identify those specific portions of the Transcripts that he claims to be untrue. Indeed, the Court expressly directed him to do so. Dillon has categorically failed to comply with the Court's instruction, attempting instead to obfuscate the record through a pattern of intentionally vague, evasive, and self-serving testimony. Having assessed Dillon's demeanor and credibility on the stand, and considering all of the other evidence before it, the Court ***1335** believes that Dillon was telling the truth during his discussions with Defendant's counsel, and that his in-court testimony was little more than a thinly-veiled effort to conceal that fact and discredit his own prior statements.

Moreover, in assessing the veracity of Dillon's conflicting statements, the Court finds it highly relevant to consider *why* Dillon reached out to Defendant's counsel in the first place.[5] There is no dispute that Akrie owed money to Dillon, that Dillon and Akrie had a falling out over the issue, and that prior to speaking with Defendant's counsel, Dillon informed Akrie of his intention to do so. Feb. 16 Hearing Tr., at 30:1–22.

Against this backdrop, there is an inescapable inference that when Dillon reached out to Defendant's counsel, he did so as part of a misguided effort to obtain leverage over his former boss. Indeed, after speaking with Defendant's counsel, Dillon informed Akrie not only that he had done so, but also that Defendant's counsel had asked him to sign the declaration. The threat underlying these communications was clear: unless Akrie came to terms with Dillon, he ran the risk that Dillon would sign the declaration, expose Plaintiff's various discovery abuses, and effectively end the instant litigation. The scheme initially worked: Immediately after Dillon declined to sign the declaration—in an email he copied to Akrie—Akrie responded by telling Dillon what he clearly expected to hear: that Akrie "will not forget" what Dillon had done.

The Court recites these findings in order to underscore a simple point: Dillon's scheme would be of little value unless he was actually telling the truth to Defendant's counsel, as a threat to expose discovery abuses that never occurred, or those that are easily disproved, is nary a threat at all. Indeed, it was the *truth* of Dillon's statements—and Dillon's mistaken belief that he could control whether those statements ended up "in the record"—that promised to give Dillon the leverage he desired.

This conclusion is bolstered by the fact that, during the September 16 call, Dillon confirmed the accuracy of the statements contained in the draft declaration. Although Dillon testified to making that statement without having read the declaration, and then only in an effort to dissuade Defendant's counsel from contacting him further, that testimony is belied by the fact that it was Dillon who proposed specific revisions to the draft declaration—something he could not have done unless he actually read the document. Moreover, the explanation Dillon gave for making the statement in question is nonsensical, as his request that the Defendant's counsel revise and resubmit the draft declaration to him is precisely the outcome Dillon now claims he was seeking to avoid—i.e., further contact from Defendant's counsel.

In sum, the Court finds that Dillon's in-court testimony was wholly incredible, and that the statements contained in the Transcripts are credible. As a result, the Court credits the statements contained within the Transcripts.

2. *Spoliation*

Having credited the statements contained within the Transcripts, the Court is confronted with overwhelming evidence of spoliation. Although Akrie has presented multiple declarations denying that Plaintiff ***1336** despoiled evidence, those self-serving declarations rely almost entirely upon *ipse dixit,* and are contradicted by substantial evidence.

It is worth noting, however, that portions of the sworn declarations submitted by Dillon and Akrie are consistent with some of the damning statements contained in the Transcripts. As such, even if the Court did not credit the statements made in the Transcripts, it would still come to the conclusion that spoliation of evidence has occurred.

[6] For example, Akrie declares that in early 2009, after Plaintiff began contemplating a lawsuit against Defendant, he provided Volcan employees with new notebooks. Dkt. # 104, ¶ 8. Akrie further declared that employees copied "assorted project notes" into those notebooks, and that he was aware of the fact that employees were then destroying their old notes. *Id.* For his part, Dillon declares that he copied various notes into his new notebook and included in that notebook additional information he "remembered when [he] was copying the notes and included for the sake of completeness and accuracy." Dkt. # 107, ¶ 6. Dillon also stated that, after copying his old notes into the new notebook, he too destroyed his old notes. *Id.* As Dillon has testified, the notes at issue concerned his personal dealings with Defendant during the course of their business relationship.

