NO. 31837-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

YVONNE A.K. JOHNSON, a single person,

Appellant,

vs.

JAMES P. RYAN, a married individual,

Respondent.

BRIEF OF RESPONDENT JAMES P. RYAN

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I. INTRODUCTION

Appellant Yvonne A.J. Johnson ("Johnson") filed this lawsuit for one reason: to silence Respondent James P. Ryan ("Ryan") and prevent him from exercising his federal and state constitutional rights to free speech. Ryan operates a blog, "Civic Doody", that provides commentary and criticism about Spokane Civic Theatre, a community theatre fostering public participation in the arts, and relying upon thousands of members of the public who volunteer in all aspects of production, donate half of the theatre's operating expenses, and attend shows. Johnson was the public leader of Spokane Civic Theatre, and, prior to Civic Doody's inception, Ryan's supervisor. Johnson terminated Ryan after Ryan sought a sexual relationship outside of his marriage because, as Johnson termed it, such activity created a "public scandal."

It is undisputed that Civic Doody is critical of Johnson's leadership and management of Spokane Civic Theatre, including her choice to terminate Ryan and unsuccessfully contest his claim for unemployment. Johnson, under the erroneous assumption that speech need only be negative or unflattering to be actionable, sought to shut down Civic Doody by filing suit and alleging baseless claims for defamation and tortious interference with a business expectancy.

Washington's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, RCW 4.24.525 (2010), allows for the early termination of meritless lawsuits, such as Johnson's, that the court will eventually dismiss after significant cost and expense to the speaker and his constitutional rights to free speech.[1] RCW 4.24.525 provides that once a defendant shows that it is more likely than not that the plaintiff's suit is one "involving public participation and petition", the burden shifts to the plaintiff to show the probability of prevailing on her claims by clear and convincing evidence.

Given Ryan's showing of public concern – the management and leadership of a community theatre – and Johnson's failure to show all essential elements of defamation, the trial court properly granted Ryan's Special Motion to Strike Johnson's Complaint, awarding Ryan statutorily-mandated attorneys' fees and a penalty of $10,000.

Johnson now appeals the trial court's decision in a sensationalistic brief, replete with inappropriate name-calling, designed to mask her lack of both factual and legal support for her position. Johnson asks the Court to apply a narrow interpretation of "public concern", contrary to the

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[1] That Johnson's complaint failed to identify a single defamatory statement yet sought to shut down Ryan's blog and all related social media **in their entirety** underscores that Johnson's suit was a SLAPP suit brought with the intention to chill Ryan's free speech.

legislative mandate that RCW 4.24.525 be applied liberally. Johnson also asks the Court to apply the legal doctrine of "defamation per se" in an unprecedented manner by allowing a public figure plaintiff to skip a showing of the required elements of defamation, falsity and actual malice, and instead simply show that the statements at issue may expose the plaintiff to hatred, contempt, or ridicule.

The trial court properly rejected Johnson's arguments and dismissed her case against Ryan. The Court should affirm the trial court's orders granting Ryan's Special Motion to Strike and awarding Ryan attorneys' fees, in addition to $10,000.

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

A. Response

1. Ryan assigns no error to the trial court's ruling dismissing Johnson's suit pursuant to RCW 4.24.525.

2. Ryan assigns no error to the trial court's ruling that Ryan's speech was made in connection with an issue of public concern pursuant to RCW 4.24.525.

3.-4. Ryan assigns no error to the trial court's ruling that Johnson failed to show clear and convincing evidence of defamation, and thus, tortious interference.

B. Issues Pertaining to Assignments of Error

1. RCW 4.24.525(2)(d) provides that an action involving public participation and petition includes written statements in a place open to the public or a public forum in connection with an issue of public concern. Did the trial court properly conclude, in accordance with the statute's liberal application, that Ryan's online statements regarding the leadership and management of a community theatre are more probably than not in connection with an issue of public concern? (Appellant's Assignments of Error 1 and 2.)

2. RCW 4.24.525(4)(b) provides that once a moving party meets his burden of showing that the action involves public participation and petition, the responding party must show by clear and convincing evidence a probability of prevailing on her claims. Johnson is undisputedly a public figure and the actual malice standard of fault applies.

It is undisputed that Spokane Civic Theatre submitted Johnson's termination letter to Ryan, alleging misconduct, to the Employment Security Division ("ESD") in an effort to contest Ryan's unemployment claim. It is also undisputed that ESD found no misconduct and awarded Ryan unemployment. Ryan stated that "Johnson submitted false statements to [ESD], in the form of my official separation letter." Did the

trial court properly conclude that the lack of Johnson's name on the ESD Separation Statement is not clear and convincing evidence of actual malice, such that Johnson's defamation, and all derivative, claims fail? (Appellant's Assignments of Error 3-7.)

III. COUNTERSTATEMENT OF THE CASE

Johnson presents a statement of the case that is inaccurate, incomplete, and misstates facts relevant to her appeal. All facts below are undisputed, except where indicated.

A. Johnson Led Spokane Civic Theatre, a Community Theatre of the Arts that Encourages, and Survives Upon, Public Involvement.

At all relevant times, Johnson, an admitted public figure, served as the Executive Artistic Director of Spokane Civic Theatre. In a blatant effort to "privatize" the issues in this case, Johnson fails to advise the Court of the public nature of Johnson's leadership of Spokane Civic Theatre.

As the name denotes, Spokane **Civic** Theatre is a non-profit community institution that vitally depends on the public's participation and assistance to further its goal of encouraging artistic expression and appreciation. Spokane Civic Theatre is not a professional theatre. Rather, it is overwhelmingly comprised of volunteer, unpaid members of the public who stage and star in its productions.

1. Spokane Civic Theatre Serves the Public By Providing the Community With an Outlet for Artistic Expression, Educating Public Audiences and Representing the Community in the Arts.

Spokane Civic Theatre is a "nationally recognized non-profit theatre" and "one of the oldest community theatres in the country." CP 27. It bills itself as belonging to the public, with a banner at the top of its public home webpage proudly proclaiming that it is "**Your** National Award-Winning Community Theatre". CP 33 (emphasis added). Likewise, the official mission of Spokane Civic Theatre, "to foster and operate a **volunteer live community theatre** of high artistic merit", reflects the level of public involvement. CP 27 (emphasis added). Founded in 1947, "Spokane Civic Theatre has been active in a number of activities, both social and theatrical, and the **tradition of public education** has continued throughout our history." *Id.* (emphasis added). "Civic, as it is fondly called by the surrounding community, sets a high standard for theatre in the Spokane area." *Id.* Johnson has characterized the theatre's importance to the community as follows: "[A]s vanguards of the dramatic arts, the Theatre is cognizant of its role in challenging the community's intellect and in pushing the boundaries of creativity and artistic expression." CP 85.

There are three primary areas of public involvement in Spokane Civic Theatre: community volunteers participating as on and off-stage talent, public donations, and community attendance.

First, the public instrumentally performs as cast and crew in productions at Spokane Civic Theatre, allowing the theatre to survive, while simultaneously encouraging the public to pursue artistic interests:

> Spokane Civic Theatre has more than **1,000 volunteers** who serve as actors, backstage crews, house managers, hosts and hostesses, ushers, and board members. They contribute approximately 55,000 hours each year. Volunteers return to Spokane Civic Theatre time and time again, supporting the theatre's endeavors.

CP 27 (emphasis added). New volunteers are also vital to Spokane Civic Theatre's success. CP 31. As one newspaper article explains: "[i]n a community theater, which does not pay actors, the enthusiastic participation of performers is crucial." CP 51.

Second, in "addition to volunteering their time, the Spokane Community has given incredible amounts in the form of donations that support us in our mission to provide and promote theatre excellence." CP 29. Community fundraising accounts for half of Spokane Civic Theatre's costs: "Both earned incomes from programming and charitable donations are critical to our success. Revenue from programming covers only 50 percent of our operating costs. **We depend on the support and**

commitment of our community to make up the essential difference." CP 29 (emphasis added).

Finally, community attendance is necessary to support Spokane Civic Theatre's mission. *See* CP 29. With 336 seats in its main auditorium, Spokane Civic Theatre boasts that under Johnson's "leadership, Spokane Civic Theatre continues to set attendance records, create sell out shows, and bring Spokane community theatre to a professional level of entertainment production quality and a level of excellence that has resulted in many awards." CP 27.

Without such a high level of public involvement, Spokane Civic Theatre could not carry out its mission to operate a community theatre promoting the theatrical arts.

2. As Executive Artistic Director, Johnson's Leadership of Spokane Civic Theatre Included Public Interaction, Involvement, and Publicity.

Johnson, Executive Artistic Director, was the self-admitted public face and voice of Spokane Civic Theatre, responsible for both business and artistic decisions at Spokane Civic Theatre. CP 37. **In her own words, it was Johnson's responsibility to "[r]epresent the theatre to the community**." *Id.* (emphasis added).

Johnson had extensive interaction with the volunteer community of cast and crew. She oversaw **all** of Spokane Civic Theatre's productions, including directing at least 20 herself. CP 37, 41.

Similarly, Johnson was intimately involved with public fundraising. She was responsible for "cultivating long-standing relationships with arts bodies, foundations, corporations, and individuals." CP 37. She "[e]stablished and secured extensive funding" for Spokane Civic Theatre's Children's Academy. CP 37-38. Johnson produced a documentary on Spokane Civic Theatre that aired on PBS, and produced and directed many other Spokane Civic Theatre fundraising benefits, including the theatre's Annual Endowment Benefit. CP 40.

Johnson also had direct involvement with encouraging audience participation. She describes herself as having a "keen sense for identifying areas . . . to draw in new audiences and reach out to a wider audience base." CP 37. Johnson claims to have increased subscription revenue 120%, and single ticket sales 150%, in six seasons. *Id.*

Johnson's public involvement with Spokane Civic Theatre went far beyond interactions with community cast and crew, donors, and audiences extending to the public at-large. Johnson and Spokane Civic Theatre have won multiple community awards. CP 43-45. Johnson was involved in "**[c]ommunity outreach and development** – Benefit performances,

lectures, [and] discussion groups for various organizations including: Kiwanis, Rotary, YWCA/YMCA, Cancer Patient Care, Lions Club, Senior Centers, Church Organizations, High School Senior Nights, [and] Center for Justice." CP 38.

Johnson has been profiled in news stories and reviews, including a January 27, 2005 article in The Spokesman-Review regarding Johnson's hiring. CP 47-49. The public was invited to a welcome reception in her honor. CP 47. Johnson, aware of her public leadership role, enjoyed being "incognito" her first weekend in Spokane – that is, "before everyone could say, 'Oh, that's Yvonne Johnson of the Civic.'" CP 49. On August 29, 2010, Johnson was again profiled by The Spokesman-Review, describing herself as being "**responsible for every dollar and every word at the theater**." CP 53 (emphasis added).

B. Johnson Terminated Ryan After Concluding That His Sexual Interests Outside of His Marriage Created a Public Scandal for Spokane Civic Theatre Sufficient to Cause Its Ruin.

