No. 996725

SUPREME COURT OF WASHINGTON STATE

KMP, a minor child, by and through her natural mother and custodial parent,

SARAH HALL PINHO,

Respondent,

v.

BIG BROTHERS BIG SISTERS OF PUGET SOUND, and MICHAEL WAYNE SANCHEZ,

Petitioner.

AMICUS'S REVISED R.A.P. 10.8 STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Amicus submits this statement of additional authorities:

Issue #1.

On whether sufficient record is available in the trial court and Court of Appeals to adjudicate the right to unconflicted retained counsel in a civil case, when court denies motion to withdraw and continue due to RPC 1.7 conflict. Whether petitioner had met the RAP 10.3(a)(6) requirements to entitle Petitioner to be heard on the specific issue of right to unconflicted counsel, (i.e. counsel's need to lose to moot malpractice),per assignment of Error #1 and pages 16-19), and motions to reconsider in trial and appeals court.

AUTHORITIES FOR ISSUE #1

RAP 6.1 Appeal as a Matter of Right

RAP 10.3(a)(4)-(6)

RAP 12.1(a)(b).

RAP 10.3(a)(5)

***Holland v. City of Tacoma*,** 90 Wn. App. 533, 538, 954 P.2d 290 (1998)

***US West v. Utilities and Transp. Com'n*,** 949 P.2d 1337 (1997) 134 Wash. 2d 74,(1998) and cases cited therein.

***Adams v. Dep't of Labor & Indus*.**, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995), overruling *State v. Wilburn*, 51 Wn. App. 827, 828, 755 P.2d 842 (1988).

Issue #2 Right to retained counsel of choice in a civil case and court's duty to inquire when a conflict develops.

AUTHORITIES:

***McCuin v. Tex. Power & Light Co.*,** 714 F.2d 1255 (5th Cir. 1983), citing *Bottaro v. Hatton Assocs*., 680 F.2d 895, 897 & n. 2 (2d Cir.1982)

....explores the scope of any due process right to retained (as distinguished from court-appointed) counsel in civil cases.

Davis v. Stamler, 650 F.2d 477, 480 (3d Cir.1981) (due process clause).

United States ex rel. Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969), cert. denied, 397 U.S. 946, 90 S. Ct. 964, 25 L. Ed. 2d 127 (1970).

Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020, 1025 n. 6 (5th Cir.), cert. denied, 454 U.S. 895, 102 S. Ct. 394, 70 L. Ed. 2d 211 (1981).

(b) On the scope of court's duty to inquire about a conflict brought to its attention:

United States v. Torres-Rodriguez, 930 F.2d 1375 (9th Cir. 1991) U.S. App. LEXIS 5357, 9th Circuit Court of Appeals, 1991 citing *United States v. Mills*, 597 F.2d 693, 700 (9th Cir. 1979).

U.S. v. D'Amore, United States Court of Appeals, Ninth Circuit 56 F.3d 1202 (9th Cir. 1995)

*" **United States v. McClendon**, 782 F.2d 785, 789 (9th Cir. 1986), see Lily, 989 F.2d at 1056; Torres-Rodriguez, 930 F.2d at 1381.*

*Applying the "mills standard"citing **McClendon,** 782 F.2d at 789; **United States v. Pruitt**, 719 F.2d 975, 978 (9th Cir.), cert. denied, 464 U.S. 1012, 78 L. Ed. 2d 716, 104 S. Ct. 536 (1983)".* 2

***United States v. Ellison*, 798 F.2d 1102 (7th Cir. 1986)**

AUTHORITIES ON the EFFECT (on parties' options))

OF COURT'S DENIALOF WITHDRAWAL.

WSBA Ethics Opinion #201701 Section 6 RPC 1.16(c):

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Issue #3 Effect on Court of Appeals' granting Respondent's motion to publish on the issue of "substantial public interest".

AUTHORITIES

RAP 12.3(e) (4) and (5).

RAP 12.3 (c),(d)

Issue #4: Post the 2015 *Davis v. Cox* decisions on the issue of RCW 424.525 SLAPP penalty phase.

AUTHORITIES:

SUBSTITUTE SENATE BILL 5009 2021, Enacted 5/12/21, effective 7/25/21:

See attached...appendix 1:New section 3 and 4 (no attorney fees if new SLAPP timelines not met) (mandatory stay but allows discovery needed to litigate the SLAPP motion). New section 6 (specific procedures on notice, burdens of production, proof and fact findings) New section 11 (construction clause, intent to balance conflicting public interests)

Whether the sanctions order in the case at bar conflicts with Supreme Court's post-Cox decisions.