[7] Those notes were—at a minimum—potentially relevant to this litigation, and Dillon was not entitled to alter or destroy them. Indeed, "[a] party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.' Moreover, because 'the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist,' a party 'can hardly assert any presumption of irrelevance as to the destroyed documents.' " *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 959 (9th Cir.2006) (citations omitted). Here, Dillon and his colleagues clearly had notice that their old notebooks were potentially relevant to the instant litigation. Discarding those notes therefore constitutes spoliation of evidence. *Leon,* 464 F.3d at 959.

[8] **[9]** In the absence of a satisfactory explanation, tampering with relevant evidence also gives rise to a finding of spoliation. *See Wong v. Swier,* 267 F.2d 749, 759 (9th Cir.1959). Here, Dillon has not provided a satisfactory

explanation for altering the notes transcribed into his new notebook. Indeed, one of the central issues in this case concerns the course of dealing between the parties, including the parties' contemporaneous understanding of what their agreement entailed. Against that backdrop, it is totally unacceptable for the Plaintiff's central witness—who worked in an executive role and had day-to-day interaction with the Defendant—to modify his working notes at the same time his employer was preparing to file a lawsuit. *Wong,* 267 F.2d at 759. Dillon's explanation for altering his notes is unsatisfactory, and that conduct also constitutes spoliation of evidence.

3. *Integrity of the Judicial Process*

[10] Although the Court is deeply troubled by Plaintiff's spoliation of evidence, the Court's biggest concern is the damage this litigation promises to inflict upon the integrity of the judicial process if it is permitted to continue.

Dillon is a key witness—perhaps *the* key witness—in this litigation. In the event the Court permitted this case to move forward, his testimony would be among the most critical evidence considered by the finder of fact. But the record already reflects that Dillon has deliberately and ***1337** repeatedly lied to both Defendant's counsel and the Court in the form of informal communications, sworn declarations, and in-court testimony. Along the way, Dillon has exhibited a breathtaking lack of respect for his business partners, the law, this Court, and the judicial process.

Although Akrie has recently decided to characterize his former colleague as a "frustrated, disgruntled ex-employee," Dkt. # 161, at 3, it is clear that Akrie is complicit in Dillon's pattern of dishonesty. Aside from Akrie's willful spoliation of evidence, there is no serious dispute that he also promised to pay Dillon a portion of the litigation proceeds in exchange for his "support" throughout the case.

Under these circumstances, the Court finds no assurance that a trial in this matter would be a fact-finding endeavor. On the contrary, the collective dishonesty of Dillon and Akrie has "undermined the truth-finding function of the Court beyond repair." *Jackson v. Microsoft Corp.,* 211 F.R.D. 423, 432 (W.D.Wash.2002), *aff'd,* 78 Fed.Appx. 588 (9th Cir.2003).

Courts in this district have dismissed cases on such grounds. In *Jackson,* for example, the plaintiff "perpetrated a lengthy series of elaborate misrepresentations and lies both to the Court and Counsel." *Id.* at 425. Like Dillon, the plaintiff in *Jackson* submitted a sworn declaration that "contains statements which conflict with statements made by [plaintiff] under oath at other times during the pendency of this litigation." *Id.* at 428. Like Dillon, the *Jackson* plaintiff's "misconduct did not cease" when his initial dishonesty was uncovered. Instead, he "told an ever more elaborate series of lies about his misconduct," which included "perjured statements at his deposition, and continued through a sworn declaration and two separate evidentiary hearings." *Id.* at 431–32. Before dismissing the plaintiff's case, the *Jackson* court offered the following insight, apropos of the conduct now before the Court:

> [P]laintiff has been evasive and untruthful at every turn.... Despite [several opportunities] to come forward and be forthright, [plaintiff] continued to perjure himself. He was once again evasive about [certain relevant issues] and he was patently dishonest about [others]. The Court can conceive of no other sanction [than dismissal] which would promote fairness to all parties in this proceeding.

Id. at 432.