Ryan's initial involvement with Spokane Civic Theatre and Johnson began in 2010 when Johnson created a new, full-time music director staff position., a newsworthy development CP 37, 51. In August of that year, Ryan, with 15 years in professional theatre, moved with his family from out-of-state to Spokane for what he believed was a three-year-

term as Residential Musical Director. CP 81. Ryan was attracted to the public aspect of community theatre. *Id.*

Among Johnson's responsibilities as Executive Artistic Director were recruiting and hiring employees, supervising and evaluating employees, administering personnel procedures, and administering grievance and termination procedures. CP 37. Just two months into the job, Johnson terminated both Ryan and his wife, who was also employed by Spokane Civic Theatre. CP 81. Johnson had posted an ad on craiglist.org that did not include any identifying information or association with Spokane Civic Theatre. CP 81, 123. He subsequently exchanged private emails with an individual that he had met on craigslist.org. *Id.* Spokane Civic Theatre later received an anonymous email disclosing the mutually non-monogamous nature of the Ryans' marriage. *Id.*

Johnson's position that Ryan's speech is not on a matter of public concern is a 180 degree deviation from her pre-litigation statements that Ryan's position and termination were not only on matters of public concern, but were also so consequential to the public that his sexual interests could destroy Spokane Civic Theatre. Realizing the inconsistency, Johnson fails to address her termination letter to Ryan. *See* CP 83-86 (also attached in its entirety as Respondent's Appendix ("App.") 1-4.) In the letter, Johnson accuses Ryan of creating a public controversy

sufficient to bring down Spokane Civic Theatre because of the potential public response. Resp. App. 2. Johnson cites both public standards and decorum for theatre representatives, as well as the public's essential involvement and support:

> **You know how dependent we are upon the good will of the local community in the greater Spokane metropolitan area. The Theatre exists and thrives only because of local support. Local ticket sales, local donations, and local volunteers are the lifeblood for our not-for-profit and growing civic theatre. . . .The Theatre could have and still can go down in financial flames because of what you have done. All of our hard work could be lost to public scandal and the Theatre could dwindle into obscurity. That is what you have done, Jim. That is the magnitude of the potential harm.**

Resp. App. 2 (emphasis added). Johnson ponders hiring a publicist to address "image damage" to Spokane Civic Theatre, and concludes the letter by hoping that Ryan will not begin litigation, as "[o]nly the art and the community will suffer."[2] Resp. App. 3.

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[2] Johnson's termination letter contains numerous false allegations: (1) Ryan did not put information into the public domain that would permit an association between Spokane Civic Theatre and Ryan; (2) Ryan did not publicly associate his sexual activities with Spokane Civic Theatre; (3) Ryan did not use the photo that was on Spokane Civic Theatre's website to publicly solicit sexual activity; (4) Johnson did not refuse to have an in-person meeting with the Board, nor did he become belligerent; and (5) Ryan did not circulate or show Theatre employees or "others" explicit photos of Ryan or his wife. CP 122-23.

1. Johnson and Spokane Civic Theatre Challenged Ryan's Claim for Unemployment in a Government Proceeding.

Spokane Civic Theatre contested Ryan's subsequent unemployment claim. CP 125-26. The theatre's Separation Statement to ESD was nothing more than a cover sheet to the aforementioned termination letter that Johnson sent to Ryan. *Id.* The form asks the employer to "explain" if separation is for any reason other than lack of work, to "identify" the final incident that caused the claimant to be discharged, and to "specify" the details relating to any reasons why the claimant was discharged. *Id.* In each instance, the answer was "see attached letter of termination" or "see termination letter". *Id.* The Separation Statement includes no substantive information as to Ryan's termination. *Id.*

ESD found no misconduct on Ryan's part, and that he was entitled to unemployment benefits. CP 122-23.

C. Ryan's Blogs About Spokane Civic Theatre, and Johnson's Management and Leadership of the Theatre, on Civic Doody, Are Matters of Public Concern.

Civic Doody,[3] an obvious play on "Civic Duty" and with a tagline of "Something Stinketh at Spokane Civic Theatre", serves as a public

[3] Civic Doody can also be found at thetyrannyofyvonne.blogspot.com. CP 80. Spokanecivictheater.org and

forum for the discussion and dissemination of commentary, complaints, and general information related to Spokane Civic Theatre, particularly regarding Johnson's and the Board of Directors' leadership[4] of the theatre. CP 80. In talking with others, Ryan learned that there is great breadth and depth of community frustration with the leadership of Spokane Civic Theatre, including widespread public opinion that Johnson's autocratic leadership style was detrimental to the public volunteers and the Spokane community as a whole. CP 81-82. The blog also publishes information regarding other Spokane arts and entertainment and human interest stories.[5] *Id.*

Ryan receives reports about Spokane Civic Theatre from dozens of members of the community. He only publishes facts that he has witnessed himself, or which he has been able to confirm through his own

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spokanecivictheatre.org redirect to civicdoody.com. CP 81. Spokane Civic Theatre also operates a blog. CP 12, 27.

[4] Ryan does not publish on Johnson's personal life.

[5] The blog had over 36,000 page hits at the time of the anti-SLAPP motion. CP 82. Johnson's position that Ryan "heavily" relied on this fact, and her dedication of four pages to the argument, is perplexing. App. Br. pp. 41-44. Ryan cited it once in his motion to strike. CP 66. Neither he nor the trial court cited the statistic at oral argument. The number of page hits is simply evidence of the popularity of Ryan's blog; Ryan has not and does not argue that it is determinative of "public concern".

investigation and research. CP 82. To Ryan's knowledge, all facts on his blog are true. CP 82.

1. Ryan's July 5, 2011 Blog Post

On July 5, 2011, Ryan posted on the outcome of his unemployment claim, and its effect on the theatre community. CP 106-07 (also attached as Resp. App. 5-6). Ryan notified the audience that despite Johnson's and Spokane Civic Theatre's allegations, ESD found no misconduct and that Ryan was entitled to unemployment benefits. Resp. App. 5. Ryan calls for Johnson's termination, and expresses regret that the community was involved in the "drama", "negativity" and "personal information" surrounding Ryan's termination. Resp. App. 5.

> If Ms. Johnson had been acting in the best interest of Spokane Civic Theatre, she would not have contested this claim. (If my calculations and understanding are correct, the absolute most that my claim will cost Civic is $202.68. That is 6% of the amount I am eligible for.) In the course of fighting my claim, Ms. Johnson submitted false statements to the Unemployment Security department, in the form of my separation letter. She had not previously provided this document to anyone other than myself. She has now opened the theater to further charges of defamation, as well as to charges of making demonstrably false statements to a government agency, should Washington State wish to pursue that. She actually went out of her way to request additional time from the adjudicator, an indication that could only mean she put all of her best efforts into contesting my claim.

Resp. App. 5-6.

Johnson claims that the above statement is defamatory because the Separation Statement attaching Johnson's termination letter is signed by the theatre's Managing Director James E. Humes ("Humes"). *See* App. Br. p. 39. Johnson, who by her own admission is responsible for "every dollar and every word at the theater" and for "grievance and termination procedures", has failed to produce any evidence that **her** letter to Ryan was attached to the Separation Statement without her approval or authorization. She offers no proof, let alone clear and convincing evidence, that Ryan's statement is provably false or made with actual malice.

D. Procedural History

Johnson filed suit against Ryan on April 5, 2013, alleging defamation and intentional interference with a business expectancy. CP 3-6. Johnson failed to identify a single defamatory statement in her complaint. *Id.* Nonetheless, she sought preliminary and permanent injunctive relief for the removal of the entire blog and any other related internet cites. CP 6.

On May 9, 2013, Ryan advised, by way of answer, that Ryan would be seeking attorneys' fees and a statutory penalty of $10,000 pursuant to Washington's anti-SLAPP statute, RCW 4.24.525. CP 17.

On May 31, 2013, Ryan filed his Special Motion to Strike the Complaint Pursuant to RCW 4.24.525. CP 60-78.

On June 21, 2013, the Superior Court of Spokane County, the Honorable Gregory D. Sypolt presiding, granted Ryan's Special Motion to Strike. CP 140-42. The trial court noted the liberal application of RCW 4.24.525, and held that under the totality of the circumstances, Ryan's blog is on a matter of public concern and not a private grievance. RP 15-16 (also attached as Resp. App. 21-22). The trial court, in considering the second prong of RCW 4.24.525, held that Johnson, an admitted public figure, had failed to show clear and convincing evidence of actual malice and actual damages. Resp. App. 22-23. The trial court dismissed both of Johnson's claims and awarded Ryan $10,000 in statutory penalties, with the amount of attorneys' fees to be decided on a later date. CP 140-42. Subsequently, on August 16, 2013, the trial court awarded Ryan attorneys' fees in the amount of $8,358.40. CP 169-70. The trial court's June 21 and August 16 orders are the subject of Johnson's appeal.

IV. ARGUMENT

A. Summary of the Argument

Johnson's appeal arises out of an obvious misunderstanding of Washington's anti-SLAPP statute's "public participation and petition" requirement, and the essential elements of defamation.

Johnson argues for a narrow interpretation of RCW 4.24.525 in direct contravention of its legislative directive for liberal application. While no Washington state court has yet construed the statute's "public concern" subsection, RCW 4.24.525 was modeled after California's anti-SLAPP statute, and both Washington state and federal courts have found California case law persuasive. Nonetheless, Johnson proposes that the Court strictly adopt the *Connick* test of form/content/context, created by the United States Supreme Court for public employee speech, and which carries with it inherent risks in the application of RCW 4.24.525. Regardless of whether the Court applies a rigid "form/content/context" test in construing RCW 4.24.525, Ryan has shown, more probably than not, that Civic Doody reports on matters of public concern – the leadership and management of Spokane Civic Theatre, particularly under Johnson's control.

Therefore, the burden shifts to Johnson to show the essential elements of her claims. Realizing that she has failed to provide clear and convincing evidence that Ryan's statements are provably false, or that Ryan has acted with actual malice, Johnson incorrectly articulates and applies the doctrine of defamation per se. Because Johnson's defamation claim fails, so must her derivative tortious interference claim.

The Court should affirm the trial court's order dismissing Johnson's claims, affirm the award of $10,000 and attorneys' fees in Ryan's favor, and award Ryan additional fees necessitated by Johnson's appeal.[6]

B. Washington's Anti-SLAPP Statute Is an Early Resolution Procedure for Meritless Actions Involving Public Participation and Petition, Including Statements Made in Connection With an Issue of Public Concern.

In 2010, the legislature amended Washington's anti-SLAPP law by enacting RCW 4.24.525 to curb "lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech."[7] LAWS of 2010, ch. 118 § 1. Such lawsuits "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." *Id.* In enacting the law, the legislature directed that the act be "construed liberally to effectuate its general purpose of protecting participants in

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[6] Ryan agrees that the proper standard of review is *de novo*. *Dillon v. Seattle Deposition Reporters, LLC*, 2014 Wash. App. LEXIS 123, *35 (Division I No. 69300-0-I, January 21, 2014) (citations omitted).

