No. 31837-1-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

YVONNE A.K. JOHNSON, a single person,

Appellant,

v.

JAMES P. RYAN, a married individual,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 13-2-01362-7

APPELLANT JOHNSON'S AMENDED OPENING BRIEF

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"**Cyberbullying**" – "*[t]he use of the internet and related technologies to harm or harass other people, in a deliberate, repeated, and hostile manner.*"[1]

I. INTRODUCTION

On April 5, 2013 a civil suit by Yvonne A.K. Johnson ("Johnson") was filed against a cyberbully, James P. Ryan ("Ryan"), a fired employee of the Spokane Civic Theatre ("Civic Theatre"). The suit came as a result of ex-employee Ryan's libelous and vitriolic personal Internet attacks against his ex-supervisor, Ms. Johnson, the Civic Theatre's Executive Artistic Director. After Ryan adamantly refused to cease defaming Johnson, accusing her of libelous, criminal behavior, and intentionally attacking her moral turpitude in a blatant attempt to harm her reputation, Ms. Johnson filed her suit for defamation and tortious interference with business relations. Ex-employee Ryan counter-attacked moving to invoke (1) Washington's Anti-SLAPP statute, seeking dismissal of Johnson's Complaint; (2) a mandatory $10,000 fine; and (3) applicable attorney fees and costs.

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[1] See Wikipedia – http://en.wikipedia.org/wiki/Cyberbullying citing "*What is Cyberbullying*" U.S. Department of Health & Human Services.

At the Anti-SLAPP hearing, Spokane County Superior Court Judge Gregory D. Sypolt committed reversible error granting Ryan's motion, erroneously finding Ryan's online blogging activity addressed speech on a matter of "public concern." The Trial Court then compounded its error by subsequently dismissing Ms. Johnson's suit finding she could not show a "probability" that she would prevail on either of her claims – per se defamation or tortious interference with business expectancy. Specifically as to the defamation claim, the Trial Court erroneously found Johnson had not provided a prima facie showing of evidence regarding actual malice and failed to prove damages.

In finding Johnson failed to show a probability of success on her claim of defamation, the Trial Court committed reversible error by erroneously failing to recognize that Ryan's false online accusations against Johnson were libel per se. Ryan's claims that Johnson had engaged in crimes involving moral turpitude – namely, making false statements to a government agency during an unemployment hearing – was on its face actionable.

This appeal pertains to the Trial Court's reversible error in applying RCW 4.24.525 finding that: (1) Ryan's cyber-speech addressed matters of "public concern;" (2) Johnson failed to show her defamation claim was "*legally sufficient*," and (3) Johnson's claim was unsupported by a prima facie showing of facts sufficiently favorable to sustain a judgment upon the evidence.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in granting ex-employee Ryan's Anti-SLAPP (RCW 4.24.525)[2] Motion to Dismiss against his former supervisor, Johnson.

2. The Trial Court erred in applying Washington's Anti-SLAPP statute (RCW 4.24.525) to a wholly private employment dispute between a disgruntled ex-employee and his former supervisor.

3. The Trial Court erred both legally and factually in dismissing Appellant Johnson's defamation and tortious interference claims.

4. The Trial Court erred in granting the Anti-SLAPP motion at issue despite the existence of material questions of fact.

III. ISSUES

1. Whether a cyberbully engaging in non-protected activity solely related to a private employment dispute

[2] Attached hereto as **Appendix A** is the full text of RCW 4.24.525.

is entitled to invoke Washington's Anti-SLAPP statute. (RCW 4.24.510).

2. Whether the Trial Court erred in finding ex-employee Ryan's cyber-conduct against his former supervisor, Johnson, constituted speech on a matter of "public concern."

3. Whether the Trial Court erred in granting the Anti-SLAPP motion at issue despite the existence of material questions of fact.

4. Whether the Trial Court committed reversible error in finding Johnson failed to show that her defamation per se claim was "*legally sufficient*."

5. Whether the Trial Court committed reversible error in finding Johnson's defamation per se claim failed due to a claimed lack of proof regarding damages.

6. Whether the Trial Court erred in dismissing Johnson's suit despite the existence of material questions of fact.

7. Whether the Trial Court committed reversible error in failing to find that the objective evidence of Ryan's reckless disregard of the truth (and/or objective evidence of Ryan's knowledge of the falsity of his statements) was insufficient prima facie evidence sufficient to substantiate the actual malice criteria of Johnson's defamation per se claim.

IV. STATEMENT OF CASE

Appellant Yvonne A.K. Johnson ("Johnson") was the Executive Artistic Director of the Spokane Civic Theatre. She was also the supervisor of James P. Ryan ("Ryan") whom she had to fire

for cause. Thereafter, Ryan began a vicious campaign of relentless cyberbullying vilifying Ms. Johnson personally. As a result, Ms. Johnson filed a lawsuit alleging defamation and tortious interference with business relations against Ryan. In turn, Ryan filed an Anti-SLAPP motion against Ms. Johnson. The Trial Court granted Ryan's motion, dismissed Ms. Johnson's claims, and ordered Ms. Johnson to pay $10,000 in mandatory statutory damages, as well as Ryan's reasonable attorney fees and costs. That Order is the subject of this appeal.

V. MATERIAL FACTS

A. Spokane Civic Theatre.

This case involves a suit against a fired employee of the Spokane Civic Theatre ("Civic Theatre") a private, not-for-profit, performing arts theatre located in Spokane, Washington. CP 27. The Civic Theatre is a private foundation receiving support from private donors and operating with an endowment – the Spokane Civic Theatre Endowment Fund. CP 27-30.

B. Yvonne A.K. Johnson.

In 2005, Appellant Johnson was hired as the Executive Artistic Director for the Civic Theatre. CP 47. Ms. Johnson was a highly acclaimed theatre veteran who was selected to the Civic Theatre position from scores of applicants. CP 47-48. At the time, the Civic Theatre was on the cusp of financial ruin. CP 37, 50. By 2010, despite the economic recession, Johnson had *doubled* revenue for the Civic Theatre during her tenure. CP 50; 51.

This economic feat was accomplished through a significant increase in ticket sales, expansion of the Civic Theatre's training camp for children, and numerous fundraising endeavors. CP 51. Johnson's financial acumen and ingenuity allowed the Civic Theatre to expand their full-time staff by several positions. Id. One of these contemplated positions was for a full-time Music Director. Id.

As the Artistic Director, Ms. Johnson was charged with supervising and evaluating employees, administering personnel policies set by the Civic Theatre's Board of Directors, and administering grievance and termination procedures. CP 37. In July 2013, Ms. Johnson herself was terminated by a newly constructed

Board within days of having received an extension of her employment contract. See Johnson v. Spokane Civic Theatre, et al., Spokane Superior Court Cause No. 13-2-02907-8. That termination is presently being litigated. Id.

C. James P. Ryan.

On or about August 19, 2010, Appellant Johnson hired and was to supervise Respondent Ryan as full-time Music Director for the Civic Theatre. CP 3. A mere two months later, Ryan's employment was terminated for cause by Johnson at the direction of the Civic Theatre's Board. CP 3; 83-85; 94.

