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No. 87745-9

Thurston County Superior Court No. 11-2-01925-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE,

Appellants/Plaintiffs Below,

v.

GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICAN LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Respondents/Defendants Below.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents fundamentally mischaracterize the basis of Appellants' claims and ignore key facts. This case does not arise from Respondents' constitutionally protected "speech," but rather their violation of the Co-op's governing rules, principles, and procedures. Put differently, Appellants' claims are directed not at the way the Co-op's Board members voted (i.e., in favor of boycotting Israeli goods), but at the fact that the Board acted in derogation of its own authority. Appellants have consistently expressed their willingness to accept the Israeli boycott—so long as it is enacted legitimately. Only because Respondents exceeded the limits of their authority and violated longstanding Co-op policy were Appellants forced to file this derivative action.

By enacting the Co-op's Boycott Policy ("Policy" or "Boycott Policy") in 1993—a Policy it has since tried (but failed) to amend—the Board divested itself of the power to enact boycotts. Instead, through the Policy, it vested such power in the Co-op staff. Two key features of the Policy are that the Co-op shall participate only in "nationally recognized" boycotts—and thus be a "follower" and not a "leader"—and that the Co-op staff must approve boycotts by consensus. In direct violation of both rules and therefore "unlawfully," the Board voted on whether to join an international movement to boycott Israeli goods. At that point, ***before they even cast their votes***, the Board members acted unlawfully. The vote was unlawful not because of the viewpoint it expressed, but because it was the

culmination of an improper process. The Board's participation in that process, including its subsequent refusal to take remedial action, is the source of this derivative lawsuit.

The anti-SLAPP Act was not designed, and must not be read, to preclude legitimate efforts to curb abuses of power by corporate directors and officers—a right so important that it is expressly recognized by statute and court rule.[1] Moreover, courts must apply anti-SLAPP acts cautiously, as the extraordinary remedy they allow deprives litigants of access to the judicial system and chills the constitutional right to petition. That is why anti-SLAPP movants must demonstrate that the conduct in issue involves the "'heartland' of First Amendment activities."[2] It is also why courts must accept as true all evidence favoring the non-moving party. Appellants were afforded none of these protections.

As for the constitutionality of the anti-SLAPP Act, Respondents primarily argue that other states have upheld their versions of the statute. But not one of those state's statutes is as onerous as Washington's. That Respondents utterly fail to address the impact on Appellants of the Washington Act's uniquely elevated burdens, without allowing Appellants access to ***any*** discovery, speaks volumes—as does their misguided reliance on flatly inapposite TEDRA precedent.

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[1] RCW 23B.07.400; RCW 24.03.040; CR 23.1; CR 23.2.

[2] *Jones v. City of Yakima Police Dept.*, 2012 WL 1899228, at *3 (E.D. Wash. May 24, 2012).

II. REPLY RE STATEMENT OF THE CASE

Respondents' statement of facts consists of argument about (1) the meaning and scope of Bylaws that no Board member ever mentioned in connection with the Israel boycott vote; and (2) the Board's actions after that vote. But the Board's lawyers' development of an after-the-fact, Bylaw-based defense does not transform the Board's actions into "lawful" constitutional speech. The same is true of the Board's post-vote activities. Respondents' Statement of the Case is thus largely irrelevant.

A. The Board's Vote Was Unlawful Because Only the Co-op Staff Has Authority to Enact Boycotts

To invoke the anti-SLAPP Act, Respondents must demonstrate that their conduct was both "lawful" and taken 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)(e), (4)(b).[3] The Board's vote on the Israel boycott was not lawful, however, because the Boycott Policy plainly gives the staff—not the Board—authority to determine whether the Co-op will follow any particular boycott. CP 106-07. Nowhere in the Policy, the Bylaws, or any other Co-op document is there an indication that the Board intended to retain power with respect to this issue. Indeed,