[7] For example, RCW 4.24.525 seeks to deter lawsuits brought by legal bullies who "employ[] the legal system in order to punish someone who publicly spoke about the bully's conduct and in order to quiet someone from speaking, in the future, about that conduct. Typically, the bully's conduct is a matter of public importance." *Henne v. City of Yakima*, 177 Wn. App. 583, 592, 313 P.3d 1188 (2013) (Fearing, J. concurring in part and dissenting in part).

public controversies from an abusive use of the courts." LAWS of 2010, ch. 118 § 3. *See also Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981) (citation omitted) ("In the First Amendment area, summary procedures [like summary judgment] are even more essential. For the stake here, if harassment succeeds, is free debate . . . [that] will become less uninhibited, less robust, and less wide open . . .").

The statute allows the target of a SLAPP lawsuit to bring a special motion to strike at the outset, and imposes a high burden of proof on the responding party. *See* RCW 4.24.525; *Dillon* 2014 Wash. App. LEXIS 123 at *40. Discovery is stayed pending a decision on the motion, and a plaintiff who cannot meet her burden is subject to dismissal of her claims, a $10,000 penalty per movant, and an award of attorneys' fees. RCW 4.24.525(5)-(6).

RCW 4.24.525 outlines a two-step analysis for special motions. First, "[a] 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." RCW 4.24.525(4)(b). This includes "[a]ny 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" as well as "[a]ny … lawful conduct in furtherance of the exercise of the constitutional right of free

speech in connection with an issue of public concern." RCW 4.24.525(2)(d)-(e), 4(a).

If the matter is more likely than not speech in connection with an issue of public concern, then the burden shifts to the responding party. Johnson grossly misconstrues her burden. *See* App. Br. pp. 17, 35, 37, 38, 40, 41. Unlike California's statute, upon which Johnson relies and which only requires a prima facie showing of facts sufficient to prove a claim, Washington's statute explicitly heightens the responding party's burden to clear and convincing evidence, which requires consideration of the moving party's defenses. RCW 4.24.525(4)(b); *Dillon*, 2014 Wash. App. LEXIS 123, *41. Only if the plaintiff can meet this heighted burden may the case proceed as normal. Otherwise, the case is dismissed and penalties in favor of the defendant are assessed. RCW 4.24.525(6)(a).

C. The Trial Court Properly Held That Ryan's Speech on Johnson's Leadership and Management of Spokane Civic Theatre Are Statements Made in Connection With Issues of Public Concern.

The anti-SLAPP statute's early-resolution procedure recognizes that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *See Snyder v. Phelps*, 131 S. Ct. 1207, 1225 (2011) (citation omitted). Under RCW 4.24.525(2)(d)-(e), 4(a), the moving party must show that it is more likely

than not that the speech complained of is in connection with an issue of public concern. RCW 4.24.525(2)(d)-(e), 4(a). RCW 4.24.525 does not define "public concern" and no Washington court has construed "public concern" under RCW 4.24.525.

1. There Are Inherent Problems in Adopting *Connick* as the Exclusive Test for "Public Concern" Pursuant to RCW 4.24.525.

Without citing to any authority, Johnson asserts that the *Connick* form/content/context test is the proper test for determining if speech is "in connection with an issue of public concern" pursuant to RCW 4.24.525. Given that this issue has not been decided in Washington, Johnson's position is less of a rule and more accurately a request for the Court to adopt *Connick* as the exclusive test for RCW 4.24.525. Although Ryan's speech is in connection with an issue of public concern whether or not the Court accepts this request, a discussion of *Connick* is warranted because the issue is a matter of first impression in this State.

In *Connick v. Myers*, 461 U.S. 138 (1983), the high court held that a public employee plaintiff who is claiming employer retaliation because of the employee's free speech must first show that the speech was on a matter of public concern.[8] "Whether a[] [public] employee's speech

[8] Division I recently held that the legislature intended RCW 4.24.525 to apply to the Washington State Constitution to the exclusion of

addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. The *Connick* court cautioned against a rigid application of its test:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Id. at 154 (citation omitted). Unsurprisingly, then, the boundaries of the *Connick* test are not – as Johnson would have the Court believe – well-defined. *See Snyder*, 131 S. Ct. at 1216. However, the United States Supreme Court has affirmed that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to **any matter of political, social, or other concern to the community**' or when it is 'a subject of general interest and of value and concern to the public'". *Id.* (citations omitted) (emphasis added). The "inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." *Id.* (citation omitted).

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the United States Constitution. *Dillon*, 2014 Wash. App. LEXIS 123, *46-47 (citing RCW 4.24.525(2)(e)). That the legislature would have intended for a federal test to interpret a state law and the state's constitution is doubtful.

Applying *Connick* to RCW 4.24.525 is not be without inherent problems:

> [S]peech that is a matter of public concern in one setting will not necessarily constitute speech on a matter of public concern in another context. Thus, while the law that develops in these various categories of free speech cases can be relevant to elucidating what constitutes "a matter of public concern," the **courts should refrain from reflexively applying a determination in one context to another**.

Lewis v. NewsChannel 5 Network, L.P., 238 S.W.3d 270, 297 n.29 (Tenn. Ct. App. 2007) (emphasis added). Indeed, the Supreme Court of California explicitly refused to adopt the *Connick* test as the gold standard for its anti-SLAPP statute due to the narrow constraints in which the *Connick* test was created. *Briggs v. Eden Council for Hope and Opportunity*, 969 P.2d 564, 573 n.8 (Cal. 1999).

One problem with applying *Connick* and its progeny as the sole test for RCW 4.24.525 is the overwhelming focus on the public's interest in **government** activities, a niche of public concern far narrower than Washington's broad anti-SLAPP statute. The anti-SLAPP standard does not only protect activities that "meet the lofty standard of pertaining to the heart of self-government. [citation omitted]. Thus, the activity of the defendant need not involve questions of civic concern; social or even low-brow topics may suffice." *Hilton v. Hallmark Cards*, 599 F.3d 894, 905

(9th Cir. 2010). The risk of misapplying case law, as Johnson has demonstrated, is high. *See, e.g.*, App. Br. pp. 21-22, where Johnson improperly relies on *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) for the proposition that Ryan's statements are not on a matter of public concern because they "have no relevance to developing informed policy in a democratic society much less evaluating the performance of governmental agencies" and again at pp. 25-26, on *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013), where she states that "Ryan's postings [were] about a private not-for-profit organization wholly unconnected to government funding or government control."[9]

Moreover, "public concern", as it is applied in *Connick*, is decided as a matter of law. *White v. State*, 131 Wn.2d 1, 11, 929 P.2d 396 (1997) (citations omitted). A moving party under RCW 4.24.525 has a much lower burden – preponderance of the evidence – of showing that the speech is connected to a matter of public concern. Similarly, RCW 4.24.525 is legislatively mandated to be applied liberally, whereas a liberal application in other contexts is lacking. Therefore, case law where a party has failed to meet his or her burden of showing that speech is on an issue of "public concern" is not persuasive because of (1) the higher burden

[9] Johnson is incorrect. Ryan's written statements about the unemployment decision are in connection with governmental proceedings.

placed upon such parties and (2) in most instances, a failure to apply the *Connick* test liberally. *See, e.g., Vern Sims Ford, Inc. v. Sims*, 42 Wn. App. 675, 713 P.2d 736 (1986).[10]

Finally, Washington federal courts do not use the *Connick* test in analyzing Washington's statute, instead looking to California cases, which broadly interpret that state's similar statute, and after which Washington's was modeled, because both states have the same legislative interest in protecting speech on public issues.[11] *See., e.g., Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (individual's private experience with medical treatment in the United Kingdom shown in a

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[10] *Vern Sims* is inapposite to the great weight of anti-SLAPP cases, which hold that consumer speech is on an issue of public concern. *See, e.g., Gardner v. Martino*, 2005 U.S. Dist. LEXIS 38970 (D. Or. September 19, 2005) (citing cases) (district court held that speech discussing watercraft dealership's refusal to give customer a refund was on a public issue, a concession that the dealership made on appeal in *Gardner v. Martino*, 563 F.3d 981 (9th Cir. 2008)).

[11] The preamble to California's anti-SLAPP statute expressly declares that it is in the public interest of the state of California "to encourage continued participation in matters of public significance", and the California Supreme Court has defined "significance" to mean "importance" or "consequence." *Hilton*, 599 F.3d at 906 (citations omitted). Washington's legislative finding is nearly identical "'[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. Johnson has failed to show any discernible differences between the two standards, and in fact relies upon multiple California state and federal court cases as persuasive authority.

documentary about United States health care crisis is in connection with an issue of public concern even though the claim was based on home video footage involving just two participants); *Davis v. Avvo, Inc.*, 2012 U.S. Dist. LEXIS 43743, *10 (W.D. Wash. March 28, 2012) (statements on avvo.com, a website providing information regarding doctors, dentists, and lawyers, are in connection with an issue of public concern even though the claim concerned only the single profile of just one professional).

Concededly, there are ways to apply the *Connick* test consistently with RCW 4.24.525, as this Court did in *Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.*, 114 Wn. App. 371, 393, 57 P.3d 1178 (2002), prior to enactment of RCW 4.24.525. In that case, Microsoft filed suit against a Spokane computer company for selling just 500 bogus copies of software. This Court held that allegedly defamatory statements in a newspaper about the case, if construed narrowly, involved nothing more than an intellectual property dispute between two private companies. *Id.* "In a **broader context**, however, the dispute touches on a matter of public importance, software piracy" and is accordingly a matter of public concern. *Id.* at 393-94 (emphasis added).

2. In Factually Similar Circumstances, California Courts Have Found Speech to be in Connection with Issues of Public Concern.

Regardless of whether *Connick* applies, California cases are persuasive authority as to what type of facts constitute a "public concern".[12] *Henne*, 177 Wn. App. at 589 n.2 (citing *Aronson*, 738 F. Supp. 2d at 1110). Like courts following *Connick*, California courts have also not "define[d] the precise boundaries of a public issue." *Rivero v. Am. Fed'n of State*, 130 Cal. Rptr. 2d 81, 89 (Cal. Ct. App. 2003) (citation omitted). The courts look at the "principal thrust or gravamen of the plaintiff's cause of action" – what is "the cause of action 'based on.'" *Chaker v. Mateo*, 147 Cal. Rptr. 3d 496, 501 (Cal. Ct. App. 2012) (citations omitted). California courts refuse to apply that state's anti-SLAPP statute to matters only of private interest or mere curiosity, finding that the public interest requirement is met when the statements are about a person or entity in the public eye, or conduct that could directly affect a large number of people beyond the direct

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[12] Johnson suggests, without support, that "public concern" is a higher standard for a defendant to meet than the "public issue or an issue of public interest" requirement in California's statute. App. Br. pp. 18-19. The terms public "issue", "interest", and "concern" are the same. *See Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 440, 442, 444, 546 P.2d 81 (1976), where the Washington Supreme Court used the terms interchangeably.

participants, or a topic of widespread, public interest. *Rivero*, 103 Cal. Rptr. 2d at 89-90

Application of the anti-SLAPP statute should not, however, require relevance to the public-at-large. *The Traditional Cat Ass'n v. Gilbreath*, 13 Cal. Rptr. 3d 353, 356 (Cal. Ct. App. 2004) (where web site statements concerned matters of public interest in the cat breeding community). Otherwise, issues that impact a collection of the public would fall outside the anti-SLAPP statute's scope, in contravention of its broad statutory objective, and the legislature's mandate that the statute be construed liberally. Many matters of public concern to a cognizable and definable group may have little or no significance to the public-at-large.