Prior to Ryan's termination, the Civic Theatre had received an anonymous email disclosing the non-monogamous nature of Ryan's marriage, as well as Ryan's use of graphically nude photos and texts while engaging in online extra-marital sex solicitations. CP 64-65. Not only did the Civic Theatre discover that Ryan utilized graphically nude photos and texts in his solicitations, but more offensive was the fact he had used his Civic Theatre employee photo in doing so. Id., 83. Further, he blatantly advertised he was employed by the Civic Theatre in his online solicitations for extra-

marital sex. Id., 83. Moreover, it was learned that Ryan had even initiated some of his sexual solicitations while backstage on Civic Theatre premises. CP 83. Ryan's 'for cause' termination was a result of his actions implicating and associating the Civic Theatre with his online solicitations for sexual relations. CP 83-85.

D. Civicdoody.com And/Or Thetyrannyofyvonne.com.

Within two weeks of his termination, Ryan initiated his campaign of personal attacks against Ms. Johnson by creating online blogs entitled "civicdoody" and "thetyrannyofyvonne." CP 3-4. The civicdoody blog is accessed by anyone attempting to access http://spokanecivictheater.org; http://spokanecivictheatre.org; or civicdoody.com. ("*They might even just enter http://www.spokanecivictheatre.org, assuming that would be the correct domain.*") CP 4, 64 at fn.1, 81, 97. Accordingly, anyone who mistakenly searches for the Civic Theatre's legitimate website by utilizing one of the above addresses was immediately routed by his design to Ryan's online addresses. CP 4; 81.

The overall thrust and dominant theme of Ryan's blogging sites is pointedly and vociferously related to his claim that he was

wrongfully terminated in breach of his employment contract, thereby entitling him to either reinstatement or to a severance package. E.g., "*I would love to see her [Johnson] continue to deal with the consequences of her actions on a daily basis, as I do. I would love for her to remain as preternaturally fixated on my doings as I am on obtaining justice for what she did to us....*" CP 7; "*Every other major theatre in the region has hired me since Civic fired me. Interplayers, Lake City Playhouse, Coeur d'Alene Summer Theatre, Gonzaga University, and others. ...Unfortunately, the combined wages from all of these short-term gigs has not come close to providing a wage that is comparable even to the meager salary I moved here for.*" CP 7. Unquestionably, Ryan's incessant incendiary, vicious, and vituperative postings were personal rants aimed specifically at his former supervisor, Johnson. CP 7-14.

In his blogged tirades, Ryan blatantly accused Johnson of criminal dishonesty in a governmental hearing – namely submitting false statements to the government. "*In the course of fighting my claim, Ms. Johnson submitted false statements to the Unemployment Security Department, in the form of my official separation letter.*

...She has now opened the theater to... charges of making demonstrably false statements to a government agency, should Washington State wish to pursue that." CP 106-107; "*...you should know that in addition to the outright lies submitted to the State of Washington by Civic in my official separation letter....*" CP 108.

Further, Ryan's blogged entries intentionally exposed Johnson to hatred, contempt, and ridicule with the express purpose of depriving her of the benefit of public confidence, as well as injuring her professionally. "*It is terrible for Spokane audiences who will see a show that was directed by a person utterly lacking in empathy and humanity.*" CP 12. "*'I think it changes lives,' Johnson said. One thing is for sure: she's good at changing them for the worse. She destroyed ours.*" Id.

After being terminated, Ryan filed a meritless lawsuit against the Civic Theatre for breach of contract seeking damages in the form of back pay, front pay, attorney fees and costs. Ryan v. Spokane Civic Theatre, Spokane Superior Court, Cause No. 12-2-02311-0. Ultimately, Ryan's spurious suit was dismissed on summary judgment on or about February 10, 2013. CP 96, 104.

Once Ryan's suit against the Civic Theatre was dismissed, his campaign of vicious personal attacks upon Ms. Johnson increased in volume and intensity. "*This was their best chance to make this go away without spending money. It was handled by their insurance company and had the potential to end this all with a settlement and a non-disclosure agreement.*" CP 104-105. Ryan's cyberbullying blogging commentary escalated to the extent it became more antagonistic and vicious towards Johnson causing her great harm and distress. CP 102.

On April 5, 2013, Ms. Johnson filed suit against fired employee Ryan alleging defamation and tortious interference with business relations as a result of his cyberbullying. CP 3-6.

On May 31, 2013, Ryan filed an Anti-SLAPP motion seeking dismissal of Johnson's civil suit alleging that his online postings, via civicdoody.com, were intended to provide a public forum for "*discussion and dissemination of commentary, complaints, and general information related to Spokane Civic Theatre.*" CP 60; 64. Ryan supported his Anti-SLAPP motion by asserting that his online cyber-conduct addressed matters of "public concern," evidenced by

Internet traffic the blog purportedly received. E.g., he claimed the blog had received over 36,000 "*page hits*," thus proving it was a "*popular site for Spokane Civic Theatre's community.*" CP 7.

On June 21, 2013, Spokane County Superior Court Judge Gregory D. Sypolt entered an Order granting Ryan's Anti-SLAPP motion and dismissal. CP 140-42. The Order awarded Ryan statutory damages of $10,000, as well as attorney fees and costs. CP 166.

Notably, the true goal of Ryan's blogging conduct was personal vengeance and gain. "*Occasionally, some well-meaning person will suggest that I'm 'never going to get anything out of them,' and that I should move on for my own well-being. ...the truth is this: It has never once – not once – occurred to me that I will not get the justice I seek.*" CP 7. "*Now its going to cost serious money if they ever want to end this.*" CP 10. "*Ironically, this is likely a huge disappointment for Yvonne A.K. Johnson and Civic's 'board of directors.' This was their best chance to make this go away without spending money... and had the potential to end this all with a reasonable settlement and a non-disclosure agreement.*" CP 11.

Thus, by admission, Ryan's blogging was at all times centered on his personal, private vendetta and conflict with former supervisor, Ms. Johnson. Id. It was this personal campaign which Ryan orchestrated to make publicly known *his* grievance in order to seek personal vengeance – and not for any "public concern." Id.

Indeed, his unrelenting personal attacks and diatribe against Ms. Johnson continue unabated as viewed on his websites on any given day. www.civicdoody.com.

VI. SUMMARY OF ARGUMENT

Based upon erroneous factual and legal contentions, the Trial Court was misled into committing reversible error in granting Ryan's Anti-SLAPP motion in a strictly private employment matter involving a disgruntled ex-employee fired for cause. The Trial Court erroneously concluded as a matter of fact and law that Ryan's campaign of online cyber-conduct via several blogs addressed matters of "public concern." CP 4, 7, 64 at fn.1, 81, 97.

The Trial Court further committed reversible error by finding Ms. Johnson was unable to prove that her per se defamation claim was supported by a sufficient prima facie showing of facts to support

a favorable judgment. Ryan's statements that Ms. Johnson had engaged in criminal behavior were assertions of false facts constituting actionable libel per se which the Trial Court erroneously ignored.