AUTHORITY

***Avi Lipman and Curtis Isacke*,** "Supreme Court Slaps Down Anti-SLAPP Law". KCBA Journal, page 4, July 2015. APPENDED HERE for history of the SLAPP and then-pending cases before the Supreme Court) at that time, (outcomes cited below).

***Worthington v. City of Bremerton*,** 187 Wn.2d 184, 385 P.3d 133, 2016 Wash. LEXIS 1372

Shandola v. Henry, 198 Wn. App. 889, 396 P.3d 395, 2017 Wash. App. LEXIS 1106, 2017 WL 1885425

Moms v. No, 2015 Wash. App. LEXIS 2527, 2015 WL

RCW 4.24.525(6) (The struck-language)

~~**(a)** The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:~~

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

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

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

Issue #5: OTHER STATES INTERPRETING THE SCOPE OF "persons" included in SLAPP absolute immunity, and their nexus with THE PUBLIC INTERET:

Thomas v. Chadwick, 224 Cal.App.3d at p. 827.) cites Stecks v. Young (1995)

***Kruger v. Grauer**, 173 Conn. App. 539, 557, 164 A.3d 764, 775 (2017). (child protection vs. bad faith accusations.)*

• ***Bhatia v. Debek**, 287 Conn. 397, 416, 948 A.2d 1009, 1023 (2008).*

(b)Washington Chld Abuse qualified immunity standards.

RCW 26.44.060

Immunity from civil or criminal liability—Confidential communications not violated—Actions against state not affected—False report, penalty.

RCW 26.44.061

False reporting—Statement warning against—Determination letter and referral.

APPENDICES OF REPRINTED AUTHORITIES:

1. ***Avi Lipman and Curtis Isacke*****,** "***Supreme Court Slaps Down Anti-SLAPP Law***". CKBA Law Review July 2015.

2. ***AMENDED AND REPEALED SLAPP STATUTE****.*

Respectfully submitted:

Kenneth Henrikson (Official E-signed)
#17592
11th of July, 2021.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5009

Chapter 259, Laws of 2021

67th Legislature
2021 Regular Session

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

EFFECTIVE DATE: July 25, 2021

Passed by the Senate April 14, 2021
Yeas 48 Nays 0

DENNY HECK

President of the Senate

Passed by the House April 9, 2021
Yeas 97 Nays 1

LAURIE JINKINS

Speaker of the House of Representatives

Approved May 12, 2021 2:40 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5009** as passed by the Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

FILED

May 12, 2021

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 5009

AS AMENDED BY THE HOUSE

Passed Legislature - 2021 Regular Session

State of Washington 67th Legislature 2021 Regular Session

By Senate Law & Justice (originally sponsored by Senators Padden, Pedersen, Brown, McCune, and Mullet; by request of Uniform Law Commission)

READ FIRST TIME 02/05/21.

AN ACT Relating to the uniform public expression protection act; adding a new chapter to Title 4 RCW; and repealing RCW 4.24.525.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** SHORT TITLE. This chapter may be known and cited as the uniform public expression protection act.

NEW SECTION. **Sec. 2.** SCOPE. (1) In this section:

(a) "Goods or services" does not include the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic, or artistic work.

(b) "Governmental unit" means a public corporation or government or governmental subdivision, agency, or instrumentality.

(c) "Person" means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

(2) Except as otherwise provided in subsection (3) of this section, this chapter applies to a cause of action asserted in a civil action against a person based on the person's:

(a) Communication in a legislative, executive, judicial, administrative, or other governmental proceeding;

(b) Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding;

(c) Exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern.