Considering the liberal application of RCW 4.24.525, and persuasive case law from other jurisdictions and venues, the trial court properly held that Ryan's statements are on matters of public concern. Not only do arts and entertainment[13] of all types contribute greatly to a

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[13] The creative process underlying the production of arts and entertainment is a matter of public concern. *See, e.g., Tamkin v. CBS Broadcasting, Inc.*, 122 Cal. Rptr. 3d 264, 272 (Cal. Ct. App. 2011) (where plaintiff's real full names were used in casting synopses for the TV show CSI: Crime Scene Investigation and subsequently posted on the Internet, the writing and casting creative process, as well as the broadcast itself, were issues of public interest); *Biro v. Condé Nast*, 2013 U.S. Dist. LEXIS 108113, *42-43 (S.D.N.Y. August 1, 2013) (citing cases) (statements about art and art authenticity are "clearly" a matter of public

community, but the very nature of Spokane Civic Theatre, led by Johnson, is one of even higher public participation and involvement than the professional arts. Johnson was charged with publicly carrying out Spokane Civic Theatre's mission of creating a community theatre comprised of public volunteers to stage and star in its productions of high artistic merit. Johnson was a highly visible leader, responsible for overseeing every production, seeking public donations, and wooing public audiences.

Johnson's public stewardship of Spokane Civic Theatre even went beyond immediate theatre community interaction to the greater public, as she admittedly reached out to the public through various organizations, including the media, and staged fundraisers. *See, e,.g., Nygård, Inc. v. Timo Uusi-Kerttula,* 72 Cal. Rptr. 3d 210, 213-14, 220 (Cal. Ct. App. 2008) (unflattering speech by former employee about former working conditions at a private employer was on issue of public interest where company and founder spent a great deal of money and effort to promote their business, success, wealth, and lifestyle). "By disseminating [] information to the public, [Johnson] must believe the public is interested in [Spokane Civic Theatre's] activities." *See Summit Bank v. Rogers*, 142

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concern – although they may not affect the public at large, they affect the art community).

Cal. Rptr. 3d 40, 58 (Cal. Ct. App. 2012) (unflattering speech on a "Rants and Raves" website by former employee about private bank's management decisions was on public issue where the bank had actively promoted itself as a "community partner" and its CEO had been the subject of media attention).[14] While Spokane Civic Theatre cannot survive without public support, the relationship with the public is symbiotic: Spokane Civic Theatre provides an outlet for artistic expression for those members of the public who cannot or choose not to pursue that passion professionally.

With that context in mind, Civic Doody's form is undisputedly public. Any member of the public, whether or not a member of the Spokane theatre community, who has access to the internet also has access to the blog. Ryan sought the broadest public audience for his statements. *Compare, e.g., Connick*, 461 U.S. at 148 (questions were circulated only to co-workers and the speaker did not "seek to bring to light actual or potential wrongdoing or breach of public trust").

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[14] For example, the defendant posted, "Being a stockholder of this screwed up Bank, this year there was no dividend paid. The bitch CEO that runs this Bank thinks that the Bank is her personel [sic] Bank to do with it as she pleases. Time to replace her and her worthless son" and "Whats [sic] up at this problem Bank. The CEO provides a [sic] executive position to her worthless, lazy fat ass son Steve Nelson. This should not be allowed. Move your account now." *Summit Bank*, 142 Cal. Rptr. at 46.

Turning finally to content, Civic Doody contains information calling into doubt Johnson's leadership of and management decisions for Spokane Civic Theatre as it relates to both artistic and business decisions. *See, e.g.,* CP 11-12 (regarding the production of *Next to Normal*) and CP 106-07 (regarding Johnson's and the Civic's challenge to Ryan's termination). Johnson is admittedly **publicly responsible** for both. *Compare Rivero*, 103 Cal. Rptr. 2d at 90-91 (plaintiff supervisor oversaw eight janitors and had never received public attention or media coverage). These public business decisions involve questionable choices regarding Ryan's termination and subsequent legal battles with Spokane Civic Theatre, including his unemployment claim. *See Sedgwick Claims Management Serv., Inc. v. Delsman*, 2009 U.S. Dist. LEXIS 61825, *1, 4-5 (N.D. Cal. July 17, 2009) (affirmed at 2011 U.S. App. LEXIS 5830 (March 8, 2011) (blog strongly criticizing business practices of plaintiff insurance claims service was on matter of public concern, even though defendant had submitted a claim to plaintiff and was highly dissatisfied with plaintiff's handling of it, as negative publicity was a "good way to fight back against these despicable characters").

Ryan filled Johnson's newly created position of Music Director to further Spokane Civic Theatre's public mission. Johnson asks the Court to suspend disbelief and find that despite her termination letter that Ryan's

sexual interests and termination were an issue of public concern of such gravity to destroy the Theatre in "financial flames", Ryan's subsequent critique of Johnson's management decisions concerns only a private grievance. *See, Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 459, 467 (Cal. Ct. App. 2012) (finding public concern in statements about coaching style of a volunteer basketball coach of just one fourth grade team, noting that the coach admitted, in his own words, that a PTO investigation could "ensure the well being of our kids").

Discussion of a community theatre's termination of, and subsequent unsuccessful denial of unemployment to, its new Music Director is a matter of public concern, **regardless of who makes the statement**, particularly when the leader of that Theatre is a public figure whose interactions with the community are threefold: building public audience, seeking public donations, and overseeing 1,000 public volunteers. *See, Damon v. Ocean Hills Journalism Club,* 102 Cal. Rptr. 2d 205, 207-08 (Cal. Ct. App. 2000) (statements by board members and homeowners' publication calling into question general manager's leadership of 1,633-home community were "issues of critical importance to a large segment of our local population"). This is especially true considering that ESD found against Spokane Civic Theatre, raising a serious question as to the propriety of challenging the claim. CP 81.

Thus, Ryan's reporting of Johnson's choices are matters of concern to these public audiences, donors, and volunteers who are entitled to evaluate her very public leadership of the Theatre, debate these issues, and decide whether, and to what extent, to participate in a theatre that depends nearly entirely on their support and exists solely for their benefit. *See, e.g., Chaker*, 147 Cal. Rptr. 3d at 1141-43 (where defendant's daughter and plaintiff had a contentious paternity and custody dispute, statements about the plaintiff and his forensic business – including, "I would be very careful dealing with this guy. He uses people, is into illegal activities, etc." – on "Ripoff Report" website were on public issues).

Ryan's blog, including his reporting on his unemployment claim, is on a matter of public concern, and the trial court properly concluded that RCW 4.24.525 applies to Johnson's suit.

3. A Speaker's Self-Interest in Speech on a Matter of Public Concern Does Not Reduce the Speech to a Private Grievance.

Johnson's meritless argument that Ryan's speech is "self-serving" (App. Br. pp. 25, 27) and therefore a matter of private concern contradicts the "well-accepted First Amendment doctrine [that] a speaker's motivation is entirely irrelevant to the question of constitutional protection." *Fed. Elec. Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (citation omitted). A "test turning on the intent of the speaker does not

remotely fit the bill" of promoting the "principle that debate on public issues should be uninhibited, robust, and wide-open" because no one would choose to speak, no matter how compelling the speech, if he had to show pure motives. *Id.* (citations omitted). *See also Snyder,* 131 S.Ct. at 1216 (*Connick* test looks to "what was said, where it was said, and how it was said"; no mention of "why it was said").

Indeed, in the *Connick* context, the Washington Supreme Court has already held that self-interest does not diminish a statement's public concern. *White*, 131 Wn.2d at 5-6, 13 (plaintiff wrote a report of "patient abuse" after supervisor, with whom the plaintiff had a longstanding "strained" relationship, directed that a patient be put into a straightjacket). "The fact that [the speaker] may have had a personal interest in reporting the incident **does not diminish the concern the public would have in this matter**." *Id.* at 13 (emphasis added). It is the "nature of the speech" that controlled, and "even the slightest tinge of public concern is sufficient." *Id.* at 12-13, n.5 (citations omitted).

California has also specifically rejected Johnson's position that self-interest plays a role under its anti-SLAPP statute. In *Dible v. Haight Ashbury Free Clinics, Inc.*, 88 Cal. Rptr. 3d 464, 470-71 (Cal. Ct. App. 2009), the court disregarded evidence that the defendant's motivation was to silence and discredit the plaintiff, because "even if that allegation is

true, it is irrelevant to the determination of its status as protected speech. If the actionable communication fits within the definition contained in the statute, the motive of the communicator does not matter."

The same is true here. If someone other than Ryan reported on Spokane Civic Theatre and its leadership and management, including Johnson's termination of Ryan and challenge to his unemployment claim, it would be on a matter of public concern. That Ryan was the speaker does not reduce that public concern. As the trial court noted:

> I'm mindful of the broad and liberal application which the legislature undoubtedly had in mind and contemplated at the time this particular section of the statute was enacted. And it is correct that there is to be a liberal application. That there is assistance that the court finds in cases from other jurisdictions that talk about the gravamen, the core, of what constitutes or may constitute a public concern. And it would appear that, indeed, Mr. Ryan's focus here is somewhat in the nature of tunnel vision. He's focused on Ms. Johnson and her role at the civic theater. He's apparently not happy with the way he was treated, and he's spoken out about it on a number of occasions. And just because he's angry or he could be considered a gadfly doesn't reduce this matter from being one of public concern to a private matter or a private vendetta. I'm of the view that that given the circumstances here and the totality of them that this is, indeed, a matter of public concern.

Resp. App. 21-22.

D. The Trial Court Correctly Held That Johnson Failed to Show Clear and Convincing Evidence of the Essential Elements of Defamation, and Properly Dismissed Johnson's Defamation and Tortious Interference Claims.

Once a moving party, like Ryan, has shown that the action is one involving public participation and petition, the burden shifts to the responding party to show, by **clear and convincing evidence**, a probability of prevailing on the merits. 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 need not reach the level of "beyond a reasonable doubt." [] It is the quantum of evidence sufficient to convince the fact finder that the fact in issue is "highly probable." [] This standard places a "higher procedural burden on the plaintiff than is required to survive a motion for summary judgment.

Dillon, 2014 Wash. App. LEXIS 123 at *64 (citations omitted). The clear and convincing standard not only requires that the plaintiff has demonstrated a prima facie claim, but "'**also requires consideration of the defenses raised**' by the moving party" at the anti-SLAPP stage. *Id.* at *67 (citations omitted) (emphasis added).