VII. ARGUMENT

A. Standard of Review.

In making determinations under RCW 4.24.525, the trial court considers pleadings and supporting and opposing affidavits stating the basis of the liability or defense. RCW 4.24.525(4)(c). On appeal, the standard of review is de novo.

B. Washington State's Anti-SLAPP Statute Is Not Available To Cyberbullies Engaged In Solely Private Disputes.

In 2002, Washington passed the "Act Limiting Strategic Lawsuits Against Public Participation" ("Anti-SLAPP"). Laws of 2002, ch. 232, § 1. Notably, our legislature observed SLAPP suits are "*filed against individuals or organizations* ***on a substantive issue of some public interest or social significance****, and are designed to intimidate the exercise of First Amendment rights.*" Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104, 1109 (W.D. Wash., 2010). "*As first enacted, the Washington Anti-SLAPP*

law provided that a person who communicates a complaint or information to any branch or agency of federal, state, or local government 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." Id., citing RCW 4.24.510.

In 2010 the law was amended, vastly expanding the type of conduct protected. Aronson, supra. "*These amendments, patterned after California's Anti-SLAPP Act, became effective on June 10, 2010.*" Id. "*Under the borrowed statute rule, courts find that when the legislature borrows a statute from another jurisdiction it implicitly adopts that jurisdiction's judicial interpretations of the statute.*" See, A Cure for a "Public Concern": Washington's New ANTI-SLAPP Law, 86 Wash. L. Rev. 663, 690 (Oct. 2011).

The 2010 amendments to RCW 4.24.510 provide that "*a party may bring a special motion to strike any claim that is based on an action involving public participation as defined in the Act.*" Id. The Act defines public participation and petition to include: "*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.***" RCW 4.24.525(2)(d) (emphasis added).

The Anti-SLAPP Act is applied to effectuate the general purpose of protecting participants in **public controversies** from an abusive use of the courts. Aronson, supra, at 1110 (emphasis added). "*To prevail on a special motion to strike, the defendant must show by a preponderance of the evidence that the plaintiff's claim is based on an action of public participation and petition.*" Fielder v. Sterling Park Homeowners Ass'n, 914 F.Supp.2d 1222, 1230 (W.D. Wash., 2012). In evaluating a motion to strike, Courts "*must carefully consider whether the moving party's conduct falls within the 'heartland' of First Amendment activities.*" Id. at 1232. When a defendant fails to meet his initial burden, the court need not consider whether plaintiff has demonstrated a probability of success before denying a special motion to strike. See A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 137 Cal.App.4th 1118, 1130 (2006).

However, if defendants meet their initial burden, the Court must take "*Plaintiff's allegation in the light most favorable to her....*" Fielder, supra, at 1233. Indeed, the Ninth Circuit, applying California's statute, has noted the second stage determines whether plaintiff's complaint is legally sufficient and supported by a sufficient prima facie showing of facts to support a favorable judgment if the evidence submitted by the plaintiff is credited. See Hilton v. Hallmark Cards, 599 F.3d 894, 902 (9th Cir. 2010).

"*Analysis of an Anti-SLAPP motion requires a two-step process. A defendant who files an Anti-SLAPP motion bears the threshold burden of showing that the complaint arises from protected activity.*" Aronson, supra, at 1110. If this showing is met, "*the burden shifts to the plaintiff to show a probability of prevailing.*" Id. At issue here, is whether Ryan met his burden below in showing by a preponderance of the evidence that Johnson's claims are based on an action of public participation. Aronson, supra, at 1109. To meet his burden Ryan was required to prove that his Internet rants were "protected activity" made "*in connection with an issue of public concern.*" Id. As a matter of fact and law, he did

not and could not meet the burden and the Trial Court erred in ruling he had.

Notably, when our legislature amended RCW 4.24.525, it deviated slightly but significantly from the California Anti-SLAPP Act after which it was fashioned. "*[W]here the legislature modifies or ignores a provision of the borrowed statute, it implicitly rejects that provision and its corresponding case law.*" See A Cure for a "Public Concern": Washington's New ANTI-SLAPP Law, 86 Wash. L. Rev. 663, 690 (Oct. 2011). "*The Washington State Supreme Court has found that when the legislature deviates from a model act, it is 'bound to conclude' that the deviation 'was purposeful' and evidenced an intent to reject those aspects of the model act.*" Id., citing State v. Jackson, 137 Wn.2d 712, 723 (1999).

Here, while the Washington Legislature borrowed from California's Anti-SLAPP Act when effectuating the 2010 amendment, it specifically deviated from California's statute by replacing its standard, i.e., "public interest," with that of the Washington standard "public concern." Accordingly, California case law regarding what comprises a "public interest" is not

controlling in determining whether Ryan met his burden in proving by a preponderance of the evidence that his online personal attacks were "protected activity" and addressed a matter of "public concern".

Under Washington law, "*public concern*" has a specific construction historically interpreted under a test developed in the U.S. Supreme Court case of Connick v. Meyers, 461 U.S. 138, 140-41 (1983) (the "Connick test"). In Connick, the issue before the court was whether an assistant district attorney's circulated questionnaire, concerning office morale; a transfer policy; the need for a grievance committee; and the level of confidence in superiors, pertained to a matter of "public concern" deserving of First Amendment Protection. Id. at 142. The U.S. Supreme Court found it did not. Id. at 154. The test utilized by the Court was one where three factors were analyzed: **content**, **form**, and **context** of the speech. Id. at 147-48.

No one of the three factors is individually dispositive. Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011). When analyzing **content**, courts look to see if the expression relates to public, rather than

private, matters. Id. at 1211. When analyzing **form**, courts consider whether the speech was rendered in a public rather than private manner, such as a note to a superior. See A Cure for a "Public Concern": Washington's New ANTI-SLAPP Law, 86 Wash. L. Rev. 663, 685 (Oct. 2011), citing Markos v. City of Atlanta, 364 F.3d 567, 571 (5th Cir. 2004).

When analyzing **context**, courts look to the purpose of the speech, notably whether the speech was part of a public discussion or whether it merely served a private purpose. Id., citing Rankin v. McPherson, 483 U.S. 378, 386 (1987). In Connick, the court found the fired assistant district attorney's conduct was not meant to begin a debate about work conditions, but simply to "*gather ammunition for another round of controversy with her superiors.*" The Court concluded it did not address an issue of public concern. Connick, at 148. That same conclusion and result applies to this case here, both factually and legally.

1. Ryan's Vitriolic And Libelous Personal Cyber-Attack On Johnson Was Neither Protected Nor Of "Public Concern."

Here, the Trial Court erred in granting Ryan's Anti-SLAPP motion. Ryan's speech, as a matter of fact and law, was neither protected activity nor centered on matters of "public concern." The fundamental basis supporting First Amendment protection to speech on matters of "public concern" arises from the collective-level benefit that such speech provides in the "*development of informed public opinion and policy in a democratic society.*" See, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, Lyrissa Barnett Lidsky 2010 U. Ill. L. Rev. 799, 810 (2010). Our courts have consistently underscored the precept that "*speech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'*" Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003). All, personal matters relating to Ryan's employment termination for cause from a private employer, and the self-serving methods he employed in seeking retribution and retaliation against his former

supervisor for that termination have no relevance to developing informed policy in a democratic society much less evaluating the performance of governmental agencies.

