No. 69300-0

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

JASON DILLON, an individual;
Plaintiff,

vs.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company; DAVIS WRIGHT TREMAINE, LLP, a Washington Company; JAMES GRANT and Jane Doe Grant, individually and the marital community composed thereof if any;
Defendants.

On Appeal from King County Superior Court
The Honorable Bruce Heller

SUPPLEMENTAL RESPONSE TO AMICUS CURIAE BRIEF

Dennis M. Moran, WSBA #19999
William A. Keller, WSBA #29361
Moran & Keller PLLC
600 108th Ave NE, Suite 650
Bellevue, Washington 98004
Telephone: (206) 877-4410
Facsimile: (206) 877-4439
dmoran@morankellerlaw.com
bill@morankellerlaw.com

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I. INTRODUCTION

The amicus brief filed by Allied Daily Newspapers of Washington and the Washington Newspaper Publishers Association (hereafter together "Newspapers"), requests the Court take a broad approach to determining what constitute a matter of public concern for purposes of anti-SLAAP protection. Freedom of speech is important and worthy of broad protections under the act. However, in this case, the Court must not expand its analysis of free speech under the SLAAP act in order to decriminalize acts that the legislature in this state has sought to criminalize. In particular, the Court in protecting the right to public participation cannot simply ignore and decriminalize the acts and penalties Congress has set forth in the Privacy Act RCW 9.73.050. Under the Privacy Act, an attorney does not have the right to unilaterally tape a conversation with a witness without permission, and then claim such conduct is protected by the first amendment and the SLAAP statute.

II. Dillon Agrees That The Time, Place And Manner of Speech is Important for Anti-SLAPP Analysis

Mr. Dillon absolutely agrees that a "court must examine what was said, how it was said, and where it was said, looking at all of the surrounding circumstances, in determining if a defendant's speech is subject to anti-SLAPP protections." The Amicus brief relates to a

defendant who was making comments on a public forum, Indeed.com, wherein he commented on practices and working conditions at a company called Alaska Structures. Dillon is not familiar with all the facts in that case, however, **it should be noted that what is at issue for SLAPP analysis is the defendant's conduct and actions, not that of the plaintiff.** (Emphasis added).

A defendants conduct is granted SLAPP protection in the following context under RCW 4.24.525:

(2)(a): ..testimony and documents submitted to a court, etc.

(2)(b): ..testimony and documents submitted in connection with an issue under consideration by a court, etc.

(2)(c): ..testimony and documents likely to encourage public participation in legislative process, judicial process, etc.

(2)(d)...statements made in an open public forum in connection with an issue of public concern, etc.

(2)(e).....other lawful conduct...in furtherance 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.

Amicus is concerned with the breadth of protection provided by (2)(d)/(e) and has requested that this Court adopted the First Amendment

test set forth in *Snyder v. Phelps,* 131 S.Ct 1207 (2011) for determining when speech addresses a matter of public concern under SLAAP.

In *Snyder*, the Court stated that "Speech 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,'" *quoting Connick v. Myers*, 461 U.S. 138, 146 (1983) or "when it 'is a subject of legitimate news interest." The court under that test is to examine the content, form and context of speech as revealed by the whole record to make sure that the judgment does not intrude on free expression. *Snyder*, at 1216. The Court is to look at the "circumstances of the speech, including what was said, where it was said and how it was said." *Id.*

A. If The Court Were To Adopt the Snyder Test For Determining What Constitutes a Public Concern It Still Wouldn't Legalize the Defendants Conduct Here, or Provide Them With SLAAP Protection.

As an initial matter, there is no justification, legal analysis, case law or source of any kind that gives First Amendment protection to criminal conduct. If the defendants violated the privacy act by illegally recording a conversation there can be no SLAPP protection for that. See e.g. *Gaims v. Gerbosi*, 193 Cal.App 4th 435, 446 (2011). The trial court found that Dillon had no expectation of privacy, even though the record was undisputed that Dillon requested and defendants agreed that the conversation would be confidential and defendants even claimed the conversation was privileged.

Dillon is unsure what SLAAP protection recording a telephone conversation without permission of all participants could actually fall under. Nevertheless, if the First Amendment test in *Snyder* were used in evaluating the defendants' claims of protected conduct in this case, there still can be no justification for granting the defendants SLAAP protection. Using the *Snyder* "public concern" test here, however, would require that the Court focus on the activity and conduct of the defendants. The Court should look at what the Defendants did, and what the defendants said, and the activities for which the defendants seek SLAAP protection, as opposed to focusing on Dillon's actions.

As per the First Amendment Public Concern test looking at all the circumstances, no actions of the defendants related to a matter of political, social or other concern to the community, other than such actions could change how lawyers communicate with themselves and with witnesses, if such conduct is allowed by this Court.

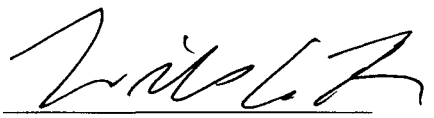
First Amendment protections are broad, and the SLAAP statute is to be liberally construed, but there is no justification for using those vehicles to decriminalize a statute that the legislature of this state has deemed important. The defendants blatantly lied to Dillon on the phone and failed to tell him that they had situated a Court Reporter in their office, who was tasked with taking a verbatim recording of their

conversation. They did so even after assuring Mr. Dillon the conversation would remain private and confidential. The defendants cannot set forth any basis for the trial court finding that their recording of Mr. Dillon's phone call with them should be subject to SLAAP protection. Using the time, place and manner assessments of the *Snyder* Court would not further their cause.

CONCLUSION

Even under the broadest approach to the First Amendment, there is no test this Court should use or adopt that would allow the Court to decriminalize the Privacy Act. Consequently, whether the Court adopts the test the Newspapers encourage or not, this Court still must find that the trial court erred in providing the defendants SLAAP protection for their activities.

Dated and Signed this 1st day of November, 2013 at Bellevue, Washington.



William A. Keller, WSBA #29361
Dennis M. Moran, WSBA #19999
Attorneys for Jason Dillon

Certificate of Service

I declare and certify under penalty of perjury of Washington Law that on this day I served a copy of the foregoing document on the counsel of record identified below in the manner specified below. Dated 11/1/13 at Bellevue, Washington by: /s/ Kami Mejia

Katherine George Harrison-Benis LLP 2101 Fourth Ave, Suite 1900 Seattle, WA 98121 kgeorge@hbslegal.com	__ by ECF __ by email __ by fax x_ by mail __ by hand delivery __ by overnight delivery
Jofrey Malcolm McWilliam Byrnes Keller Cromwell LLP 1000 2nd Ave Fl 38 Seattle, WA 98104 jmcwilliam@byrneskeller.com	__ by ECF __ by email __ by fax _x by mail __ by hand delivery __ by overnight delivery
Ralph E. Cromwell, Jr. Byrnes Keller Cromwell LLP 1000 2nd Ave Fl 38 Seattle, WA 98104 rcromwell@byrneskeller.com	__ by ECF __ by email __ by fax _x by mail __ by hand delivery __ by overnight delivery