[3] Respondents claim Appellants did not assert "unlawful conduct" in the trial court. They are wrong. The first paragraph of Appellants' argument opposing Respondents' anti-SLAPP motion states: "Defendants admit that the anti-SLAPP Statute ... protects lawful conduct....Here, the Board's conduct was ***not lawful***. The anti-SLAPP statute was designed to stop meritless suits targeted to prevent speech, ***not suits designed to hold Board members accountable for failing to follow the rules***." CP 317 (emphasis added).

since it unlawfully enacted the Israel boycott, the Board has repeatedly tried to amend the Boycott Policy to (among other things) clarify "the role of the board of directors." CP 928 & n.3 (citing CP 837, 849, 862-63, 872, 884, 893-94, 902, 906). It never succeeded. *Id.*

Mr. Lowsky testified that "the Board's involvement ... was not consistent with either prior boycotts or my understanding of the Boycott Policy." CP 351 ¶ 4.[4] But rather than accepting that testimony (or the Trinin and Breuer declarations[5]), the trial court credited only the declaration of Respondent Mr. Levine. That was error, because a court deciding an anti-SLAPP motion must accept as true all evidence favoring the non-moving party, and cannot weigh credibility or compare the weight of the evidence.[6] Tellingly, Respondents make no mention of the Lowsky declaration. Rather than addressing all evidence before the trial court, Respondents try to justify their conduct and establish its lawfulness by mischaracterizing the situation after the staff voted on the proposed Israel boycott as a "*deadlock*"—i.e., an "organizational conflict" requiring Board resolution. Resp. Br. at 3-4. That characterization fails for several reasons.

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[4] Respondents' argument that "Appellants failed to present any admissible evidence to support their interpretation" of the Boycott Policy, like the trial court's oral and written rulings, ignores Mr. Lowsky's declaration. Resp. Br. at 24.

[5] The trial court erroneously excluded the testimony of Ms. Susan Trinin and Mr. Tibor Breuer as hearsay. CP 988; *see* Sec.III(G) *infra.*

[6] *Fielder v. Sterling Park Homeowners Ass'n,* 2012 WL 6114839, at *9 (W.D. Wash. Dec. 10, 2012); *Sycamore Ridge Apts., LLC v. Naumann,* 157 Cal. App. 4th 1385, 69 Cal. Rptr. 3d 561, 571 (2007); *see also* Sec.III(C) *infra.*

First, when the staff failed to approve the Israel boycott by consensus, it was following established Co-op procedure. As Mr. Lowsky confirmed in sworn testimony:

> As presented, Co-op staff had three options: (a) "consent"; (b) "stand aside"; or (c) "take to meeting."
>
> 5. After at least one Co-op staff member checked "take to meeting," the proposal was sent to Co-op staff work group meetings (how and where the collective makes decisions). There were approximately 10-15 Co-op staff members at each meeting, as well as the staff representative to the Board. The meetings took place in or around the beginning of July 2010. Among the staff members at the meetings, there were a number of "firm blocks," meaning these members were clearly against the Israel boycott and divestment proposal. ***Because it only takes one Co-op staff member to block consensus, it was clear at those meetings that the Co-op staff did not support the Israel boycott and divestment proposal.***

CP 351-52 ¶¶ 4-5 (emphasis added). The process the staff followed is consistent with the Co-op's governing principle of consensus-based decision-making, espoused in the very Bylaws on which Respondents rely:

- "The purpose of the Cooperative is to contribute to the health and well-being of people ... through a ... collectively managed, not-for-profit cooperative organization that relies on consensus decision making."
- "Our goals are to ... 5. Provide information about collective process and consensus decision making...."

CP 56 ¶ 2.[7]

[7] The foregoing should have led the trial court to infer that the Board exceeded its authority by intervening in the Israel boycott. Instead, the court did the opposite by ***inferring*** that "[t]he scheme was for staff consideration [of a proposed boycott] first ... and if necessary, followed by Board consideration in resolution of organizational conflicts[.]" CP 1116. The Policy and Bylaws simply do not support that inference. And even if the record otherwise did so (it does not), the court erred by drawing an inference in Respondents' favor.