Johnson erroneously relies upon California's anti-SLAPP statute for the proposition that her burden of production under the second prong of RCW 4.24.525 is to create a "material question[] of fact." *See, e.g.*, App. Br. pp. 39-40, 43. Unlike Washington's anti-SLAPP statute,

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 the issue."[15] *Dillon*, 2014 Wash. App. LEXIS 123 at *64-65 (citation omitted).

1. Johnson Failed to Establish Clear and Convincing Evidence of Falsity and Actual Malice, Both Essential Elements of Defamation.

As a party alleging defamation, Johnson has the burden of proving four essential elements: (1) that the statements at issue are false, (2) that the statements are not privileged, (3) that they were made with the requisite level of fault, and (4) that they caused her damage. *Mark*, 96 Wn.2d at 486 (citation omitted). The failure to establish any one element renders the entire claim unsustainable, and all other facts immaterial. *Id.*

Johnson cannot meet her burden. She has failed to provide any evidence that could convince a factfinder that it is "highly probable" that Ryan's statements are false, let alone that they were made with actual malice. Moreover, Johnson misstates the rule of defamation per se. It is not, as Johnson urges, a substitute showing for all elements of defamation. Rather, it is simply an assumption of damages that is available only where

[15] Johnson commits the same mistake when she relies on Nevada case law. App. Br. p. 39.

all other elements of defamation have been met. Because that is not the case here, defamation per se is a totally irrelevant analysis.

a. *Johnson Has Failed to Show Clear and Convincing Evidence of Falsity and Actual Malice.*

To sustain her claim for defamation, Johnson must show clear and convincing evidence of actual malice of provable false statements.[16] She has utterly failed to do so.

Johnson alleges that Ryan's July 5, 2011 blog post,[17] in which Ryan summarizes Johnson's and Spokane Civic Theatre's challenge to his

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[16] The trial court expressly held that Johnson failed to show clear and convincing evidence of actual malice. Although argued to the trial court, the trial court did not expressly rule on the issue of falsity. The Court can affirm the trial court's holding on either or both grounds. RAP 2.5(a); 9.12.

[17] The November 14, 2011 post contains a similar, but much shorter, recap of Spokane Civic Theatre's challenge. CP 108. Johnson cites the passage wherein Ryan stated ". . . Ms. Johnson would bring more drama and divisiveness than any respectable institution would care to have." App. Br. p. 37. It is unclear if Johnson claims this statement is defamatory, but such statements of opinion that cannot be proven true or false are not actionable. *Dunlap v. Wayne*, 105 Wn.2d 529, 537, 716 P.2d 842 (1986) (citation omitted). "Likewise, statements that "cannot reasonably be understood to be meant literally" are not defamatory. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55-56, 59 P.3d 611 (2002) (statements that plaintiff was among other things, a "bitch," "snitch," "liar", and "idiot" were non-actionable opinions). "The most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (citation omitted) (words like "traitor", "unfair", and "fascist" are non-actionable opinion).

unemployment, the results, and Ryan's conclusions, is defamatory.

The party alleging defamation bears the burden of showing that the statement is "provably false." *Alpine Indus.*, 114 Wn. App. at 379 (citation omitted). "Under the clear and convincing standard, a mere scintilla of evidence, evidence that is merely colorable, or evidence lacking significant probative value" is insufficient to defeat a defendant's motion. See *id.* at 389 (citation omitted). A statement need only be "substantially true or [] the gist of the story, the portion that carries the 'sting', [must be] true." *Id.* at 494. For example, the Washington Supreme Court dismissed defamation claims based on reports that a plaintiff had been "charged" with defrauding the State of $200,000, when, in fact, he had been only been "charged" with larceny in excess of $75. *Id.* The "charge" arose out of a report revealing at least $200,000 in fraudulent billing. *Id.* at 496. "The inaccuracy, if any does not alter the 'sting' of the publication as a whole and does not have a materially different effect on a viewer, listener, or reader than that which the literal truth would produce." *Id.* (citation omitted).

Johnson claims that because the Separation Statement disputing Ryan's unemployment claim was signed by Hume, and not Johnson herself, that the statement that Johnson "submitted false statements to the Unemployment Security Department, in the form of my official separation

letter," is untrue. It is undisputed that (1) Johnson's separation letter to Ryan was sent to ESD to contest Ryan's claim for unemployment, (2) that the Separation Statement relied entirely on Johnson's letter, (3) that Johnson is responsible for all termination and grievance procedures at Spokane Civic Theatre, and (4) that Johnson is responsible for the Theatre's business and artistic decisions. Moreover, Johnson, whose burden it is to show falsity, has failed to provide any evidence showing that she was not involved in Spokane Civic Theatre's challenge of Ryan's unemployment claim, or that she did not direct, or even authorize, the use of her letter to Ryan in the Theatre's submission to ESD. It is her burden to show, by clear and convincing evidence, that Ryan's statement is provably false in its stinging points. That the Separation Statement enclosing Johnson's termination letter was signed by Hume and not Johnson falls far short of that requirement, particularly where Ryan specifically references the false statements as being in the termination letter.

Moreover, falsity alone does not render a statement defamatory. There must also be some fault on the part of the defendant, the level of which depends on whether the plaintiff is a public or private figure. Johnson is an admitted public figure and must show Ryan acted with actual malice. Actual malice requires that defendant had knowledge of, or

exercised reckless disregard for, the falsity of the defamatory matter. *Mark*, 96 Wn.2d at 482-83. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) (citation omitted). "Malice" is not used in its lay sense of "ill will", nor is proof of animosity sufficient to prove actual malice. *Id.*

That Johnson's signature was not on Spokane Civic Theatre's Separation Statement does not give rise to clear and convincing evidence of actual malice. Johnson was the leader of Spokane Civic Theatre. Ryan received the termination letter from Johnson on or about October 22, 2010. CP 81. Johnson authored the termination letter. Resp. App. 3-4. Johnson's letter to Ryan was not only submitted to ESD in support of Spokane Civic Theatre's challenge to Ryan's unemployment claim, but was the sole "evidence" for disputing the claim. CP 125-26. Moreover, Ryan knew that the contents of the letter were false. CP 122-23.

Thus, based on Ryan's personal knowledge of his actions, Johnson's contentions in her termination letter to Ryan, the Separation Statement's inclusion of the termination letter, the results of the unemployment determination supporting Ryan, and Johnson's leadership of Spokane Civic Theatre, Ryan had every belief his July 5, 2011 posting

was true. The trial court properly concluded that Johnson failed to show clear and convincing evidence of actual malice.

b. *Defamation Per Se Is Unavailable to Johnson Because Presumed Damages Are Allowed Only if All Other Essential Elements of Defamation Are Met.*

The trial court properly found Johnson failed to prove any actual damages. Curiously, Johnson now alleges that because of the doctrine of defamation per se, she has met her burden of showing clear and convincing evidence of defamation. App. Br. pp. 37-38.

Johnson requests that the Court apply defamation per se in an unprecedented manner. The doctrine is not a substitute for defamation. Rather, it allows a factfinder to "presume" damages without proof of special damages, but only when all other elements of defamation are met. *Maison de France Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34, 44-45, 108 P.3d 787 (2005). Well-established law forbids any presumed damages where there is no falsity, or, in cases involving a public figure, no actual malice. *Id.* at 45, 53 (citations omitted) (presumed damages available to public figure only upon showing of actual malice and to private plaintiff only when no matter of public concern is involved). Given Johnson's failure to show clear and convincing evidence of either or both falsity and

actual malice, her argument regarding defamation per se and presumed damages is irrelevant.

2. The Trial Court Properly Held that Johnson's Failure to Show Clear and Convincing Evidence of Defamation Required Dismissal of Johnson's Derivative Tortious Interference Claim.

The trial court properly held that Johnson's failure to show the essential elements of defamation also required dismissal of her tortious interference with a business expectancy claim. In Washington, when both a defamation claim and tortious interference claim "arise out of the same conduct, it can be said that the tort of interference with prospective advantage simply provides a method of measuring damages sustained by the party defamed", and thus both claims are subject to the same defenses. *Stidham v. Dep't of Licensing*, 30 Wn. App. 611, 615-16, 637 P.2d 970 (1981); *see also Right-Price Recreation L.L.C. v. Connells Prairie Comm'y Council*, 146 Wn.2d 370, 384, 46 P.3d 789 (2002) (under previous version of Washington's anti-SLAPP statute, where plaintiff's defamation failed, so did its tortious interference claim because the facts for both claims were the same). "[W]hen a claim of tortious interference with business relationships is brought as a result of constitutionally-protected speech, the claim is subject to the same First Amendment requirements that govern actions for defamation." *Gardner*, 563 at 992

(citation omitted). To hold otherwise would allow a plaintiff to trump free speech rights simply by how she titles her claim and drafts her complaint. Here, because Johnson's defamation claim fails, so too must her claim for tortious interference. The Court should affirm the trial court's dismissal of both of Johnson's causes of action and strike the complaint in its entirety.

E. The Court Should Affirm the Trial Court's Award of $10,000 Plus Attorneys' Fees, Award Ryan His Attorneys' Fees on Appeal, and Deny Johnson's Request for $10,000 and Fees.

A moving party who prevails on a special motion to strike, whether in part or in whole, "shall" be awarded his attorneys' fees and a $10,000 award. RCW 4.24.525(6)(a). The statute's use of the word "shall" makes mandatory the award of $10,000 and attorneys' fees to a prevailing **moving party.** *Akrie v. Grant*, 2013 Wash. App. LEXIS 2893, *14 (Division I No. 68345-4-I December 23, 2013). Because Johnson's claim falls squarely within RCW 4.24.525, the Court should affirm the trial court's award of $10,000 and fees to Ryan, and also award Ryan his fees on appeal. *See* RAP 18.1; *Gray v. Bourgette Constr.,* LLC, 160 Wn. App. 334, 345, 249 P.3d 644 (2011) (citation omitted) ("where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal")

The Court should deny Johnson's request for attorneys' fees plus a $10,000 award. A party responding to an anti-SLAPP special motion to

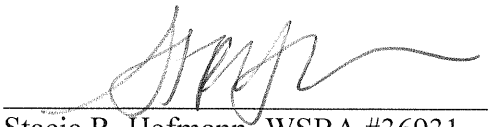
strike is entitled to fees **only** if the special motion is "frivolous or solely intended to cause unnecessary delay." RCW 4.24.525(6)(b). For all of the reasons stated throughout this brief, that is clearly not the case.

V. CONCLUSION

The trial court properly held that Ryan's speech is connected with an issue of public concern, and that Johnson failed to show clear and convincing evidence of defamation. This Court should affirm the trial court's orders dismissing Johnson's lawsuit and awarding Ryan $10,000 and attorneys' fees, and award Ryan fees on appeal.

DATED this 3rd day of February, 2014.

LAW OFFICE
ANDREA HOLBURN BERNARDING



Stacia R. Hofmann, WSBA #36931
Attorneys for James P. Ryan

NO. 31837-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

YVONNE A.K. JOHNSON, a single person,

Appellant,

vs.

JAMES P. RYAN, a married individual,

Respondent.