(3)(a) Except when (b) of this subsection applies, this chapter does not apply to a cause of action asserted:

(i) Against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;

(ii) By a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety;

(iii) Against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services;

(iv) Against a person named in a civil suit brought by a victim of a crime against a perpetrator;

(v) Against a person named in a civil suit brought to establish or declare real property possessory rights, use of real property, recovery of real property, quiet title to real property, or related claims relating to real property;

(vi) Seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action, unless the claims involve damage to reputation;

(vii) Brought under the insurance code or arising out of an insurance contract;

(viii) Based on a common law fraud claim;

(ix) Brought under Title 26 RCW, or counterclaims based on a criminal no-contact order pursuant to chapter 10.99 RCW, for or based on an antiharassment order under chapter 10.14 RCW or RCW 9A.46.050, for or based on a sexual assault protection order under chapter 7.90 RCW, or for or based on a vulnerable adult protection order under chapter 74.34 RCW;

(x) Brought under Title 49 RCW; negligent supervision, retention, or infliction of emotional distress unless the claims involve damage to reputation; wrongful discharge in violation of public policy;

whistleblowing, including chapters 42.40 and 42.41 RCW; or enforcement of employee rights under civil service, collective bargaining, or handbooks and policies;

(xi) Brought under the consumer protection act, chapter 19.86 RCW; or

(xii) Any claim brought under federal law.

(b) This chapter applies to a cause of action asserted under (a)(iii), (viii), or (xi) of this subsection when the cause of action is:

(i) A legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; or

(ii) A legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

NEW SECTION. **Sec. 3.** SPECIAL MOTION FOR EXPEDITED RELIEF. (1) Prior to filing a special motion for expedited relief under subsection (2) of this section, the moving party shall provide written notice to the responding party of its intent to file the motion at least 14 days prior to filing the motion. During that time, the responding party may withdraw or amend the pleading in accordance with applicable court rules, but shall otherwise comply with the stay obligations listed in section 4 of this act. If the moving party fails to provide the notice required under this subsection, such failure shall not affect the moving party's right to relief under this act, but the moving party shall not be entitled to recover reasonable attorneys' fees under section 10 of this act.

(2) Not later than sixty days after a party is served with a complaint, cross-claim, counterclaim, third-party claim, or other pleading that asserts a cause of action to which this chapter

applies, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to dismiss the cause of action or part of the cause of action.

NEW SECTION. **Sec. 4.** STAY. (1) Except as otherwise provided in subsections (4) through (7) of this section, on the earlier of the giving of notice of intent to file a motion under section 3(1) of this act or the filing of a motion under section 3(2) of this act:

(a) All other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed; and

(b) On motion by the moving party, the court may stay a hearing or motion involving another party, or discovery by another party, if the hearing or ruling on the motion would adjudicate, or the discovery would relate to, an issue material to the motion under section 3 of this act.

(2) A stay under subsection (1) of this section remains in effect until entry of an order ruling on the motion under section 3 of this act and expiration of the time under section 9 of this act for the moving party to appeal the order.

(3) Except as otherwise provided in subsections (5), (6), and (7) of this section, if a party appeals from an order ruling on a motion under section 3 of this act, all proceedings between all parties in the action are stayed. The stay remains in effect until the conclusion of the appeal.

(4) During a stay under subsection (1) of this section, the court may allow limited discovery if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden under section 7(1) of this act and the information is not reasonably available unless discovery is allowed.

(5) A motion under section 10 of this act for costs, attorneys' fees, and expenses is not subject to a stay under this section.

(6) A stay under this section does not affect a party's ability voluntarily to dismiss a cause of action or part of a cause of action or move to sever a cause of action.

(7) During a stay under this section, the court for good cause may hear and rule on:

(a) A motion unrelated to the motion under section 3 of this act; and

(b) A motion seeking a special or preliminary injunction to protect against an imminent threat to public health or safety.

NEW SECTION. **Sec. 5.** HEARING. (1) The court shall hear a motion under section 3 of this act not later than sixty days after filing of the motion, unless the court orders a later hearing:

(a) To allow discovery under section 4(4) of this act; or

(b) For other good cause.

(2) If the court orders a later hearing under subsection (1)(a) of this section, the court shall hear the motion under section 3 of this act not later than sixty days after the court order allowing the discovery, unless the court orders a later hearing under subsection (1)(b) of this section.

NEW SECTION. **Sec. 6.** PROOF. In ruling on a motion under section 3 of this act, the court shall consider the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under superior court civil rule 56.

NEW SECTION. **Sec. 7.** DISMISSAL OF CAUSE OF ACTION IN WHOLE OR PART. (1) In ruling on a motion under section 3 of this act, the court shall dismiss with prejudice a cause of action, or part of a cause of action, if:

(a) The moving party establishes under section 2(2) of this act that this chapter applies;

(b) The responding party fails to establish under section 2(3) of this act that this chapter does not apply; and

(c) Either:

(i) The responding party fails to establish a prima facie case as to each essential element of the cause of action; or

(ii) The moving party establishes that:

(A) The responding party failed to state a cause of action upon which relief can be granted; or

(B) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

(2) A voluntary dismissal without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under section 3 of this act does not affect a

moving party's right to obtain a ruling on the motion and seek costs, attorneys' fees, and expenses under section 10 of this act.