Second, the fact that the Board engaged in a protracted (but failed) effort to amend the Boycott Policy, ***after*** its unlawful enactment of the Israel boycott, belies Respondents' claim of a staff "deadlock" warranting Board intervention. *See* CP 928 & n.3 (citing CP 837, 849, 862-63, 872, 884, 893-94, 902, 906). Had the Board acted properly and within the limits of authority, there would be no need to amend the Policy. That the Board sought amendment reinforces that the Policy, as enacted in 1993 and in force at all relevant times, vests authority to enact boycotts exclusively with the Co-op staff. Respondents conveniently ignore these failed efforts, and thus minimize facts that should have led to denial of their motion. For its part, the trial court erroneously drew inferences on this issue in favor of Respondents, rather than Appellants.

Third, Respondents' own evidence undermines their position. The examples Respondents cite of prior "organizational conflicts" resolved by the Board demonstrate why the Co-op's failure to enact the Israel boycott did not qualify as such. *See* CP 41-43 (referencing impasses over labor-related matters and operational issues).[8] These were situations in which the issues being considered by the staff were not—like boycotting—the subject of an explicit policy requiring staff consensus for adoption.

In sum, the staff considered the boycott proposal and did not

[8] As a separate matter, the Board minutes cited in Mr. Levine's testimony regarding the prior "organizational conflicts" do not support his claim the Board intervened to resolve staff deadlock. *See* CP 42-43 (citing CP 63-83).

approve it. Under the Boycott Policy—which requires (1) that the staff approve boycotts "***by consensus***"; and (2) notice to a boycotted entity "[i]f the ***staff*** decides to honor a boycott"—that put an end to the matter. CP 106-07 (emphasis added). There was no "deadlock" or "organizational conflict" warranting Board intervention.[9]

Under Respondents' after-the-fact rationalization, if the staff's blocking of a boycott proposal constituted an "organizational conflict," the Boycott Policy's staff consensus language would have no meaning. No matter how many staff members objected to a proposal—whether 1%, 49%, or 90%—the Board could disregard their views and substitute its own judgment. That is not what the Boycott Policy says, nor what it was intended to achieve.[10] CP 106-07. Nor is such a result consistent with the Co-op's well-documented commitment to decision-making by consensus (i.e., universal agreement). Moreover, in no uncertain terms, the Lowsky, Breuer, and Trinin declarations negate Respondents' proposition.

B. The Vote Was Unlawful Because the Board Never Addressed the "National Recognition" Requirement

In addition to the its improper involvement with a boycott proposal

[9] Even assuming *arguendo* there was an organizational conflict, the Board failed—as the Bylaws require—to exhaust "all other avenues of resolution." CP 987-89; *see* CP 58 ¶ 13(16). For example, the Board could have asked (though not instructed) the staff to consider a modified boycott.

[10] Respondents virtually concede their position is implausible by arguing that the Policy permits the Board to enact a boycott "without ***any*** staff input[.]" Resp. Br. at 19. Under this interpretation, the Policy's mandate that the "staff [] will decide by consensus" whether to honor a boycott means nothing.

that staff had refused to enact, the Board failed to consider whether the Israel boycott was in fact "nationally recognized." CP 116-19, 122-23. This was a fatal omission, as the Boycott Policy mandates such a finding and it is unrebutted that the Israel boycott proposal was presented to staff "as an opportunity to be the ***first*** grocery store to publicly recognize a boycott and/or divestment from Israel." CP 352 ¶ 5.[11] Obviously, to the extent boycott advocates lobbied the staff to make the Co-op a national leader, their efforts were wholly inconsistent with the Co-op's policy of being a boycott follower. *See* Appellants' Br. at 14 & n.10.