APPENDIX

Stacia R. Hofmann
LAW OFFICE
ANDREA HOLBURN BERNARDING
Attorneys for Respondent James P. Ryan

1730 Minor Avenue, Suite 1130
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(206) 403-4800

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June 21, 2013, Verbatim Report of Proceedings	Resp. App. 7-25

Mr. James Ryan
3927 S. Sherman Street
Spokane, WA 99203

October 22, 2010

Dear Jim:

As we discussed Sunday, October 17, 2010, your employment with the Theatre is terminated effective October 17, 2010. This is not a pleasant separation for the Theatre and we are sad and dismayed by the lack of professionalism you accorded us during the process.

YOUR PRE-TERMINATION CONDUCT

The Theatre decided to terminate your employment because you exercised extremely poor judgment by placing into the public domain sexually graphic text and pictures of you and Lynette combined with information that permitted an association to the Theatre. There are three gross offenses here.

First, there is the public nature of your indiscretions due to using www.Craigslist.org to solicit sex. For most people -- sexual conduct is a personal matter, not something to be shared with the community at large or imported into the workplace.

Second, you would have been fine had you exercised even a modicum of judgment and maintained professional anonymity. Instead you chose to publicly associate your sexual activities with the Theatre by referencing your workplace in e-mails, sending sexually explicit e-mails from work while backstage, and using your photo that is on the Theatre's website to solicit sexual activity. You claim you shared the professional association with the Theatre only "privately" via e-mail correspondence with an individual. However, due to the abilities of www.Craigslist.org users to maintain anonymity, surely you appreciate that sharing photos and information with even one person in that forum has the potential for the information to be posted on the whole internet due to the lack of accountability that accompanies anonymity. Sharing with one there is sharing with all. You've admitted this lapse in judgment to me personally and you obviously share the same concerns, which is why you intimated to me that you normally don't share photos via e-mail until you get to know them better.

Another instance of poor judgment occurred in September during the *Buddy* production wherein we had an altercation regarding the music tempo. Obviously, professionals may differ in their artistic opinions. However, a difference of opinion is not license to accuse your superiors of intentionally or maliciously undermining your authority or abilities. A more mature response would have valued the differing opinions and worked amicably and constructively through the critical process. After, this early lapse in judgment, I coached you on a more appropriate method of communication and in using better judgment when working with superiors in the workplace.

Third, as the Music Director, you were in a leadership position and miserably failed to uphold yourself to the high public standards charged to representatives of the Theatre. (See our handbook). On Friday, October 15, 2010, you first disclosed your personal sexual activities to me. As I told you then and as I believe in my heart now, the Theatre neither judges nor cares about what employees do in their personal lives. It is wholly personal.

However, the very moment that the Theatre became implicated is the moment that serious business concerns arose. What was once wholly personal quickly transformed into a matter regarding professional judgment and leadership competence.

While I do not share the same sexual affinities as you and Lynette, I do not personally find them offensive. To each his own, I say. I cannot speak for the rest of the Board, since I do not know their personal inclinations in this regard, nor do I care to so educate myself. However, our personal sensitivities are not the proper measure for the appropriate boundaries of public decorum for representatives of the Theatre. In gauging our public actions, we must think of the diverse community we serve and the potential for its offense. We serve mature audiences and youth audiences. We serve audiences both conservative and liberal, both modest and flagrant. Given the range of diversity, the Theatre must take a high road and hold itself and its representatives to the highest of ethical standards, lest we offend even a fraction of our supporters none of whom we can afford to alienate. The potential to offend the local community is the appropriate measure to guide our judgment. As a director and leader of the Theatre, you, of all people, should have known better, Jim.

You know how dependent we are upon the good will of the local community in the greater Spokane metropolitan area. The Theatre exists and thrives only because of local support. Local ticket sales, local donations, and local volunteers are the lifeblood for our not-for-profit and growing civic theatre. Furthermore, we are not the only game in town. The competition for local charity is fierce and dollars and resources are scarcer due to the degraded state of the economy. Before associating the Theatre with your graphically nude pictures and public domain solicitations for sex, did you even once think beyond your personal gratification and consider the potential negative impact on the Theatre's patron, donor and/or volunteer support? The Theatre could have and still can go down in financial flames because of what you have done. All of our hard work could be lost to public scandal and the Theatre could dwindle into obscurity. That is what you have done, Jim. That is the magnitude of the potential harm.

POST-TERMINATION CONDUCT

To worsen matters, you horribly mismanaged your response to the Theatre's reaction. On Sunday, October 17, 2010, I contacted you to have an in-person meeting with the Board so that we could professionally discuss options. Instead, you refused, became belligerent, and engaged in a smear campaign to discredit me and the Theatre by falsely spreading rumors that your termination was due to disclosing your status as a "swinger". As you may recall, you disclosed that information to me on Friday, October 15, 2010. It was no big deal then and remains innocuous to this day. The concerns arose later that afternoon while reviewing the

photographs and text and realizing the public nature of the association of your sexual solicitations with the Theatre. Even then, the reinstatement of you and Lynette to the Theatre's employ and rehabilitation of the Theatre's image might have been possible. It appears that dissemination of the information may have been limited. Maybe we could have hired a publicist to help us address potential image damage.

However, your public announcement on Sunday in the lobby before several patrons and staff that the Theatre was terminating you and Lynette for being "swingers" further publicized the unwanted sexual association. At a later time at a party at which Theatre employees and several others were present you circulated the explicit photos and text among attendees in an apparent attempt to generate support for your defense. Again, you further publicized the association and added insult to injury by demonizing the Theatre with attributions of false reasons for alleged wrongful termination. At that time, any possibility for reinstatement and image rehabilitation surely evaporated, thanks to your additional indiscretions and poor judgment, part two.

In light of the above, the Board does not view its termination actions as unfair, unduly harsh or artistically stifling in direct contravention of the Theatre's mission. The decision was made after careful and compassionate deliberation. Of course, as vanguards of the dramatic arts, the Theatre is cognizant of its role in challenging the community's intellect and in pushing the boundaries of creativity and artistic expression. However, your public sexual endeavors are exclusively prurient in nature and deserve no safe harbor.

We are truly sorry for the co-victims of your indiscretion and poor judgment, namely Lynette and your son. Because Lynette was an employee and her sexual activities were publicly associated with the Theatre (albeit through your actions), termination was unavoidable. The end result and the potential for the Theatre's financial ruin is just as great. You are fortunate you are on good terms with her for she likely has a legal claim against you if the disclosures were made without her consent.

It is unfortunate we find ourselves in this position. We wish that you would have maintained anonymity and kept your private life out of the workplace. We also wish that you would have responded more amicably and responsibly instead of making matters more public and enlarging the potential harm. Now, in addition to the potentially adverse financial repercussions, the Theatre is losing two contributing and talented employees.

We wish you the best of luck and goodwill in your future endeavors and hope that you now better understand the reasons for our actions. Hopefully, the better human being in you will forego any vengeful and malicious actions to injure the Theatre and the community through costly litigation. Only the art and the community will suffer. We know that is not your wish and that you are not selfish people.

Regretfully,
Yvonne A. K. Johnson

Executive Artistic Director
Spokane Civic Theatre

That's it for now. Remember that I am no longer sending out alerts when I post, so if you think others should read this, please share it!

Posted by JR at 2:24 PM 0 comments Recommend this on Google

Labels: footloose, jane eyre, thoroughly modern millie

TUESDAY, JULY 5, 2011

A Moral Victory

[PLEASE NOTE: This is obviously NOT the official site of Spokane Civic Theatre. That can be found at **www.spokanecivictheatre.com**. This site is here for the purposes of commentary and criticism. There is nothing for sale on this site, nor is the site itself for sale. If you would like to purchase tickets for Footloose, Jane Eyre In Concert, Thoroughly Modern Millie, Turn of the Screw, A Christmas Carol, The Best Little Whorehouse in Texas, Cutlass Moon, The Count of Monte Cristo, BINGO, Duck Hunter Shoots Angel, or Annie, please visit THIS LINK to Spokane Civic Theatre's ticketing page.]

After a six-week investigation, the State of Washington has found that Spokane Civic Theatre did not have sufficient cause to terminate my employment on the basis of misconduct of any kind. While this does nothing to improve my family's general situation, it is clearly a moral victory.

Yvonne A.K. Johnson was unable to document any of her allegations, as they were blatantly false to begin with. Moreover, she never conducted even a cursory investigation of the facts. Rather, she immediately capitulated to the outrageous demands of a criminal blackmailer on the basis of an anonymous email and proceeded to justify her actions after the fact. My official separation letter should be expunged from the record now that Ms. Johnson's lies and distortions have been revealed as such. Her handling of this situation has done irreparable harm to Spokane Civic Theatre and to her own ability to lead. She should resign her position immediately.

The state of Washington found that **none of the following occurred:**

• Willful or wanton disregard of the employer or fellow employee.

• Deliberate violations or disregard of standards of behavior which the employer has a right to expect.

• Carelessness of negligence that causes or would likely cause serious bodily harm to the employer or fellow employee.

• Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer.

• Conduct connected with your work that demonstrates a flagrant and wanton disregard for the employer or a fellow employee.

If even one of Ms. Johnson's shocking and salacious allegations had been true, the Washington State Department of Unemployment would surely have found that my behavior showed "wanton disregard of the employer" or "disregard of standards of behavior which the employer has a right to expect." This is all very hard to square with the tone of my official separation letter, which says:

> The Theatre could have and still can go down in financial flames because of what you have done. All of our hard work could be lost to public scandal and the Theatre could dwindle into obscurity. That is what you have done…That is the magnitude of the potential harm.

Whether you are an actor, a staff member, a musician, a patron, or a board member, you now know that all of this could have been easily avoided by an honest and interpersonally competent executive. All of the drama, all of the negativity, all of the personal information you would rather have never learned - none of it had to become your problem. Ms. Johnson made it your problem.

The sad irony is that Yvonne A.K. Johnson could have avoided granting us this victory if her extraordinary intelligence had not been overwhelmed by her extreme maliciousness. This ruling is the result of her decision to fight my Washington State unemployment claim, which I filed in May, when my Pennsylvania benefits ran out. Washington found that I was eligible for $3378, paid out at the rate of $198 per week, for as long as I remained unemployed, eligible for work, and actively seeking work.

If Ms. Johnson had been acting in the best interest of Spokane Civic Theatre, she would not

have contested this claim. (If my calculations and understanding of the system are correct, the absolute most that my claim will cost Civic is $202.68. That's 6% of the amount I am eligible for.) 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 had not previously provided this document to anyone other than myself. She has now opened the theater to further charges of defamation, as well as to charges of making demonstrably false statements to a government agency, should Washington State wish to pursue that. She actually went out of her way to request additional time from the adjudicator, an indication that can only mean she put all of her best efforts into contesting my claim.

If Ms. Johnson had not been blinded by her determination to justify her mistakes, she would not have contested this claim, as in doing so she allowed for an adjudication of the circumstances surrounding my termination. That adjudication has shown, beyond a shadow of a doubt, that she has been in the wrong all along.