The same result follows here for the same reason. Although he has had numerous opportunities to cure his misconduct, Dillon, with the cooperation of Akrie, has instead elected to continue spinning a web of lies, entangling himself and the Plaintiff along the way. After his tortured testimony in court Dillon is now left with no credibility whatsoever. The Court does not hesitate in concluding that such conduct rises to the level of bad faith. *Tilton,* Case No. C06–0098RSL, 2007 WL 777523, *6, 2007 U.S. Dist. LEXIS 17421, *20 ("Plaintiff's lack of remorse and the recency of his wrongdoing further evidence bad faith and cast serious doubt on whether he will change his behavior absent sanctions.").[6] Indeed, the behavior of Dillon and Akrie in conducting this litigation has been deliberately deceptive and utterly inconsistent with the orderly administration of justice. ***1338** *Anheuser–Busch, Inc.,* 69 F.3d at 348. Although it hardly requires saying, Defendant has been prejudiced by the dishonest conduct of Dillon and Akrie, as it is now clear that they did not, in Dillon's words, "get the full story" regarding the relevant facts. This case must therefore be dismissed.

Neither Defendant nor its counsel should be proud of this result. While the Court does not believe that Defendant's counsel violated Washington law by recording their discussions with Dillon, [7] it is clear that the representations they made to Dillon at the outset of those discussions led him to adopt the mistaken belief that his statements were not being transcribed. The Court believes that Defendant's counsel knew of Dillon's misunderstanding, but intentionally did nothing to correct it. The Court questions whether such conduct can be squared with demanding standards of a lawyer's professional responsibilities under RPC 4.1(a).

But even more troubling is the sordid business relationship that is at the core of this case. Although both parties have attempted to ignore the apparent kickback scheme underlying their relationship, [8] the Court cannot simply ignore evidence of such potentially criminal conduct. While the Transcripts suggest that Swaine was the main beneficiary of the particular kickbacks at issue here, they also suggest that others at T–Mobile knew of and possibly benefitted from kickbacks as well, and that the practice of soliciting and receiving such payments was not confined to those at issue in this case. This improper conduct is highly troubling to the Court, and it should be highly troubling to the parties as well.

Although parties are entitled to zealously pursue legitimate legal claims, the parties to this action and their counsel have stepped over the line. Given the tumultuous history between these parties, the blatant dishonesty underlying the instant motion, and Dillon's role as one of the central witnesses in this case, the Court has every reason to anticipate that further proceedings in this matter would be permeated with "continued deceptive misconduct." *Anheuser–Busch,* 69 F.3d at 352. As such, the misconduct that has come to the attention of the Court is not of a type that can be remedied through the imposition of lesser sanctions. On the contrary, dismissal is the only appropriate remedy.

III. *CONCLUSION*

For all of the foregoing reasons, Defendant's motion to dismiss, Dkt. # 58, is **GRANTED.** This case is **DISMISSED WITH PREJUDICE,** and without an award of costs or fees to either party.

Footnotes

1 That draft declaration included statements regarding (1) Plaintiff's maintenance of separate files/merging of files/destruction of documents reflecting revised pricing, (2) Dillon's destruction of his old notebook and creation of the new notebook, (3) Akrie's sale of company computers through Craigslist, (4) Akrie's apparent destruction of email files, (5) the absence of document preservation instructions, and (6) Akrie's promise to pay Dillon a portion of the litigation proceeds in exchange for his "support." *Id.*

2 The transcripts of the August 25 and September 16 calls are collectively referred to herein as the "Transcripts."

3 Defendant redacted and/or omitted, among other things, any and all statements regarding Plaintiff's alleged "purchase" of the contract at issue.

4 After conducting a brief hearing on February 2, it became clear that Dillon was not prepared to offer complete testimony as to which portions of the Transcripts he believed did not "accurately depict the conversation" he had with Defendant's counsel. As a result, the Court continued the hearing so that Dillon would have adequate opportunity to prepare for such testimony.

5 Dillon has already "disavowed" the reason he originally gave for approaching Defendant's counsel—i.e., that he simply wanted to "clear [his] conscience." Although Dillon later claimed that, with respect to his discussions with Defendant's counsel, "[t]here was nothing in it for me," Feb. 16. Hearing Tr., at 8:1, the Court finds that testimony to be wholly incredible.

6 Although the sanctions imposed by the *Tilton* court stopped short of dismissal, the Court noted that the remedy of dismissal was a "close call" and that lesser sanctions were appropriate because the plaintiff's conduct appeared to be a result of mental illness. *Tilton,* Case No. C06–0098RSL, 2007 WL 777523 at *7, 2007 U.S. Dist. LEXIS 17421 at *21–22. Mental illness is not at issue in this case.