(3) A voluntary dismissal with prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under section 3 of this act establishes for the purpose of section 10 of this act that the moving party prevailed on the motion.

NEW SECTION. **Sec. 8.** RULING. The court shall rule on a motion under section 3 of this act not later than sixty days after a hearing under section 5 of this act.

NEW SECTION. **Sec. 9.** APPEAL. A moving party may appeal as a matter of right from an order denying, in whole or in part, a motion under section 3 of this act. The appeal must be filed not later than twenty-one days after entry of the order.

NEW SECTION. **Sec. 10.** COSTS, ATTORNEYS' FEES, AND EXPENSES. On a motion under section 3 of this act, the court shall award court costs, reasonable attorneys' fees, and reasonable litigation expenses related to the motion:

(1) To the moving party if the moving party prevails on the motion; or

(2) To the responding party if the responding party prevails on the motion and the court finds that the motion was not substantially justified or filed solely with intent to delay the proceeding.

NEW SECTION. **Sec. 11.** CONSTRUCTION. This chapter must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or the Washington state Constitution.

NEW SECTION. **Sec. 12.** UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

NEW SECTION. **Sec. 13.** TRANSITIONAL PROVISION. This chapter applies to a civil action filed or cause of action asserted in a civil action on or after the effective date of this section.

NEW SECTION. **Sec. 14.** SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 15.** RCW 4.24.525 (Public participation lawsuits—Special motion to strike claim—Damages, costs, attorneys' fees, other relief—Definitions) and 2010 c 118 s 2 are each repealed.

NEW SECTION. **Sec. 16.** Sections 1 through 13 of this act constitute a new chapter in Title 4 RCW.

Passed by the Senate April 14, 2021.
Passed by the House April 9, 2021.
Approved by the Governor May 12, 2021.
Filed in Office of Secretary of State May 12, 2021.

--- END ---

Supreme Court Slaps Down Anti-SLAPP Law

By Avi Lipman and Curtis Isacke KCBA Journal p. 4 July 2015.

In an opinion published on May 28 in Davis v. Cox, the Washington Supreme Court ruled unanimously that RCW 4.24.525 - part of the Washington Act Limiting Strategic Lawsuits Against Public Participation ("Anti-SLAPP Act") - violates the right to a jury trial under Article I, section 21 of the Washington Constitution.

Justice Debra Stephens authored the opinion, which held the Anti-SLAPP Act improperly requires trial courts to weigh competing evidence and perform a fact-finding function expressly reserved for juries. Davis is the only case in the United States in which a court has declared anti-SLAPP legislation unconstitutional.

History of Washington's Anti-SLAPP Act

Washington became the first state to enact an anti-SLAPP statute when, in 1989, the legislature codified RCW 4.24.500–.520. This initial statute, which the Supreme Court did not address in Davis, grants "immunity" from civil liability only for claims based on communication to a governmental entity regarding "any matter reasonably of concern to that agency or organization." It contains no method for early dismissal.

In 2010, the Legislature enacted RCW 4.24.525, which significantly expanded the reach of an anti-SLAPP motion, imposed a mandatory stay of discovery, and defined a procedure for early dismissal of a claim.

Under the new statute, the party filing a "special motion to strike" bears the initial burden of establishing by a preponderance of the evidence that the lawsuit constitutes an "action involving public participation and petition." This can be done by meeting one of several standards, including a "catch-all" provision relating to "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition."[1]

If the moving party meets its burden, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim."[2] *If the responding party does so, the trial court must deny the anti-SLAPP motion.*

A moving party who prevails on an anti-SLAPP motion is entitled to an award of reasonable attorneys' fees and a $10,000 penalty. (Whether this means an award of $10,000 to each moving party or to the moving parties collectively was a question left unanswered by the Supreme Court.) A non-moving party that persuades the trial court that the anti-SLAPP motion was "frivolous" or "solely intended to cause unnecessary delay" is entitled to the same forms of relief.

The Anti-SLAPP Act requires that special motions to strike be filed within 60 days of service of the complaint, and that they be heard and resolved quickly. Every party has a right to expedited appeal from the trial court's order on the motion.