I can only assume that Johnson will drag this out further by appealing this ruling. If she does, a hearing will take place, creating further opportunity for her to make false statements on the record, opening Civic to further liability. I hope she will, as I have no doubt as to what the outcome of that process would be and I welcome the opportunity to vindicate myself again. I will wait until her window of opportunity to appeal has passed before I forward a version of this letter to local media outlets.

Finally, when board members fail to exercise the duties they accept when they agree to sit on boards, they must be publicly held to account. This is Civic's Board of Directors:

President: Michael J. Muzatko
Treasurer: Barry Jones
Vice President: Margot Ogden
Secretary: Erica Uyehara
Member at Large: Wendy Klaue
Directors: Curtis Anderson, Jason Coleman Heppler, Jennifer Ferch, Daniel Griffith, Robert Mielbrecht

---

An update will be posted here in the coming days regarding the status of our search for the attacker. Sadly, the one thing we've learned is that our best chance at catching and prosecuting him would have been for the theater to have pressed blackmail charges immediately. As the theater was too busy firing and defaming us, that obviously did not happen. We are still working on it though...

Posted by JR at 3:13 PM 0 comments Recommend this on Google

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

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

HONORABLE GREGORY D. SYPOLT
VERBATIM REPORT OF PROCEEDINGS
June 21, 2013

APPEARANCES:

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Amy Wilkins, CSR No. 679, CCR No. 2157
Official Court Reporter
1116 W. Broadway, Department No. 11
Spokane, Washington 99260

FRIDAY, JUNE 21, 2013 - 9:33 A.M.

THE COURT: Next is Johnson vs. Ryan.

MS. HOFMANN: Good morning, Your Honor.

THE COURT: Good morning. Is it Ms. Hofmann?

MS. HOFMANN: Yes. Stacia Hoffman for the defendant. Would you like me to read the case caption?

THE COURT: Please.

MS. HOFMANN: This is the matter of Yvonne A. K. Johnson vs. James P. Ryan, Spokane County Superior Court Cause No. 13-2-01362-7. And we are here today on a motion to strike Ms. Johnson's claim under RCW 4.24.525.

I think we're all in agreement that Ms. Johnson wants to shut down Mr. Ryan's blog. The problem is, is that his blog is protected by the First Amendment of the United States Constitution. Washington state has gone a step further and enacted RCW 4.24.525, commonly referred to as the anti-SLAPP statute, and it was amended in 2010. So, it's a relatively new law. In our moving papers, we have cited a variety of case law from different jurisdictions, because there's not a wealth of state appellate court rulings on the application of this statute. But we do know from the legislative history of the statute and the plain language of the statute that it's a two-step process. The first is the moving party bears the burden of showing that the -- the alleged free speech or alleged speech is a matter of public concern, and the

legislature gave us some guidance on that. They said that it's to be applied liberally, indicating that a narrow interpretation of public concern is not appropriate. They also modeled the statute after California's, giving us -- I think everything's been decided in California at one point or

another -- so giving us quite a bit of case law from California that is persuasive authority. So, what we have here as far as the facts, we have Spokane Civic Theater. It's a civic theater. It's a community theater. It puts on productions that involve community members. It has -- I believe that it's 50 percent or so of its revenue is from the public in the -- by way of donations. It sells tickets to the public.

Now, Ms. Johnson, the plaintiff, runs Spokane Civic Theater, and there is sufficient evidence in this case -- and in fact it's not even disputed -- that Ms. Johnson is a public figure. She's -- she's the one who represents the theater to the community. She is very actively involved in public education and public fundraising. The comments that Ms. Johnson alleges are defamatory are all with respect to her in her role as the executive director of the theater. And, in fact, in Aronson, the court hinted -- Aronson, which is a western district Washington court case, that the public figure status of the plaintiff could be enough, just in and of itself, to be -- to put a matter into the realm of public concern. So --

THE COURT: It seems to me one of the key questions here is that Mr. Ryan's blog seems to be, for lack of a better term that comes to mind, one-dimensional. In other words, he's focused on Ms. Johnson and her operation of the theater. Does that make any difference?

MS. HOFMANN: It doesn't make any difference, and here's why. A narrow interpretation of this case, as Ms. Johnson has phrased it, is this is just an -- an angry

ex-employee, and this is really just a matter between his grievances and the theater. But when we look at what other case law says, we have cases where a homeowners' association -- a statement about a homeowners' association was found to be a public concern in the Countryside case, because it affected members of the community. We have the Nygaard case, as well as the Summit Bank case. Both of those are California cases, as well, where similar facts, former employee, who has commented on their former employer. And, for example, in Summit Bank, which I think is particularly persuasive, the issue --

THE COURT: Which case?

MS. HOFMANN: This is the Summit Bank case. I think it's Summit Bank vs. Rogers. He made some comments that the bank was just out to swindle customers or something to that effect. And what was important to the court, even though it was a private bank is, this bank has inserted itself in the community. It has taken an interest in the community. And

here we have a theater and an individual who runs a public civic community theater. And on that same note, Mr. Ryan's employment was as a musical director for that very theater, and it's one of the few paid positions that the theater has. And so whether he was wrongly or rightly terminated goes directly to the leadership of the theater, and he has commented on the leadership of the theater altogether. So, given that the theater is a public theater, the comments are with -- only with respect to Ms. Johnson and her leadership, whether it be with respect to the termination of Mr. Ryan or whether it be on other matters. Of course, there have only been a few blog

submissions that have actually been provided as evidence, regardless, it's matters in which the public is interested. And so, for that reason, the first step has been met of the defendant showing a public concern.

So then the second step under RCW 4.24.525 is whether the responding party has shown clear and convincing evidence of a probability of prevailing on the merits. And this is the time right now, right here, for Ms. Johnson to put her best case forward. And so conclusory allegations aren't even enough in summary judgment. This is an even higher standard of clear and convincing evidence, which we know is substantial evidence. So, when we look at evidence submitted in support of her opposition, she cites to two blog entries. In support of her assertion that they are false, all she says is these are false

in her declaration. She has not provided factual evidence -- factual substantial evidence that is necessary for someone to be able to determine if the statements are true and false.

We have submitted evidence that the statements are, in fact, true, but the court does not need to decide whether they are true or not. It needs to decide whether there's substantial evidence that a factfinder could find falsity, and that's missing here. Because we don't have any sort of factual explanation or factual evidence that would support that the statements are false.

THE COURT: Tell me how what you characterize as an undisputed fact, i.e., Ms. Johnson being a public figure, figures into the calculus here of a defamatory statement and any response that would rebut that.

MS. HOFMANN: Would you like me to address the facts that support her as a public figure or just what a public figure status entails?

THE COURT: Well, you said that it's undisputed she's a public figure.

MS. HOFMANN: Right.

THE COURT: So, in terms of the response from Ms. Johnson saying, Mr. Ryan posted defamatory statements about me, my recollection of the cases is that there's somewhat of a greater standard of proof that's necessary to show that a public figure as been defamed. So I just want to understand

how you see that working.

MS. HOFMANN: That is correct. There's the actual malice standard for public figures. If it's a private individual on private matters, then the standard is negligence. So what we're talking here, though, is actual malice. And what both the United States Supreme Court and the Washington Supreme Court have held is that actual malice is not ill will, it's not anger. What it is is reckless disregard for the truth or knowledge of the falsity of the statement. Essentially, it's -- it's a reckless standard. And what we have here, the two statements that were identified, and again, I should back up, that substantial evidence of actual malice is also required. Whether --

THE COURT: That's what I'm asking you. Clear, cogent, and convincing evidence is the standard that the party opposing the motion to strike has to meet. So, is that reduced somewhat because of the actual malice component --

MS. HOFMANN: No.

THE COURT: -- stemming from public figure?

MS. HOFMANN: No. Interestingly, the actual malice standard applies to public figures, regardless of whether it's a -- it's an anti-SLAPP motion or just a plain old defamation action. The -- the -- it's a higher burden for the -- the plaintiff or the responding party, and it applies across the board. So, what Ms. Johnson would need to be able to show is

substantial evidence that Mr. Ryan posted those two blog entries with reckless disregard for the truth. One of them was about comments made in a termination letter and submission to the unemployment department. Mr. Johnson -- or, excuse me, Mr. Ryan has firsthand knowledge of all of those -- of the alleged conduct that occurred. He successfully obtained unemployment, despite his employer's wishes for him not to have any. So, he had every reason to believe and in fact there hasn't been any showing of falsity, any showing of falsity. So, there's no substantial evidence of actual malice on that, that one, that entry.

The other entry is with respect to Ms. Johnson's intimidation of others due to Mr. Ryan's prior lawsuit against Spokane Civic Theater. And in that case, first we've shown the truth of -- of the statement from the person who reported it. But Mr. Ryan, as we showed in his -- our moving papers, is well connected to the theater community. And we have submitted the declaration from the individual who told him about the comment, and we have submitted the declaration of the person who originally made the comment. Mr. Johnson had a good faith

belief that the statements were true and certainly didn't exercise disregard for the state -- for the truth of the statements. And again, there's no evidence other than Ms. Johnson's conclusory, I did not do this, in one sentence, evidence that it is false. So --

THE COURT: Counsel we've gone 12 minutes, and it's ordinarily 10 minutes per side.

MS. HOFMANN: Sure.

THE COURT: But I'm going to make it 15 minutes on this particular matter, but if you want to reserve some time, you've got three minutes left.

MS. HOFMANN: I'll reserve the remainder.

THE COURT: Thank you. Ms. Border.

MS. BORDER: Thank you, Your Honor. Your Honor, Teresa Border on behalf of Yvonne A. K. Johnson. I'm not sure if we put a caption on this. It's 13201362-7. Your Honor, the first issue obviously is whether or not this is an issue of public concern. As has been indicated by both parties, there's no Washington court that has construed what a public concern is. What this case is not is all of the cases that are particularly listed by Mr. Ryan. It is not about software piracy. It is not about medical treatment in relation to the United States healthcare crisis. It is not a consumer issue, such as an acid reflux pillow for infants, or public competitive bidding and quality of toothbrushes used in New York prisons. It is not about a Better Business Bureau consumer caution. What this is is about Mr. Ryan, his private termination from the Spokane Civic Theater, which lasted

roughly eight weeks, and his subsequently wanting to go after Yvonne A. K. Johnson as a result.

What is the purpose of him doing this? Well, we look at his blog that is dated February 8, 2013, and after he has lost by summary judgment his lawsuit against the civic theater for unlawful termination, he indicates that ironically this is likely a huge disappointed for Yvonne A. K. Johnson and civic board of directors. This was their last best chance to make this go away without spending money. It was handled by their insurance company and had potential to end all this with the settlement and nondisclosure agreement. If I had to guess, Ms. Johnson was praying against hope that they would write me a check and shut me up for good.

So it's apparent what this is about. He makes no bones about it. Subsequently he took down that particular blog. As well as he has subsequently taken down another one of the blogs in this case from July 5th. Going -- coming back to that, Your Honor, again the -- this is not a matter of public concern. This is about his private postings. His postings are about what he is doing with the theater. He certainly can't say that that is a public concern. Or he is talking about whatever -- whatever he can think of against Yvonne Johnson, Your Honor. But it all relates back to if you go to every blog, it's a -- you see this from the beginning, and it takes you right back to the beginning which is him being terminated from employment. So, and also any positive comments that are ever posted on his blog are immediately taken down by him, Your

Honor.