Moreover, Ryan's act of publicly blogging his vitriolic and libelous personal attacks against his former supervisor, Ms. Johnson, does not and cannot convert or translate an otherwise private matter and dispute, e.g., termination and retaliation, into matters of "public concern." After all, the actual domain name of one of Ryan's sites is "thetyrannyofyvonne," which makes it clear that the nature of the intended content, form, and context of his postings was and is personal. The fact is, a terminated theatre employee's individualized and vituperative perception of his ex-supervisor ("*vulture-like machinations*") combined with his active campaign to extract vengeance to the tune of a "*reasonable settlement and a non-disclosure agreement*" utterly fails in developing informed public opinion and policy benefiting democratic decision making – irrespective of the fact that it was purposefully broadcast via the Internet. CP 11, 108. Simply stated, Ryan's actions are nothing more than the public airing of a totally private employment dispute

between a former supervisor and a fired, disgruntled ex-employee. Ryan has not and cannot meet his burden of proving that his online libelous speech was protected activity, much less addressed matters of "public concern."

Indeed, in Aronson v. Dog Eat Dog Films, Inc., supra, 738 F. Supp. 2d at 1112, the court underscored that even if overall activity (here a documentary addressing the healthcare crisis in America) addresses issues of public concern, it is possible for exercises of free speech within that work to fall outside the statute's protection. Plaintiff Aronson, a private individual, had brought a civil action seeking redress for invasion of privacy, copyright infringement, and misappropriation of likeness. Id. at 1104. Once the suit was filed, Defendant brought an Anti-SLAPP motion arguing his documentary "Sicko" addressed a matter of public concern – the healthcare crises in America. Id. at 1111-1112. Ultimately, in Aronson, the Court granted the Anti-SLAPP motion after it determined that while Moore "*involuntarily thrust*" Aronson into the health care discussion, Aronson's appearance was "*directly connected to the discussion of*

the healthcare system," a matter of public concern. Id. at 1111. Quite the contrary is true here.

Former employee Ryan's libelous criticisms of Johnson, herself an employee of the Civic Theatre – a non-profit private entity – her management of the Civic Theatre, and her interactions with others in the workplace, are not directly connected to any matter of public concern. Rather, the situation here is more akin to the ex-employee's conduct in Connick – intended to gather ammunition for another round of private controversy and posturing – namely, Ryan's personal goal of obtaining a severance package as a result of being fired for implicating the Civic Theatre in his extra-marital sexual pandering.

Applying the Connick test to the facts here illustrate the Court's error in holding Ryan's speech constituted matters of "public concern." Notably, when engaging the Connick analysis, courts have held "*[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.*" Snyder v. Phelps, 131 S. Ct. 1207 (2011).

a. Content.

Again, while no factor is individually dispositive, the Ninth Circuit most recently stated, "*content is the most important factor.*" Demers v. Austin, 729 F.3d 1011 (2013). In Demers, the Court found the content of a professor's speech regarding a plan for school changes "*did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow 'bureaucratic niche.' Nor did the Plan address the roles of particular individuals in the Murrow School, or voice personal complaints. Rather, the Plan made broad proposals to change the direction and focus of the school.*" Id. Ultimately, the Demers Court found the Professor addressed matters of public concern, namely, the direction and focus of a publicly funded university.

The Demers facts are not even remotely close to the facts here. Not only were Ryan's postings about a private not-for-profit organization wholly unconnected to government funding or government control, he was focused on his own self-serving, specific, private, personnel dispute against a specific person – his former supervisor, Ms. Johnson. His cyber-rants were specifically

related to his "for cause" termination and his former employer's refusal to make a severance payment. As such, Ryan's online activity was comprised of vindictive, hateful, hurtful and libelous personal complaints of no possible interest to anyone outside a narrow 'theatrical niche' to which his postings played. Ryan by no conceivable stretch was blogging about matters of "public concern." What he was engaged in was a private campaign of libel and defamation using a venue available to the public.

In Snyder, supra, the U.S. Supreme Court found that handheld signs displayed outside the funeral of an American Soldier constituted protected speech, as they addressed matters of public concern, "*the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy....*" Snyder at 1216. In so holding, Justice Roberts stressed "*even if a few of the signs – such as 'You're Going to Hell' and 'God Hates You' – were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust*

and dominant theme of Westboro's demonstration spoke to broader public issues." Id. at 1217.

While the speech in Snyder was deemed substantively important and arguably addressed the political and moral conduct of the United States, the same is not even remotely true here. Stripped of all hyperbole and emotive content, Ryan's speech regarding Ms. Johnson addresses his 'for cause' termination from a private entity and his failed demands for a severance package as a result of being fired. "*This was their best chance to make this go away without spending money.*" CP 11. In short, Ryan's speech, unlike that in Snyder, does not speak to broader public issues. Instead, the overall thrust and dominant theme of Ryan's speech is self-serving and personal, and centers on demands for payment - "*a reasonable settlement and a non-disclosure agreement.*" CP 11.

Indeed, Ryan's use of Internet blogging to personally libel and attack Ms. Johnson in demanding a $100,000 payout is similar to that of the Defendant's actions in Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675 (1986). In Vern Sims Ford, after entering into a dispute regarding the purchase price of a van, the defendant

contacted the local TV news media and mailed flyers to 100 individuals and business referring to Vern Sims and their salesperson as "thieves." Id. at 677. When these acts failed to assist the defendant in recovering the $70.24 he believed he was owed, he threatened to mail the flyer to everyone in Skagit County unless he was paid $7,500 for alleged expenses and a $50,000 donation was made to Oral Roberts. Id. After Vern Sims brought suit for defamation, the Court applied the Connick test and determined "*while Hagel claims that his purpose in disseminating the flyers was to warn people that what happened to him could happen to them, the defamatory statements do not involve a matter of public concern but rather a private business dispute.*" Id. at 683. That is precisely the case here.

Moreover, as numerous California courts have emphasized "*the focus of the Anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it.*" World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., 172 Cal. App. 4th 1561, 1572 (2009).

b. Form.

Courts have recognized that information communicated through a public forum, such as a publication, does not transform a private employment issue into a matter of public concern or interest. See Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO, 105 Cal.App. 4th 913, 926 (2003), wherein the court observed:

> *"[i]f publication were sufficient, anything the Union published would almost automatically become a matter of public interest. For example, if the Union reported in its newsletter that a supervisor arrived late for work last Wednesday, it could then argue that tardiness in supervisors was a matter of concern in the union membership. Alternatively, the Union could publish information in an effort to increase its membership vis-à-vis a competing union, as the Union did here, and thereby turn its purely private issue into a public one.* ***If the mere publication of information*** *in a union newsletter distributed to its numerous members* ***were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded****, thus seriously undercutting the obvious goal of the Legislature that the public-issue requirement have a limiting effect."*

Id., (emphasis added).