Had the Board carried out the Boycott Policy's required analysis, it would have concluded that the Israel boycott lacked national recognition. As Mr. Haber testified (in a declaration Respondents fail to mention):

> 5. No matter where they have been pursued, efforts to organize boycotts of and divestment from Israel have failed in the United States. In short, policies boycotting and/or divesting from the State of Israel have never been "nationally recognized" in this country. Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them.
>
> 6. Similarly, despite numerous campaigns and a host of misrepresentations to the contrary, there is not one college or university in the country that has adopted such policies....Nor was any major religious organization in the United States taking such a position by July 2010, and none has done so since....Divest-from-Israel campaigns have found no more success in the private sector, where retailers

[11] Ms. Trinin and Mr. Breuer testified similarly, but the trial court erroneously struck their declarations. *See* n.5 *supra*; Sec.III(G), *infra*.

> ... and other businesses have repeatedly refused to endorse a boycott of and/or divestment from Israel.

CP 348 ¶¶ 5-6.

Instead of confronting the evidence of no "nationally recognized" boycott of Israel, Respondents ask this Court to accept the trial court's conclusion that a national "movement" is equivalent to national "recognition." CP 1114. But there is a critical difference between supporting the idea of ending Israel's occupation of the West Bank and Gaza Strip and actually boycotting Israeli goods. Respondents misleadingly ignore that difference. Thus they imply, for example, that evidence of "380 state-level member organizations of the U.S. Campaign to End the Israeli Occupation," *see* Resp. Br. at 25-26, somehow demonstrates support for a boycott. But that evidence contains no mention of a boycott. CP 470, 517-44, 478-516. Nor do Respondents' numerous references to ***inter***national sources further their cause. *See, e.g.,* Resp. Br. at 26, n.20. If the framers of the Boycott Policy intended that to be the standard, they would have used the phrase "internationally recognized." They did not.

In short, in addition to unlawfully intervening in the boycott process, the Board failed to analyze the key threshold question of whether the boycott is nationally recognized. Had it done so, the Board would have determined that the requisite national recognition did not exist and thus its governing rules disallowed the proposed boycott of Israeli products.

III. REPLY RE ARGUMENT

A. Standard of Review

Respondents concede that de novo review applies to the trial court's grant of the anti-SLAPP motion, summary procedures, and decisions based entirely on declarations and documentary evidence. They nevertheless urge the Court to apply an abuse of discretion standard to the trial court's evidentiary rulings, but do so without citing apposite authority. Resp. Br. at 9. The rule is that when, as here, the challenged evidence consists entirely of declarations, review is de novo. *E.g., Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (review of admissibility of evidence in summary judgment proceeding is de novo).

Equally unavailing is Respondents' claim that the trial court's fee and sanctions rulings are reviewed for an abuse of discretion. The amount of an award is reviewed under that standard, but whether and to what extent applicable law provides a right to recover fees (or sanctions) is reviewed de novo. *E.g., In re Wash. Builders Benefit Trust,* 173 Wn. App. 34, 83, 293 P.3d 1206 (2013). Those are the critical questions here.

As for Respondents' one-sentence argument for applying an abuse of discretion standard to the trial court's refusal to allow any discovery, it, too, is unpersuasive. Unlike a party who seeks a CR 26(c) protective order (as in the case Respondents cite[12]), Appellants sought to ***initiate*** limited

[12] *Rhinehart v. Seattle Times Co.,* 98 Wn.2d 226, 654 P.2d 673 (1982).

discovery under the RCW 4.24.525(5)(c) "good cause" standard. In rejecting that reasonable request, the trial court resolved a "mixed question of fact and law" that, under Washington law, is subject to de novo review. *State v. Dearborn*, 125 Wn.2d 173, 178-79, 883 P.2d 303 (1994) ("[B]ecause the determination of good cause...is a mixed question of fact and law, centered on the meaning of the legal standard of good cause, we review the trial court's ruling on the issue de novo."). Appellants' cross-motion (and CR 59 motion) for discovery were "centered on the meaning of the legal standard of good cause" within the context of the anti-SLAPP Act. *See* CP 362-66, 926-33, 1162-63. That is a mixed question of law and fact meriting de novo review. *Dearborn*, 125 Wn.2d at 178-79.