7 RCW 9.73.030 prohibits a person from recording a "private communication" without the consent of all parties thereto. Although Dillon clearly did not consent to a transcription of his conversation with Defendant's counsel, that is not to say that he intended the call to be "private." On the contrary, Dillon clearly understood that Defendant's counsel intended to use the information he was providing in connection with these proceedings, and Dillon even offered to provide them with a sworn declaration regarding his statements. As such, those statements were not intended to be, and were not in fact, "private."

8 The Court has no doubt that Defendant initially redacted the Transcripts in order to conceal Dillon's statements regarding the kickback scheme.

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Appendix C

2014 WL 68488
Only the Westlaw citation is currently available.
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

VOLCAN GROUP, INC., a California corporation, d/b/a Netlogix, Plaintiff–Appellant,
v.
OMNIPOINT COMMUNICATIONS, INC., a Delaware corporation, d/b/a T–Mobile, and T–Mobile USA, Inc., a Delaware corporation, Defendants–Appellees.

No. 12–35217. | Argued and Submitted May 6, 2013. | Filed Jan. 9, 2014.

Synopsis

Background: Plaintiff brought action against defendant for breach of contract, promissory estoppel, and unjust enrichment. Defendant moved to dismiss as a sanction for plaintiff's spoliation and fabrication of evidence. The United States District Court for the Western District of Washington, Ricardo S. Martinez, J., 940 F.Supp.2d 1327, granted motion. Plaintiff appealed.

Holdings: The Court of Appeals held that:

[1] district court finding that plaintiff engaged in spoliation and fabrication of evidence when it was exploring breach-of-contract litigation against defendant was not clearly erroneous, and

[2] district court acted within its discretion in dismissing action as sanction for spoliation and fabrication of evidence.

Affirmed.

Attorneys and Law Firms

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Stephen M. Rummage, Esquire, James Grant, Cassandra Kennan, Davis Wright Tremaine LLP, Michael E. Kipling, Esquire, Kipling Law Group PLLC, Seattle, WA, for Defendants–Appellees.

Appeal from the United States District Court for the Western District of Washington, Ricardo S. Martinez, District Judge, Presiding. D.C. No. 2:10–cv–00711–RSM.

Before HAWKINS, THOMAS, and NGUYEN, Circuit Judges.

Opinion

MEMORANDUM *

*1 Volcan Group, Inc. d/b/a Netlogix ("Netlogix") appeals the district court's dismissal of its breach of contract action against T–Mobile USA, Inc. ("T–Mobile") as a sanction for Netlogix's spoliation and fabrication of evidence. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

[1] 1. Netlogix argues that the district court erred when it admitted into evidence transcripts of two conference calls between T–Mobile's lawyers and Netlogix's former vice president, Jason Dillon. In those transcripts, Dillon allegedly describes widespread spoilation of evidence on the part of Netlogix. Though the district court relied on those transcripts in finding spoilation and fabrication of evidence, it also concluded that the record supported such a finding even absent consideration of the transcripts. We agree.

The district court found that Akrie knowingly permitted Netlogix employees to destroy engineering notebooks that contained evidence potentially relevant to the litigation. For his part, Dillon destroyed and altered notes pertaining to Netlogix's dealings with T–Mobile—the business relationship at the heart of this contract dispute. [1]

In addition, at a time when Netlogix was already exploring litigation against T–Mobile, Netlogix failed to preserve a copy of its Project Management Server—a web-based database used by Netlogix to track the progress of its projects performed for T–Mobile—as it had existed at the time the

parties' Field Services Agreement was terminated. Numerous monthly financial reports and project files were created anew by Netlogix during this period, many of which contained material deviations from the original files. The record also suggests that certain documents and emails produced by Netlogix may have been falsified. Given this, we find no error in the district court's conclusion that spoliation can be found even absent consideration of the transcripts. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir.2006).

[2] 2. Having found spoliation, the district court did not abuse its discretion in dismissing the action. A district court should consider a number of factors prior to dismissal, including "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Anheuser–Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir.1995) (quoting *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir.1993)). However, explicit findings by the district court are not required. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir.2006). Rather, we may independently review the record to determine whether the district court abused its discretion. *Id.* We thus consider each factor in turn.