Likewise, Ryan's use of Internet blogging to libel Ms. Johnson does not and cannot turn his highly private employment

matter into one of "public concern" simply because an unsuspecting public might encounter a webpage devoted solely to a person's self-serving campaign of libel to extract compensation from a former employer. Just as in Snyder, the Trial Court here was required to focus on what was being conveyed, not how it was conveyed – namely, via Internet postings. Snyder, supra, 131 S.Ct. at 1212. Here, the Trial Court's failure to properly evaluate and apply the law to the form at issue, constituted reversible error.

c. Context.

In Snyder, Plaintiff argued the "context" of the speech – "*its connection with his son's funeral – makes the speech a matter of private rather than public concern.*" Snyder, supra, at 1217. However, the Court found that the funeral setting did not alter the conclusion that the protesting church was condemning matters at issue in modern society – speech on issues of public concern. Id. Moreover, the Court specifically stated "*there was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter.*" Id. The Court

emphasized this point by contrasting the facts in Snyder to those in Connick "*finding public employee speech a matter of private concern when it was 'no coincidence that [the speech] followed upon the heels of [a] transfer notice' affecting the employee.*" Id. That same contrast can and should be made here resulting in the same conclusion. The facts here are analogous to those in Connick.

Chief Justice Roberts' analysis of the context variable in Snyder indicates each case will require an examination of the history, if any, of the use of similar speech by a defendant involved in the lawsuit. Snyder at 1217 ("*Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its 'honestly believed' views on public issues.*"). Here, it is no coincidence that Ryan's vitriolic campaign of libel per se against Ms. Johnson followed immediately on the heels of his termination 'for cause' and the Civic Theatre's refusal to pay him any severance. Unlike in Snyder, but on point with the facts in Connick, Ryan's speech stemmed from a pre-existing personal conflict between

himself and Johnson, his former supervisor. Any attempt by Ryan to characterize his libelous accusations that Ms. Johnson had committed perjury and criminal activity, as speech on a matter of "public concern," is specious and a blatant attempt to mask his clearly personal attack and vendetta on Johnson over matters involving a strictly private employment firing, with no implications of "public concern" whatsoever.

The Trial Court's grant of protection to Ryan's viciously false and libelous accusations motivated by his desire for personal vengeance was reversible error. Additionally, the Court's ruling was contrary to the purpose of Washington's Anti-SLAPP statute which is to encourage participation in matters of public significance. The "*content-form-context*" of Ryan's vituperative cyber-monologue makes clear the focus of his blogging was to coerce a severance package and/or his reinstatement by means of false and libelous claims, neither of which constitute matters of "public concern." Ryan's conduct was nothing more than a campaign of actionable accusations and insinuations wielded as a sword intending to cause hatred, contempt, and ridicule toward his former supervisor.

Ryan's postings (even excluding the most recent ones posted within weeks of the Trial Court erroneously granting Ryan's Anti-SLAPP motion seen at www.civicdoody.com) make clear that his online cyberbullying conduct was personal and self-serving, that it would never have occurred and he would have simply gone away if only the Civic Theatre had capitulated to his demands for severance pay or re-employment. "*Occasionally, some well-meaning person will suggest that I'm 'never going to get anything out of them,' and that I should move on for my own well-being. ...the truth is this: It has never once – not once – occurred to me that I will not get the justice I seek.*" CP 7. "*Now it's going to cost serious money if they ever want to end this.*" CP 10. "*Ironically, this is likely a huge disappointment for Yvonne A.K. Johnson and Civic's 'board of directors.' This was their best chance to make this go away without spending money... and had the potential to end this all with a reasonable settlement and a non-disclosure agreement.*" CP 11. These statements glaringly highlight the fact that Ryan's campaign was for his own benefit – using unprotected speech as a weapon for the sole purpose of achieving personal economic gain after being

terminated for just cause. There is no question that the focus of Ryan's blogging, as a matter of fact and law, was not about matters of "public concern." Ryan's blogging was focused solely on his own self-serving gain. Washington's Anti-SLAPP statute was never intended to protect such conduct, and it was reversible error to apply it in such a matter to Ryan's motion.

2. Johnson Has Shown By Clear And Convincing Evidence The Probability Of Prevailing On The Merits Of Her Defamation Claim.

The second stage taken under the Anti-SLAPP statute requires a determination of whether plaintiff's complaint is legally sufficient and supported by a sufficient prima facie showing of facts to support a favorable judgment if the evidence submitted by the plaintiff is credited. See Hilton v. Hallmark Cards, 599 F.3d 894, 902 (9th Cir. 2010).

To prove defamation, a plaintiff must establish (1) falsity, (2) publication, (3) fault, and (4) damages. Phoenix Trading, Inc. v. Loops, LLC, --- F.3d ---, 2013 WL 5495695, *6 (October 4, 2013). Notably, a statement of opinion implying existence of defamatory facts is itself defamatory. Henderson v. Pennwalt Corp., 41 Wn.

App. 547, 557 (1985). Here, Johnson is not required to establish she will succeed on the merits but rather only the probability that she will prevail. To do so, Johnson is only required to show that her defamation claim is "*legally sufficient*" and "*supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by* [Johnson] *is credited.*" Wilson v. Parker, Covert & Childester, 28 Cal. 4th 811, 821 (2002). Here, Johnson provided a prima facie showing of defamation per se. Ryan clearly accused Ms. Johnson of perjury and criminal activity relating to purported falsification of documents.

"*The imputation of a criminal offense involving moral turpitude has been held to be clearly libelous per se.*" See Caruso v. Local Union No. 690 of Int'l Brotherhood of Teamsters, 100 Wn.2d 343, 353 (1983); see also Davis v. Fred's Appliance, Inc., 171 Wn. App. 348, 366 (Div. 3, 2012). Moreover, Washington Courts have held *"[w]here the definition of what is libelous per se goes far beyond the specifics of a charge of crime, or of unchastity in a woman, into the more nebulous area of what exposes a person to hatred, contempt, ridicule or obloquy, or deprives him of public*

confidence or social intercourse, the matter of what constitutes libel per se becomes, in many instances, a question of fact of the jury." Caruso, at 354. Ultimately, "*A defamatory publication is libelous per se (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office.*" Id. at 353. "*In all but extreme cases the jury should determine whether the article was libelous per se.*" Id. at 354.

Here, Ryan clearly accused Johnson of dishonesty in a governmental hearing – submitting false statements to a government agency with criminal implications. "*In the course of fighting my claim, Ms. Johnson submitted false statements to the Unemployment Security Department, in the form of my official separation letter. ...She has now opened the theater to... charges of making demonstrably false statements to a government agency, should Washington State wish to pursue that.*" CP 106-107; "*...you should know that in addition to the outright lies submitted to the State of Washington by Civic in my official separation letter....*" CP 108.

Further, Ryan intentionally exposed Johnson to hatred, contempt, and ridicule with the goal of intentionally depriving her of the benefit of public confidence while seeking to injure her in her profession. Caruso, supra. "*My official separation letter should be expunged from the record now that Ms. Johnson's lies and distortions have been revealed as such.*" CP 106. "*...Yvonne A.K. Johnson could have avoided granting us this victory if her extraordinary intelligence had not been overwhelmed by her extreme maliciousness.*" Id. "*a few minutes spent reading this... is likely to induce a sense that Ms. Johnson would bring more drama and divisiveness than any respectable institution would care to have.*" CP 108. As a matter of fact and law, Ryan's blogged cyberbullying is and was defamation per se.