B. Reversal Is Required Because the Anti-SLAPP Statute Does Not Apply to This Suit

This case is about corporate misconduct, not speech.[13] Appellants seek to make the Board accountable for its prior misconduct and keep it from continuing to violate Co-op rules, principles, and procedures. Appellants' derivative claims thus are directed, ***on behalf of the Co-op***, at Respondents' failure to abide by the Boycott Policy and other governing rules of the organization. As for the Respondents themselves, Appellants seek no restriction on their speech or speech-related activities. If an injunction issues, Respondents would remain free to say whatever they

[13] Respondents' unlawful acts are described in Sec.II, herein, and in Appellants' opening brief. Other than as discussed in Sec.III(D), *infra,* Respondents' failure to satisfy the statute's lawfulness requirement is not repeated here.

wish about Israel and the Middle East. What they will be prohibited from doing, and what they should have not done previously, is force the Co-op to speak ***for them*** by violating the Boycott Policy's staff consensus and the "nationally recognized boycott" requirements.

The gravamen of Appellants' claims is compliance with corporate procedures, not the "heartland" of protected speech. *Fielder v. Sterling Park Homeowners Ass'n,* 2012 WL 6114839, at *8 (W.D. Wash. Dec. 10, 2012); *Jones v. City of Yakima Police Dept.,* 2012 WL 1899228, at *3 (E.D. Wash. May 24, 2012). Thus, as Appellants argue in their opening brief (pp. 25-27), their claims are not subject to the anti-SLAPP Act.

Respondents do not attempt to explain how the actual conduct in issue falls within the "heartland" of protected speech, and ignore that anti-SLAPP acts do not apply when "a broad and amorphous" public concern is the only link to the parties' dispute. *E.g., Weinberg v. Feisel,* 110 Cal. App. 4th 1122, 2 Cal. Rptr. 3d 385, 392 (2003). Instead Respondents try to justify the trial court's "speech" ruling with sweeping references to the First Continental Congress, Dr. Martin Luther King, Jr., America's boycotting tradition, and political causes advanced by that form of protest. Resp. Br. at 13-17. Such arguments have nothing to do with the facts of this case. This case is directed not at Respondents' right to boycott Israel, but at their decision to break their organization's rules in order to force the organization to which Appellants belong to boycott Israel for them.[14] The

[14] Likewise, the cases to which Respondents cite regarding boycotts are

anti-SLAPP Act was never intended, and should not be interpreted, to bar an organization's members from exercising their constitutional and statutory right to remedy such coercive and unlawful conduct.[15]

In sum, Appellants' suit does not involve "speech," and Respondents' conduct was not "lawful." The anti-SLAPP Act does not apply and the trial court committed reversible error in holding otherwise.

C. Reversal Is Required Because the Trial Court Failed to Draw Inferences in Appellants' Favor

Appellants have established that "courts ruling on anti-SLAPP motions accept as true, all evidence favoring the non-moving party." Appellants' Br. at 22-25. Respondents do not argue for a different rule.[16] The record leaves no doubt that the trial court did not "view the evidence in the light most favorable to" Appellants. Instead, it did the opposite. Under the proper standard, Mr. Lowsky's declaration alone—not to mention those of Mr. Haber (admitted), Mr. Breuer, and Ms. Trinin (both improperly excluded)—was enough to defeat Respondents' motion. But the trial court did not mention those witnesses in its oral ruling or discuss

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readily distinguishable. *N. Am. Expositions Co. Ltd. P'ship v. Corcoran*, 452 Mass. 852, 898 N.E.2d 831 (2009) (suit about statements to legislatively-created foundation members involved public petitioning activity); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994) (claim that alleged memorandum promoting boycott was defamatory was within anti-SLAPP act).