The first two factors weigh in favor of dismissal. *See Leon*, 464 F.3d at 958 n. 5; *see also id.* at 960. Given the loss of potentially relevant evidence as a result of Netlogix's spoliation, the third factor does as well. *See id.* at 959 (noting that the pertinence and force of lost evidence "cannot be clearly ascertained because the documents no longer exist," and the party responsible "can hardly assert any presumption of irrelevance as to the destroyed documents" (quoting *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1205 (8th Cir.1982)) (internal quotation marks omitted)). While the fourth factor typically militates against dismissal as a sanction, this factor alone "is not sufficient to outweigh the other four factors." *Id.* at 961 (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 133 n. 2 (9th Cir.1987)). Finally, although the fifth factor considers "whether the court explicitly discussed alternative sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of dismissal ... [,] it is not always necessary for the court to impose less serious sanctions first, or to give any explicit warning." *Valley Eng'rs Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir.1998). In any event, Netlogix was well-aware that the district court was considering dismissal of the case as a sanction for Netlogix's misconduct.

***2** The record also supports the district court's finding that Netlogix's spoliation of evidence resulted from "willfulness, fault, or bad faith." *Anheuser–Busch*, 69 F.3d at 348 (quoting *Henry*, 983 F.2d at 946) (internal quotation marks omitted). The district court thus had a sufficient basis for concluding that Netlogix's "discovery violations ma[de] it impossible ... to be confident that the parties [would] ever have access to the true facts." *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1097 (9th Cir.2007) (quoting *Valley Eng'rs*, 158 F.3d at 1058) (internal quotation mark omitted).

" 'Although dismissal [is] harsh,' ... we do not disturb the district court's choice of sanction unless we have a 'definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' " *Leon*, 464 F.3d at 961 (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 992 (9th Cir.1999)). We have no such conviction in the present case.

AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

1 According to Akrie's and Dillon's respective declarations, the engineering notebooks were destroyed and Dillon's notes were altered in early 2009. Without reference to the transcripts, however, it is unclear exactly when Netlogix began contemplating litigation, thus triggering the duty to preserve evidence. *See Leon*, 464 F.3d at 956. That said, as discussed above, the destruction of the notebooks and Dillon's alteration of his notes were by no means the only evidence of spoliation. Viewing the record as a whole, the district court's findings were not clearly erroneous. *See id.* at 958.

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Appendix D

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [**AMENDMENT 88,** 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

Amendment 34 (1957) — Art. 1 Section 11 RELIGIOUS FREEDOM — *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment:* Provided, however, *That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 34, 1957 Senate Joint Resolution No. 14, p 1299. Approved November 4, 1958.]

Amendment 4 (1904) — Art. 1 Section 11 RELIGIOUS FREEDOM — *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.* Provided, however, *That this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 4, 1903 p 283 Section 1. Approved November, 1904.]

Original text — Art. 1 Section 11 RELIGIOUS FREEDOM — *Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office, or employment, nor shall any person be incompetent as a witness, or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.*

SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed

RCW 4.24.510
Communication to government agency or self-regulatory organization — Immunity from civil liability.

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

[2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

Notes:

Intent -- 2002 c 232: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." [2002 c 232 § 1.]

RCW 4.24.525
Public participation lawsuits — Special motion to strike claim — Damages, costs, attorneys' fees, other relief — Definitions.

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise 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.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection 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. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special

motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

[2010 c 118 § 2.]

Notes:

Findings -- Purpose -- 2010 c 118: "(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate." [2010 c 118 § 1.]

Application -- Construction -- 2010 c 118: "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." [2010 c 118 § 3.]

Short title -- 2010 c 118: "This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation." [2010 c 118 § 4.]

RCW 9.73.030
Intercepting, recording, or divulging private communication — Consent required — Exceptions.

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has 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.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

[1986 c 38 § 1; 1985 c 260 § 2; 1977 ex.s. c 363 § 1; 1967 ex.s. c 93 § 1.]

Notes:

Reviser's note: This section was amended by 1985 c 260 § 2 and by 1986 c 38 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Severability -- 1967 ex.s. c 93: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 ex.s. c 93 § 7.]

Appendix E

HOUSE BILL REPORT
SSB 6395

As Reported by House Committee On:
Judiciary

Title: An act relating to lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition.

Brief Description: Addressing lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, Kauffman and Kohl-Welles).

Brief History:
Committee Activity:
Judiciary: 2/18/10, 2/22/10 [DP].