During oral argument the Trial Court was misled into erroneously finding that Johnson's purported failure to "prove" malice due to her alleged "public figure" status defeated her defamation claim. "*Ms. Johnson is concededly a public figure and thus the standard is higher. There must be a showing of actual malice, and not only that, there must be, as I understand it, clear,*

cogent and convincing evidence of actual malice, which is not present here." **Appendix B**, June 21, 2013 hearing transcript, p. 19, ll. 18-22.

However, at this stage of proceedings, Ms. Johnson was not required to provide "*clear, cogent and convincing evidence of actual malice*." Indeed, Ms. Johnson was only required to provide a prima facie showing of facts that would support a probability of success on her defamation claim. Wilson, supra, 28 Cal. 4th at 821. In having provided evidence establishing defamation per se, Ms. Johnson satisfied this requirement. Nevertheless, the Court erred by finding Ms. Johnson failed to show actual malice. Actual malice requires *"knowledge of the falsity or reckless disregard of the truth or falsity of the statement."* Vern Sims Ford, supra, 42 Wn. App. at 680-81.

"*Actual malice ordinarily may be inferred from objective facts, and evidence of negligence, motive and intent, by cumulation and appropriate inferences, may establish the defendants' recklessness or knowledge of falsity. Further, the defendant's mere statement of his belief in the publication's truth must be weighed against evidence adduced that supports a finding of knowing falsity*

or recklessness." Id. at 681, n. 2. Here, the evidence as argued to the Trial Court shows that the document Ryan claims Ms. Johnson fraudulently submitted to the Employment Security Department, thereby subjecting "*the theatre to further charges of defamation, as well as to making demonstratively false statements to a government agency*", was in fact executed and submitted by another individual, James E. Humes. **Appendix B**, p. 12, ll. 6-15.

Arguendo, if Ms. Johnson had an obligation to show malice, the objective fact that another individual's signature was on the submission at issue establishes Ryan knew Ms. Johnson had not submitted false information to a governmental agency when he blatantly asserted she had engaged in criminal behavior. This established his recklessness and knowledge of falsity, or at minimum raises material questions of fact that were not appropriate for summary dismissal. See, Pike v. Hester, 2013 WL 3491222 (D. Nev. July 9, 2013) (wherein the Court denied the Defendants' Anti-SLAPP motion because "*Plaintiff has sufficiently attested as to the malice with which Hester allegedly carried out his slander of*

Plaintiff such that there is a material question of fact whether the defense applies.").

During oral argument, the Trial Court was also misled into believing Ms. Johnson was unable to prevail on her defamation claim due to a failure of proof regarding damages. As a result, the Trial Court committed reversible error in finding "*there hasn't been any pleading that I can recall that shows any concrete allegations of damages such as to provide even a modicum of proof to resist this motion.*" See **Appendix B** June 21, 2013 hearing transcript, p. 19, ll. 9-12.

Yet, a plaintiff is not required to prove actual damages if communications, such as those at issue here, constitute 'defamation per se.' "*A defamatory publication is libelous per se (actionable without proof of special damages) if it... imputes to the plaintiff criminal conduct involving moral turpitude.*" Maison de France, Ltd. v. Mais Oui!, Inc., 126 Wn. App. 34, 44-45 (Div. 1, 2005), citing Ward v. Painters' Local Union No. 300, 41 Wn.2d 859, 863 (1953).

The evidence submitted by Ms. Johnson clearly showed that her defamation claim was and is "*legally sufficient*" and "*supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by* [Johnson] *is credited.*" Wilson v. Parker, Covert & Childester, 28 Cal. 4th 811, 821 (2002). The Trial Court committed reversible error in summarily dismissing Johnson's defamation claim.

C. Ryan Used Technological Advancements To Manipulate The Application Of Traditional Tort Law.

In Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir., 2002), the Court noted, "*courts have struggled to analyze problems involving modern technology... often with unsatisfying results.*" That is the situation at issue here.

Ryan created a factual scenario involving the use of several website domain names that fed into his Internet blog. This manipulation was misunderstood by the Trial Court and misled it regarding the amount of purported public interest and/or public participation Ryan's cyberbullying of Ms. Johnson engendered.

Ryan, in his briefing and argument to the Trial Court, relied heavily on the assertion that his blog had supposedly received over

36,000 "*page hits*" thus proving it was a "*popular site for Spokane Civic Theatre's community.*" CP 7. Subsequently the Trial Court was misled into believing a page hit translates into individualized interest and participation. Clearly the Court did not appreciate that a "page hit" does not translate into a singular person intent upon viewing and participating in Ryan's cyberbullying. Rather, the "page hits" at issue only evidenced that some individual landed on his internet blog --- Ryan, his family members, his lawyers, Ms. Johnson, individuals in varying cities, states, and possibly countries, etc., and maybe multiple times. A mere page hit does not reflect that the individual ever intended to be there or was even remotely interested in the content of the web page, or had "participated." "*Hits are commonly misinterpreted as a metric for website success, however the number of hits rarely translates to the number of people visiting a website.*" See http://www.motive.co.nz/glossary/hits.php.

Notably, a pageview is likewise unavailing in determining active interest in the content of a web page. "*However, since a page view is recorded each time a Web page is loaded, a single user can rack up many page views on one website.*" See

www.techterms.com/definition/pageview. It is just as likely, that Ryan was his own websites' most frequent visitor.

As a result, the "page hits" Ryan so heavily relied upon to persuade the Trial Court, actually mean nothing in the context of whether or not Ryan's cyberbullying constituted speech on a matter of "public concern" or whether or not the requisite "public participation" existed so as to deserve statutory protection. Notably, the Ninth Circuit recently refused to grant an Anti-SLAPP motion when material questions of fact exist as to whether or not the statute applies. See Shropshire v. Fred Rappoport, 294 F.Supp.2d 1085, 1100 (N.D. Cal., 2003) ("*...Defendant's anti-SLAPP motion raises factual questions that cannot be resolved at this stage of the proceeding.*"). As such, at a minimum, material questions of fact existed to preclude the Trial Court's ruling.

Again, Ryan's actions are more akin to those employed by the speaking party in Connick who distributed a questionnaire and the individual in Vern Sims Ford who mass mailed a flyer. Connick, supra, 461 U.S. at 142; Vern Sims Ford, Inc., supra, 42 Wn. App. at 677. Just because an individual receives a questionnaire or flyer

does not mean that the matters described therein are of "public concern," and certainly the mere possession of such materials does not equate to public participation. See Rivero, supra, 105 Cal.App. 4th at 926 (2003) ("*If the mere publication of information... were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded....*").

Here, Ryan engaged in an active, overt, hostile, public campaign of cyberbullying against Ms. Johnson. Thereafter, when Ms. Johnson sought legal protection against his online libel, Ryan convinced the Trial Court that Washington State's Anti-SLAPP statute could be both a sword and a shield in private matters despite implicating no "public concern." That invited the reversible error at issue. Such an abusive application of a statute created to protect speech centering on matters of "public concern" was never intended.