Background of Davis

The plaintiffs in Davis were five Olympia residents and members of the Olympia Food Co-op ("Co-op"), a member-owned grocery store, who challenged a decision by the Co-op's Board of Directors ("Board") to boycott Israeli products. According to the derivative complaint filed in Thurston County Superior Court in July 2010, the Board violated the governing rules and regulations of the Co-op by acting without staff consensus and in the absence of a "nationally recognized" boycott of Israel. The plaintiffs claimed the Board's actions were ultra vires, constituted a breach of fiduciary duty, and should be permanently enjoined.

The defendants filed a special motion to strike the claims under the Anti-SLAPP Act, arguing the suit improperly targeted constitutionally protected activity. The plaintiffs opposed the motion on the merits, as well as on the grounds that the Anti-SLAPP Act is unconstitutional.

Their constitutional arguments included, among other things, that the Act violates the separation of powers, violates a non-moving party's rights to petition and to a jury trial, is void for vagueness, and violates due process. The plaintiffs focused primarily on what they contended was an irreconcilable conflict between the dismissal mechanism in the Act and summary judgment under Civil Rule 56. The plaintiffs separately filed a cross-motion for limited deposition and document discovery under a "good cause" exception to the discovery stay imposed by the Anti-SLAPP Act.[3]

The trial court granted the defendants' motion, denied the plaintiffs' cross-motion for discovery, and dismissed the case. It awarded the defendants'

attorneys' fees and a statutory penalty under RCW 4.24.525(6)(a) of $160,000 ($10,000 per defendant). The total judgment entered against the plaintiffs exceeded $230,000.

In a unanimous opinion, Division One of the Court of Appeals rejected the plaintiffs' constitutional challenges and affirmed, holding that:

(1) the defendants had met their burden under "step one" of the Anti-SLAPP Act by establishing that the Board's decision to enact the boycott of Israel was a "lawful" action "involving public participation and petition" under RCW 4.24.525(e); and

(2) the plaintiffs had failed to meet their burden under "step two" to establish "by clear and convincing evidence a likelihood of prevailing" on their claims under RCW 4.24.525(4)(b).

The Supreme Court's Decision

Oral argument took place on January 20. In its written opinion, the Court held, among other things:

- *"At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts."*
- *Because it "creates a truncated adjudication of the merits of a plaintiff's claim, including non-frivolous factual issues, without a trial," RCW 4.24.525(4)(b) "invades the jury's essential role of deciding debatable questions of fact" and violates the right to a jury trial under Article I, section 21 of the Washington Constitution.*
- *Since the truncated adjudication mechanism, (4)(b), is the "mainspring" of the Act and cannot be severed, the Act is invalid "as a whole."*
- *"The plain language of [(4)(b)] is not genuinely susceptible to being interpreted as a summary judgment procedure" because it "requires the trial court to weigh the evidence and make a factual determination of plaintiffs' 'probability of prevailing on the claim.'" Summary judgment, by comparison, "does not concern degrees of likelihood or probability." CR 56 and (4)(b) of the Anti-SLAPP Act therefore "involve fundamentally different inquiries."*

Although the right to a jury trial does not preclude a court from disposing of claims summarily - e.g., under CR 56 and the various rules governing frivolous claims - 4(b) "requires the trial judge to make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim." This, the Court held, "is no frivolousness standard."

Questions Raised by Davis

The immediate impact of *Davis* is that parties may no longer move to strike claims under RCW 4.24.525 and thus cannot recover attorneys' fees, costs and penalties under the statute. Additionally, *Davis* raises a host of questions that Washington courts are likely to confront in the coming months. These include:

How will the decision impact other anti-SLAPP cases currently before the Supreme Court?

Three anti-SLAPP cases remain pending before the Supreme Court: *Dillon v. Seattle Deposition Reporters*; *Akrie v. Grant*; and *Alaska Structures v. Hedlund*. The Court's resolution of those cases will of course comport with the decision in *Davis*. In *Dillon*, the Court could nonetheless reinstate the trial court's granting of summary judgment, though not dismissal or an award of fees and penalties under the Anti-SLAPP Act.

In *Akrie*, the plaintiff failed to appeal the dismissal of his complaint under CR 12(b)(6). Thus, the Court will likely vacate only the fees and penalties awarded to the defendants under the Act. In *Hedlund*, the Court of Appeals reversed the trial court's dismissal of the case under the Act. Thus the Supreme Court will likely affirm.