Brief Summary of Substitute Bill

- Allows a party to bring a special motion to strike any claim that is based on an action involving public participation and petition.
- Provides that a party who prevails on a special motion to strike will be awarded costs of litigation, reasonable attorneys' fees, and $10,000.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 10 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Brian Kilgore (786-7119) and Edie Adams (786-7180).

Background:

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,

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

reporting violations of law, testifying, writing letters, lobbying, circulating petitions, protesting, and boycotting.

Strategic lawsuits against public participation (SLAPPs) are initiated against people who speak out about a matter of public concern. Typically, the party who institutes a SLAPP claims damages for defamation, or interference with a business relationship, resulting from a communication made by a person or group to the government.

The U.S. Supreme Court has held that a dismissal of a SLAPP should be granted in all cases except where the target's activities are not genuinely aimed at procuring favorable government action. However, a SLAPP can result in years of litigation and substantial expense before it is dismissed.

Washington law addresses the use of SLAPPs by creating immunity from civil liability for people who communicate a complaint or other information to an agency of the federal, state, or local government, or to a self-regulatory organization that has been delegated authority by a government agency. The anti-SLAPP statute entitles a person who prevails against a SLAPP to expenses, reasonable attorney's fees, and statutory damages of $10,000. Successfully dismissing a suit under the anti-SLAPP statute can take a year or longer. If the trial court decision is appealed, receiving final judgment can take two or three years.

Summary of Bill:

An "action involving public participation and petition" is defined as including any oral statement made, or written statement submitted:

- to a legislative, executive, judicial, or other governmental proceeding authorized by law;
- in connection with an issue under consideration by a legislative, executive, judicial, or other governmental proceeding authorized by law;
- that is reasonably likely to encourage or enlist public participation in an effort to effect the consideration of an issue by a legislative, executive, judicial, or other proceeding authorized by law; or
- in a place open to the public or a public forum in connection with an issue of public concern.

An "action involving public participation and petition" also includes any other lawful action in furtherance of the exercise of the constitutional rights of free speech or petition.

Within 60 days of service of a complaint, or as a court determines, a party may bring a special motion to strike any claim that is based on an action involving public participation and petition. The court is directed to hold a hearing on the special motion with all due speed and to render its decision no later than seven days after the hearing is held. The moving party 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. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim.

A moving party who prevails, in whole or in part, on a special motion to strike any claim that is based on an action involving public participation and petition will be awarded costs of litigation, reasonable attorneys' fees, and $10,000. The court may award additional relief such as sanctions upon the responding party and its attorneys. If the court finds that the special motion to strike a claim is frivolous or was intended to cause unnecessary delay, it must award costs of litigation, reasonable attorneys' fees, and an amount of $10,000 to the responding party.

Every party has a right of expedited appeal from a trial court order on the special motion, or from a trial court's failure to rule on the motion in a timely fashion.

The act shall be construed liberally to effectuate its general purpose of protecting participants in public controversies from abusive use of the courts.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The SLAPP suits use the courts to suppress speech. The bill is aimed at strengthening our current anti-SLAPP law. The existing law is from 1989 and was the first of its kind in the country. It is simple and lacks procedural mechanisms. It is also narrow in focus, applying only to communications with certain government agencies. The bill expands SLAPP protections to the constitutional limit. Anti-SLAPP laws enforce the constitutional rights of petition and free speech, but are not required by the Constitution. The courts are responsible for enforcing these rights and this new legislation would give them an expedited way to do that. Courts need this new tool to quickly recognize and dismiss SLAPPs. Development is one area that frequently results in SLAPPs. For example, a neighborhood association will try to block development the residents feel is objectionable by petitioning elected officials not to approve a permit. The developer sues or just threatens to sue for libel. The suit is groundless but can stifle speech, as discovery costs are ruinous to the average individual. The bill accelerates the dismissal process of these suits so they can be dismissed before discovery. Meritorious complaints are unaffected by this bill. It represents a good balance between protecting citizens in exercising their free speech and petition rights and allowing meritorious claims to proceed.

(Opposed) This bill protects too much speech. Libelous statements should not be protected. Defamation in open public forums should not be allowed. More clarification is needed in how courts will carry forward the process created by the bill.

Persons Testifying: (In support) Senator Kline, prime sponsor; Rowland Thompson, Allied Daily Newspapers of Washington; and Bruce Johnson, Davis Wright Tremaine.

(Opposed) Arthur West.

Persons Signed In To Testify But Not Testifying: None.