[15] U.S. CONST. AMEND. I; WASH. CONST. ART. I §4; RCW 23B.07.400; RCW 24.03.040; CR 23.1; CR 23.2.

[16] Indeed, Respondents went so far as to adopt the standard themselves when they accused Appellants of "claim[ing] without explanation that the court drew 'inferences in the moving party's favor.'" Resp. Br. at 25.

their testimony in its skeletal written order. CP 1091-1126, 1194-96. Because the trial court rejected Appellants' evidence in favor of Respondents', it committed reversible error.

D. Corporate Legal Principles Do Not Insulate Respondents

Respondents argue that Appellants cannot meet the statutory burden of proof because Respondents are insulated from liability under (1) the "business judgment" rule; and (2) RCW 4.24.264. Respondents thus claim they "simply made a discretionary decision within [their] powers and duties." Resp. Br. at 23. But Respondents did not use "proper care, skill and diligence," and their misconduct was not "discretionary."

1. The Business Judgment Rule Does Not Apply

To avoid liability under the "business judgment rule" ("BJR"), the decision to undertake the transaction at issue must be "within the power of the corporation ***and the authority of management***." *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003) (emphasis added); *accord McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 887, 167 P.3d 610 (2007); *see also Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 914-15 (Del. Ch. 2007) (backdating stock options was *ultra vires,* not a valid business judgment). In other words, the BJR protects corporate managers from individual liability when they exercise poor judgment *while following the rules*. But such managers may not hide behind the BJR when they act without authority. Nor may they invoke it to avoid an injunction—like the one sought here—barring future misconduct.

The BJR also requires "[r]easonable care.... [G]ood faith is insufficient because a director must also act with such care as a reasonably prudent person in a like position would use under similar circumstances." *Riss v. Angel*, 131 Wn.2d 612, 632-33, 934 P.2d 669 (1997); *accord Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 834-35, 786 P.2d 285 (1990) (BJR does not protect defendant who fails to "exercise proper care, skill, and diligence").

Here, Respondents flagrantly violated a policy the Board itself created, and thus exceeded the limits of their authority. They intervened in a process delegated exclusively to Co-op staff and effectively vetoed the staff's decision not to adopt the Israel boycott proposal. They did so (contrary to the revisionist history in certain of Respondents' declarations) without considering whether there was a "nationally recognized" boycott, and instead tried to have the Co-op be the first grocery store in the United States to engage in such a boycott. CP 116-19, 122-23, 351-52 ¶ 5.

The Board's decision was outside "the authority of management," and the Board failed to act with reasonable care. Thus the BJR offers Respondents no protection.[17] *Scott*, 148 Wn.2d at 709.

2. Respondents Did Not Make a "Discretionary" Decision Within Their Official Capacity; They Broke the Rules

RCW 4.24.264 insulates nonprofit directors and officers from

[17] At a minimum, the record—if properly viewed in the light most favorable to Appellants—should have led the trial court to draw these inferences.

liability "for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence."[18] At the same time, however, it states: "Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or the corporation's members." *Id.*

The gravamen of Appellants' complaint is that Respondents engaged in unlawful conduct by breaking "hard-and-fast" rules set forth in the Boycott Policy, and that their decision to override the staff and conduct a vote on the Israel boycott proposal was expressly prohibited by that same Policy (as well as by the Co-op's consensus-based decision-making model). As a result, Respondents' conduct falls outside the parameters of RCW 4.24.264 and Appellants will not need to prove Respondents were "grossly negligent."