VIII. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Appellant Johnson respectfully requests an award of reasonable attorney fees and costs incurred on appeal. RAP 18.1; RCW 4.24.525(6)(a). Moreover, Appellant Johnson in turn respectfully requests an award of statutory damages in the amount of

$10,000 in order to deter Ryan from further abusive, frivolous use of Washington's Anti-SLAPP statute. RCW 4.24.525(6)(b)(i-iii).

IX. CONCLUSION

Based upon the foregoing, Appellant Johnson respectfully requests that the Trial Court's grant of Ryan's Anti-SLAPP motion be reversed; that the Trial Court's dismissal of Appellant Johnson's defamation and tortious interference claims be reversed; that Respondent's fees and costs awarded by the Trial Court be dismissed; and that Appellant Johnson be awarded her reasonable costs and attorney fees on appeal.

DATED this 30 day of December, 2013.

DUNN BLACK & ROBERTS, P.S.

ROBERT A. DUNN, WSBA #12089
SUSAN C. NELSON, WSBA #35637
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of December, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

☐	HAND DELIVERY	Stacia R. Hofmann Law Office of Andrea Holburn Bernarding 1730 Minor Ave Ste 1130 Seattle, WA 98101-1448
☒	U.S. MAIL	
☐	OVERNIGHT MAIL	
☐	FAX TRANSMISSION	
☐	EMAIL	

Susan C Nelson

SUSAN C. NELSON

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

APPENDIX A

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.]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

YVONNE A. K. JOHNSON,)
)
Plaintiff,)
) No. 13-2-01362-7
v.) COA III No. 318371
)
JAMES P. RYAN,)
)
Defendant.)

HONORABLE GREGORY D. SYPOLT
VERBATIM REPORT OF PROCEEDINGS
September 20, 2013

APPEARANCES:

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Amy Wilkins, CSR No. 679, CCR No. 2157

APPENDIX B

FRIDAY, SEPTEMBER 20, 2013 - 9:51 A.M.

THE COURT: I see Mr. Dunn is here now. Johnson vs. Ryan. And Ms. Hofmann is on the phone, I believe, still.

MS. HOFMANN: I am, Your Honor.

THE COURT: Okay. Thanks for your patience. And let me introduce the record. This is Case Number 2013201362-7, Yvonne Johnson vs. James Ryan. And Mr. Dunn is here, and just as a point that just occurs to me, have you filed a notice of appearance in this matter, Mr. Dunn?

MR. DUNN: Yes, we have, Your Honor.

THE COURT: Okay. And so this is the time set for your motion to stay enforcement of the judgment and also a motion to shorten time, which accompanies your further motion to strike what's described as the untimely response of Ms. Hofmann.

So, Ms. Hofmann, let me ask you, do you have any objection to the shortening of time?

MS. HOFMANN: None at all.

THE COURT: Okay. I'll grant that motion, and you may proceed then, Mr. Dunn, with your motion to strike.

MR. DUNN: Thank you, Your Honor. Thank you for your indulgence for the delay. Your Honor, at this time I'd like to

23 introduce you to a Rule 9 intern from our office, Adam
24 Chambers, who actually is the latest member of the law firm.
25 He passed the bar a week ago.

1 THE COURT: Great. Pleased to meet you, and
2 congratulations on that, Mr. Chambers.
3 MR. DUNN: With the court's permission, Mr. Chambers
4 will be arguing the motion.
5 THE COURT: Okay. Sure.
6 MR. CHAMBERS: Good morning, Your Honor.
7 THE COURT: Morning.
8 MR. CHAMBERS: So there's two motions here. There's
9 the motion where we would ask to strike the response from
10 defendant. It was filed four days late. We hadn't heard any
11 reason why, or we weren't offered any explanation. So,
12 essentially we would like to have that motion or that response
13 stricken.
14 THE COURT: Okay. Thanks. Let me hear from Ms.
15 Hofmann on that.
16 MS. HOFMANN: Yes, Your Honor. I think that there
17 was a little bit of confusion on my part, and I'd like to
18 explain what happened. But first let me say that I don't
19 believe that there's been any prejudice to Ms. Johnson. We're
20 dealing with an appellate rule that is pretty straightforward.

When I received this motion two weeks ago, I reviewed it. The motion looked appropriate, a stay. The Appellate Rule 8.1 was cited. There was mention that Ms. Johnson intended to file a bond as the court directed, and I wasn't planning on responding. And then this week I turned my attention to the

proposed order, which I admit I should have done before. However, in the proposed order, that's where it says that no bond should be issued. That wasn't mentioned anywhere in the motion. So, at that point, that's when I decided to respond, because I wanted it to be clear to the court that of course the amount of bond is within the court's discretion. But we object to this matter being stayed without a bond and -- or alternate security, but something to protect my client's interest. And so to that effect -- excuse me. I'm a little hoarse this morning. If there were reasons for, you know, good cause or reasons that Ms. Johnson cannot meet the requirements of Rule of Appellate Procedure 8.1, that those should have been in moving papers and briefed. Instead it just appeared in the proposed order. So, that's my explanation. I don't think it essentially matters, because again, in my eyes what this motion really is is to determine the amount of the bond.

THE COURT: Thanks. Counsel, I deny the motion to

strike the response of Mr. Ryan. And it appears to the court that regardless of whether or not I strike that motion, the court would still have to address the applicability and effect of RAP 8.1 (b)(1) in determining, as urged here, that on the one hand there shouldn't be any security posted or on the other hand there should be security posted, whether cash or alternatively, and what the amount of that should be.

With those things in mind, I don't believe that Ms.

Johnson is prejudiced in any way by the denial of the motion to strike. That's my ruling.

MR. CHAMBERS: Okay. Thank you, Your Honor. With regards to the motion to stay enforcement of the judgment, we're really asking first that that motion be stayed without -- without any -- without requiring any bond, and the court is entitled to do so in the interest of equity. And so, we're asking essentially the court exercise that equitable discretion to not require a bond in order to stay this enforcement. We took this case over. We weren't involved with the trial. We took it over essentially because it wasn't argued properly at trial. It's a case of first impression as it goes to the court of appeals, and we believe that there's a strong likelihood that Ms. Johnson's claims will win on appeal when presented properly. There is the Rule 8.1, Rule of Appellate Procedure

8.1, but Washington law makes clear that regardless of what statutes or rules are in place, The issue of bonds are never out of the discretion of the court. In RCW 4.44.470 it expressly says in there that the court, regardless of statutes, any bond on any action is within the discretion of the court. Several cases have applied it in that way where there is a statutory bond to essentially say that in the interest of justice, the bond will be waived or altered in whatever way the court sees fit.

Here, Ms. Johnson, given the fact that her -- her

case was initially presented improperly, given the fact that she worked for a nonprofit organization with a pretty modest salary, she doesn't have the funds to post $40 or -- you know, as defendant suggests, $40 or $50,000 to -- to enforce this stay. So, that's what we're asking --

THE COURT: Is there any declaration of that effect on the financial circumstances of the appellant accompanying your motion?