Does Davis apply retroactively?

Whether the Court's decision in *Davis* applies retroactively is an important question that Washington courts are likely to confront in short order. Since the Supreme Court applied its holding to the parties before it, *Davis* likely applies retroactively to pending litigation.[4] On the other hand, the Supreme Court has in certain instances denied retroactive enforcement of decisions invalidating other statutes.[5]

What effect does *Davis* have on claims dismissed under the Anti-SLAPP Act that are no longer pending? Under one theory, if the appellate court of

last resort declares a statute unconstitutional for deprivation of a constitutional right, then any judgment based on the statute must likewise be unconstitutional.

Courts most commonly reject such an absolute approach, however, and instead favor the principle that final decisions are not subject to retroactive correction.[6] Washington courts will likely follow this majority rule and decline to reopen final judgments previously entered under RCW 4.24.525.

Are RCW 4.24.500–.520 affected by the decision?

As noted, Washington's original anti-SLAPP statutes, RCW 4.24.500–.520, were not at issue in *Davis*. Unlike RCW 4.24.525(4)(b), those provisions do not define a dismissal mechanism. At the same time, if they are found to penalize a litigant for bringing non-frivolous claims, they may be subject to constitutional scrutiny under *Davis*.

Moreover, questions left unanswered by *Davis* - such as whether the $10,000 penalty offends a non-moving party's right to petition - may be raised in downstream challenges to RCW 4.24.500–.520.

How will the Legislature respond to Davis?

The process to introduce new anti-SLAPP legislation is already under way. As of this writing, the Code Reviser's Office already has generated a draft bill - in this instance, a "redline" of RCW 4.24.525 - aimed at accounting for the Supreme Court's holding in *Davis*.[7] On June 17, the Senate Law and Justice Committee held a hearing on the draft bill, where, among others, two of the plaintiffs in *Davis* and their counsel testified. A Senate Bill Report summarizes the draft bill in part as follows:

The moving party bringing a special motion to strike 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. <u>If the moving party meets this burden, the court must render judgment for the moving party if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.</u>[8]

This initial effort appears to reflect the Court's observation in *Davis* that "if our legislature desires to create a summary judgment standard for an anti-SLAPP motion, the relevant language in CR 56(c) describes that standard."[9] Indeed, the drafters have apparently concluded that

substituting a summary judgment standard for "step two" of RCW 4.24.525 sufficiently accommodates *Davis*.

This proposed fix avoids, however, the Court's holding that "the only instance" in which "petitioning activity may be constitutionally punished is when a party pursues *frivolous* litigation, whether defined as lacking a 'reasonable basis' ... or as sham litigation."[10]

It also does not address other challenges raised, but not resolved, in *Davis*, including: (1) whether the $10,000 penalty is constitutional and, if so, whether such a penalty should be awarded to each prevailing party or instead to the prevailing parties collectively (an issue also presented in *Akrie*, which the Supreme Court has not yet decided); and (2) whether the discovery stay, which the new draft proposal leaves intact, is constitutional. If the Legislature does not adequately account for these issues, any new anti-SLAPP statute it enacts may confront challenges like those asserted in *Davis*.[11]

Avi Lipman, a partner at McNaul Ebel Nawrot & Helgren, and Curtis Isacke, an associate at McNaul Ebel, represent the plaintiffs/petitioners in Davis v. Cox with lead attorney Bob Sulkin.

1 RCW 4.24.525(2)(e).

2 RCW 4.24.525(4)(b).

3 *See* RCW 4.24.525(5)(c).

4 *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271-72 (2009) ("Our decisions of law apply retroactively to all litigants not barred by procedural requirements unless we expressly limit our decision to purely prospective application."); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

5 *See*, *e.g.*, *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 76 (2013) (decision regarding constitutional validity of presuit notice requirement deemed to apply prospectively only) (relying on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)).

6 *See*, *e.g.*, *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) (declining to disturb an earlier final decision despite a subsequent holding that the law applied was unconstitutional).

7 S-3276.1 ("Concerning lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition.") 10 *Id*. at *10 (emphasis added).

11 The Legislature should also clarify whether a governmental entity may file an anti-SLAPP motion based on conduct other than speech by the entity itself. In *Henne v. City of Yakima*, decided shortly before *Davis*, the Supreme Court answered that question in the negative as to RCW 4.24.525.

KENNETH HENRIKSON LAW

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