So, Your Honor, I just simply go to the next level. I don't believe that these are -- this is a public concern, but I do address the second level of the SLAPP motion, because otherwise it would be completely inappropriate for me to not do so.

THE COURT: Do you agree Ms. Johnson is a public figure?

MS. BORDER: Your Honor, I don't believe that -- I believe that she is a public figure, Your Honor. I don't think I can rightfully stand here in front of you and say she's not a public figure.

Your Honor, the -- Ryan has indicated in his declarations that he only publishes what he has seen and heard himself or that which he has been able to confirm through his own investigation and research. I say that because it plays into both the defamation and the tortious interference part of this claim. The July 5, 2011, blog, which is submitted as Exhibit A to Yvonne A. K. Johnson's declaration, indicates that the paperwork that was submitted to the employment department is false and that Ms. Yvonne A. K. Johnson could be liable for basically fraud. He says she has now opened the theater to further charges of defamation, as well as to making demonstratively false statements to a government agency. He's saying she committed a fraud, Your Honor. And, again, he's

subsequently taken this post down as well. I think that that's

important, because he's taking down these posts that are clearly defamatory and does -- and all the sudden doesn't want anybody to see these anymore. Your Honor, this is clearly incorrect.

In his second declaration, which I received yesterday at 4:30 p.m., it indicates -- he has attached an Exhibit A. And it is the application for employment of two -- it's the application that went back to the Spokane theater -- Spokane Civic Theater for the employment security department. And he has attached this and says that Ms. Yvonne A. K. Johnson committed this fraud. But if you look at the second page, this is not submitted by Yvonne A. K. Johnson. It is signed and submitted by James E. Humes, the managing director, Your Honor. So, he has clearly, clearly committed a false claim here. And this has clearly damaged -- I've indicated the damage. I don't think I really need to go back over the damage. It's all in my brief. But he has -- he has basically said further, yes, I -- I knew that this was false, but I was going to say this anyway. The -- he doesn't have any -- he can't show Yvonne A. K. Johnson did this. It's again submitted by James Humes, Your Honor.

Now, we also have the February 8, 2013, blog, where he indicates that in the course of -- he indicates that I must also mention that it has come to my attention, Yvonne A. K.

Johnson used information obtained through the discovery phase of my suit to intimidate individuals cited in the documents I was legally obliged to provide. He then submits two declarations, very short declarations, of Troy Nickerson and

Michelle Holland. And, Your Honor, in declaration of Troy Nickerson, and again, I go back to his previous declaration, indicating that he only posts what he's heard himself or what he's been able to confirm through his own investigation and research. And in the declaration of Troy Nickerson, it says, At some point, in February of 2013, I told James P. Ryan it had been directly reported to me that Yvonne A. K. Johnson used information obtained through discovery in Mr. Ryan's lawsuit against Spokane Civic Theater to intimidate others. I recall speaking with Michelle Holland about this.

Okay. Even if you take Michelle Holland's declaration and his, where are the others? This doesn't -- this blog does not say that she -- it has come to my attention that Yvonne A. K. Johnson has used information to attempt to intimidate another person. No. This makes a broad-sweeping claim, factually-based claim. This doesn't come across as an opinion. This comes across as absolute fact. It's to intimidate individuals. So, Your Honor, again, a defamatory statement.

This is -- this kind -- these -- and as indicated before, Your Honor, coming back to that, there is these same --

same blogs, which I've just had a few examples of here, also go to the intentional interference with the business expectancy part of the suit, Your Honor. Ryan knew of the expectancy. In his blog from November, 2011, November 14, 2011, he lays it all out. I couldn't have said it better, Your Honor. He says that he is -- anybody who would be looking to hire Yvonne A. K. Johnson, quote, They are not likely to skip past the second

search result, which is this site. They might even just enter wrongly his domain, assuming this would be the correct domain.

He knows what he's doing, Your Honor. He's trying to make Ms. Johnson unemployable, and he -- he flat out says it. And that is on -- it's listed and it's attached to my -- to her -- Yvonne's declaration, Your Honor, and I'm sure you've already read it. So I'm not going to read through that whole long -- it's very long. So he knows she has a valid business expectancy. She's indicated in her declaration that, yes, so have the other two declarations I filed on her behalf from Michael Muzatko and Deena Caruso. And, so the valid business expectancy that she would be able to stay at Spokane Civic or move on to similar employment elsewhere exists. He knew of the expectancy as indicated in his November 14, 2011, blog, and again he went further with that, Your Honor, in his February 8, 2013, blog, where he added the red highlighter, headliner at the top, which said, If you are -- have arrived at this page because you are considering Yvonne A. K. Johnson for a job,

please feel free to contact me. I would be happy to put you in contact with individuals of status within the community, would lend tending support to what you'll read here. I can be reached at, and he gives his site.

He is clearly inducing a termination of a valid business expectancy, Your Honor. We've indicated in that there has been damage. Her reputation has been damaged immensely. Her relationships with other area theaters, where she could possibly have gone, is destroyed. It's all because of these blogs, Your Honor, and it asks --

THE COURT: Is she still currently employed?

MS. BORDER: She is still there, Your Honor. She could not be here today. She wanted to be here today, but she is in Indiana. And, Your Honor, I have nothing further.

THE COURT: Okay. Thank you, Ms. Border. And, Ms. Hofmann, your response.

MS. HOFMANN: Briefly. First, with respect to public concern, a recitation of the specific types of cases that have found public concern, in trying to fit this one exactly into that is exactly the narrow type of interpretation the court -- excuse me, that the legislature did not want to happen with the anti-SLAPP statute. This is a community issue involving a community theater and its leader.

Two, as far as purpose, we live in a world, like it or not, that in 2010, '11, '12, people take to the internet to

post things. Mr. Ryan was angry; sure. But just because he's angry and takes to the internet to put posts up, unless they're defamatory, that's freedom of speech in a nutshell right there. He has that right to do so.

Three, there still has been no showing of substantial evidence of falsity.

Four, and there's been no showing of substantial evidence of actual malice. Mr. Ryan knows Mr. Nickerson. He knows Michelle Holland. These are trusted individuals. Relying on them is not reckless behavior. There's no requirement to talk to every single person who might have knowledge of something. The question is whether it was reckless or not, and it's not. He relied on the two

individuals, two individuals he knew to be truthful.

And then briefly, as far as damages, there's been no show -- Mark, the Washington Supreme Court case, says that you have to show that the defamatory comments caused damage to reputation. We don't have that here. We have the validation that Mr. Ryan's blog did but not that those two statements did. And again, now is the time for us to know exactly what is alleged to be defamatory or not.

And, lastly, with respect to tortious interference, it's a derivative claim, so the same standards apply. But briefly as far as the elements, there's been no showing that Ms. Johnson has been terminated or that there was a specific

job that she was passed over because of those two comments. So for that reason, there's not substantial evidence as required under Washington's anti-SLAPP statute, and we ask that the court be dismissed -- excuse me, that the matter be dismissed with the appropriate penalties under the statute. Thank you, Your Honor.

THE COURT: Thanks, Counsel. It is correct that we live in an era where it's somewhat of a whole new frontier in terms of free speech and the availability of means by which folks can express their thoughts, their feelings, regardless oftentimes of how unpleasant comments might be, even distasteful or vulgar or offensive they may be. So, here the first issue, and I would agree, our state doesn't seem to have a case or cases that definitely speak to this exact type of combination of circumstances on the question of whether this is a matter of public concern. I'm mindful of the broad and

liberal application which the legislature undoubtedly had in mind and contemplated at the time this particular section of the statute was enacted. And it is correct that there is to be a liberal application. That there is assistance that the court finds in cases from other jurisdictions that talk about the gravamen, the core, of what constitutes or may constitute a public concern. And it would appear that, indeed, Mr. Ryan's focus here is somewhat in the nature of tunnel vision. He's focused on Ms. Johnson and her role at the civic theater. He's

apparently not happy with the way he was treated, and he's spoken out about it on a number of occasions. And just because he's angry or he could be considered a gadfly doesn't reduce this matter from being one of public concern to a private matter or private vendetta. I'm of the view that given all the circumstances here and the totality of them that this is, indeed, a matter of public concern.

It is conceded that Ms. Johnson is a public figure, which goes into the analysis of whether or not there's been any clear, cogent and convincing evidence to counter what the defense has brought forward here, as well as a number of other issues, as pointed out by Ms. Hofmann in her pleadings. And so, by, again, operation of the statute, the opposing party here, the plaintiff, Ms. Johnson, must counter the motion to strike with clear, cogent and convincing evidence. And as we all know, clear, cogent and convincing evidence is somewhat weighty evidence. It's more than a preponderance. It's less than beyond a reasonable doubt, but it is a heavier burden of proof that is required here. And as I recall the cases, it has

been referred to as manifest, manifestly clear, clear evidence, and the list goes on in terms of descriptors for what is clear, cogent and convincing evidence. And so, Ms. Johnson is required here to show by that, that prism, that focus of clear and convincing evidence, the probability that she can prevail on her two claims at trial on the merits. And so, we have

defamation and we have tortious interference with a business expectancy. And again, as pointed out, any inability, any failure to establish one of the elements of defamation causes the entire claim to fall. And counsel have set out the elements of defamation, number one, that they are false; that the statements are not privileged, secondly; that the statements were made with a reckless level of fault; and that the statements caused damage to Ms. Johnson.

Looking solely for now at the damages part of things, there hasn't been any pleading that I can recall that shows any concrete allegation of damages such as to provide even a modicum of proof to resist this motion. And there's a laundry list of offensive or pejorative labels that the cases have spoken about that are listed in defendant's memorandum, and the content of the statements here as against Ms. Johnson really don't rise to the level of the offensive nature of some of those labels as set out in counsel for Mr. Ryan's pleading.

And again, 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. Even giving all fair

inferences, as required, to Ms. Johnson.

Counsel, I do agree with the defendant's motion, and I grant the motion to strike. And I will also grant the

statutorily required penalty and cost. I'll sign that order, Counsel. If you want to set a date for presentment, we can do that.

MS. HOFMANN: Thank you, Your Honor. I have a -- an order that I can have Ms. Border look over and sign, and then we would have --

THE COURT: Okay. Do you want to go on out in the hall --

MS. HOFMANN: That's fine.

MS. BORDER: That's perfect.

THE COURT: -- and check that out, look it over and give it to my clerk, and I'll sign it if you're able to agree. If not, then see Karen about that.

MS. HOFMANN: Thank you, Your Honor.

MS. BORDER: Thank you.

THE COURT: Thanks very much.

* * * * * *

THE COURT: Yes. Please approach, Ms. Hofmann.

MS. HOFMANN: Thank you, Your Honor.

THE COURT: And on the previous matter, I did sign the order which was presented to me by Ms. Hofmann on Johnson v. Ryan.

(End of proceedings.)

CE R T I F I C A T E

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 15th day of August, 2013.

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