MR. CHAMBERS: I don't believe so, no.

THE COURT: Go ahead, Mr. Chambers.

MR. CHAMBERS: Okay. Thank you. As I mentioned, it's -- we're just asking that the court would exercise that

discretion in equity to allow Ms. Johnson to essentially go ahead with this. It would -- it would prevent her from obtaining relief just because she doesn't have the money on hand to secure the bond at this point. And so under 8.1, it's under 8.1 Subsection (b)(4), it does specify that the court can essentially utilize any means to secure judgment. Reading that in conjunction with the statute, the court is within discretion. It's not as clear-cut as defendant, as opposing counsel would suggest, that it has to be a certain amount that even has to be issued at all. And so that's what we're asking is that -- that Ms. Johnson not be required to post that bond.

THE COURT: A couple of questions.

MR. CHAMBERS: Yes, Your Honor.

THE COURT: First, it sounds like you're asking that there be a zero bond imposed, and secondly, in lieu of a cash bond in the supersedeas, do you have any other suggestions for what alternative security might be offered or proposed?

MR. CHAMBERS: We'd like to take some time, if the court would allow, possibly ten days, to address what could be pledged. We know that Ms. Johnson does have some assets, just not necessarily cash on hand, which -- which the sureties require to obtain the bond. But she does have other assets that could potentially be pledged. We'd just like to address

that with Ms. Johnson before we make those suggestions.

THE COURT: What amount does Ms. Johnson believe to be an appropriate dollar amount for the security?

MR. CHAMBERS: $10 -- $10,000.

THE COURT: All right. And the reason I ask that -- and maybe Ms. Hofmann would point this out. I think she probably will -- 8.1 (4) (c)(1) also describes the criteria that the trial court is to consider in setting an amount. And so we can all read that, but it's the judgment plus interest during the pendency likely to accrue and, in addition, attorney's fees, costs and expenses on the appeal. And from an equitable standpoint, apart from what you've said, it seems as though there's kind of an inferential requirement that there be some basis on which Ms. Johnson contends that she would be successful. So I have a couple of questions there for you, but

go ahead. See if you can answer those.

MR. CHAMBERS: So, could you -- excuse me. Could you repeat that?

THE COURT: Well, I cited the rule, and there's specific criteria that the trial court is to consider, and it sounds like you're saying, no, I don't need to consider that. So, why is that?

MR. CHAMBERS: Well, essentially I think it's in Bowman where the case says that this inherent authority allows the court to look at a case-by-case basis in regard to bonds in order to amend or waive the bond amount. Here, with Ms. Johnson, the whole issue is it's the instance that occurred that has put her in this financial position. And as mentioned, it's a case that, really, there was no precedence for when it was argued or when it -- as it goes to the appeals court. And so, we don't -- what we're asking is that while it's pending for that appeal, in order to present that proper argument that was never presented in order to try and regain her status in the community, she doesn't have to post this -- this high amount in order to do so. And that's where we would say that on the case-by-case basis this court would allow her to proceed without that bond.

THE COURT: Okay. Thanks, Mr. Chambers. Anything else you wanted to say?

MR. CHAMBERS: Not at this point, Your Honor.

THE COURT: Okay. Thank you, sir. Ms. Hofmann.

MS. HOFMANN: Sure. Excuse me. Your Honor, I was going to point out the rule in 8.1 as to what is to be considered, and I think the first problem that we have is that we don't have any evidence as to what Ms. Johnson can or cannot

do. Certainly the case law indicates that in situations where someone is unable to pay court fees or pay bonds, that the court has inherent power with respect to those issues, but that's missing here. So, that's -- that's the first objection we have.

The second objection is the whole idea of appealing and bonding and staying is to protect the interests of everyone involved. And if Ms. Johnson is not required to post some sort of security, and we're hearing now that she's not going to be able to -- even though we don't have any declarations or affidavits to that effect -- my client is prejudiced, because he's not able to enforce the order. And he also has no guarantee or security. We're confident on appeal that we're going to win. Obviously opposing counsel has the opposite feeling. But nonetheless, the idea is to balance both parties' needs. And at this point we already have approximately 20,000 in past orders. Assuming that we were correct and the appeal is -- affirms this court's prior orders, I estimate that could be anywhere from an additional 15 to 20,000. That's why we asked for 40,000. That protects both my client and allows Ms.

Johnson to seek this appeal. The question is what is that security. Well, we don't know, because we don't have any

information as to what she can and can't do. So, that's where we are.

THE COURT: Thanks, Counsel.

Counsel, I reread RAP 8.1, and it seems as though there are two principles at work here. One is whether a party who has not prevailed or hasn't been successful in the lawsuit has the right to stay enforcement of the trial court's decision here that is the judgment and the attorneys's fees order that's been signed previously. And that's on the one hand. On the other hand, given the fact that there is a right to stay enforcement of the trial court's decision, is the posting of a security supersedeas, as it's commonly known, a condition precedent to obtaining a stay. And while I agree with counsel that the court has equitable authority to set an appropriate amount of security, the court's of a view that the posting of a supersedeas bond or cash or alternative security is the criterion that a party must employ in order to obtain that right to stay. And I think that Ms. Hofmann has said it accurately in her pleadings. And I did take a look at Tegland on this, and he did cite a case, Seventh Elect Church in Israel vs. Rogers, 34 Washington Appellate 105, and the comment there simply says what I believe I've tried to summarize. And reading that, it says the Rule 8.1 (b)(1) gives the party the

right to stay enforcement of a money judgment upon the filing of a bond, cash or alternate security. With that comment in mind and also the text of the rule, the court believes that that is a prerequisite for a party being able to exercise the right to stay enforcement of a trial court decision.

With that in mind, then, the court has looked to the criteria that should be considered under 8.1 (b)(4) (c)(1), money judgment, and it does address the same criteria that Ms. Hofmann has advanced here. There is a judgment. There are attorney's fees. An approximate amount of that total is about $20,000. The court sets bond, supersedeas bond at $30,000 here. So, that's the court's order, Counsel.

MR. CHAMBERS: Thank you, Your Honor.

THE COURT: All right. Thanks.

MS. HOFMANN: Thank you, Your Honor.

THE COURT: So, if you'd be so kind to present an order. I don't know if you've sent me an original, somebody has an original ready to go right now. Otherwise I'll sign it later when you bring it back.

MR. CHAMBERS: We'll prepare one for you, Judge.

THE COURT: Thank you. Is there anything else then, Counsel?

MS. HOFMANN: I don't believe so.

THE COURT: Okay. Thanks. Have a great weekend.

MS. HOFMANN: Thank you.

THE COURT: Congratulations again, Mr. Chambers.

MR. CHAMBERS: Thank you very much.

THE COURT: Pleasure to meet you.

(End of proceedings.)

CERTIFICATE

I, AMY WILKINS, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, sitting in Department No. 11, at Spokane, Washington;

That the foregoing proceedings were taken on the date and place as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 25th day of October, 2013.

AMY WILKINS, CCR No. 2187
Official Court Reporter
Spokane County, Washington

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Amy Wilkins, CSR, CCR
Spokane County Superior Court, Dept. 11