3. The *Ultra Vires* Doctrine Applies to This Case

Respondents wrongly assert that Appellants abandoned their *ultra vires* argument. *Ultra vires* conduct is unauthorized and unlawful conduct of the sort Appellants addressed at length in their opening brief. That Appellants did not expressly label their arguments with the Latin term

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[18] "'Discretionary' is ... defined as 'involving an exercise or judgment and choice, ***not an implementation of a hard-and-fast rule***,' and 'discretion' as 'the latitude of decision within which a court or judge decides questions arising in a particular case ***not expressly controlled by fixed rules of law*** according to the circumstances and according to the judgment of the court or judge[.]'" *State v. Osman,* 168 Wn.2d 632, 639-40, 229 P.3d 729 (2010) (citations omitted).

does not mean they abandoned its concepts. Moreover, Respondents misstate the doctrine's scope. It is hornbook law that:

> [A]n act can be characterized as ultra vires in the broad sense, not because the corporation lacked the power to perform it, but for want of power in its agents or officers, because mere formalities which the law requires were not observed, or because the act is an improper use of one of the corporation's enumerated powers...

18B AM. JUR. 2D *Corporations* § 1735 (2013). Such unauthorized "*ultra vires*" conduct includes situations where, as here, "the body has jurisdiction of the subject-matter, but, in the execution of its authority, trespasses upon the rights of others." *Wendel v. Spokane Cnty.*, 27 Wash. 121, 123-24, 67 P. 576 (1902); *accord Colley v. Chowchilla Nat'l Bank*, 200 Cal. 760, 255 P. 188, 191 (1927) (act may be termed *ultra vires* "with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation").

Thus while (as Respondents argue) transactions may be *ultra vires* because the entity had no authority to enter into them, transactions may also be *ultra vires* because the entity executed its authority in an irregular or defective way. *Failor's Pharmacy v. DSHS*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994) (even if contract is within agency's "substantive authority, failure to comply with statutorily mandated procedures is ultra vires"); *Chem. Bank v. WPPSS*, 102 Wn.2d 874, 911, 691 P.2d 524 (1984)

(*ultra vires* may be procedural or substantive); *Haslund v. Seattle*, 86 Wn.2d 607, 610, 622, 547 P.2d 1221 (1976) (same).

In sum, under the *ultra vires* doctrine—as well as for the simple reason that Respondents' conduct was unlawful—Appellants met their statutory burden by establishing a probability of prevailing on their claims.

E. Respondents' Constitutional Arguments Fail

Washington's anti-SLAPP Act has been the subject of multiple constitutional challenges. Washington courts have not as yet addressed those challenges, as they have resolved each case on other grounds. The Court could do that here for any of the reasons advanced by Appellants, or by finding RCW 4.24.525 unconstitutional as applied (an argument Respondents largely ignore). But Appellants urge the Court to address the constitutionality of RCW 4.24.525 and to declare it unconstitutional for the reasons stated in their opening brief and herein.

1. Rulings on Foreign Anti-SLAPP Acts Are Inapposite

Respondents try to demonstrate that RCW 4.24.525 is constitutional by arguing that other courts (particularly California's) have upheld foreign anti-SLAPP statutes. Resp. Br. at 27. But that ignores a critical distinction; namely, that Washington's statute puts a far greater burden on plaintiffs than does any other state's, including California's.

In Washington, if the movant establishes it engaged in lawful conduct furthering the constitutional right of free speech, "the burden shifts to the responding party to establish by clear and convincing

evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). Whatever that means, and it is sufficiently unclear that Appellants challenge the standard as unconstitutionally vague, Washington's standard is much greater than California's "minimal merit" standard. *Compare Jones,* 2012 WL 1899228, at *3 (noting Washington's "radically" higher burden); *with Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010) (noting California's "minimal merit" standard).[19]

Indeed, Appellants found only one other anti-SLAPP statute (Minnesota's) that imposes a similarly high standard of proof. However, that statute's scope is so narrow that it is not comparable to RCW 4.24.525. Minnesota's statute applies only to claims that "materially relate[] to an act ... that involves public participation," and defines "public participation" as "speech or lawful conduct ... genuinely aimed in whole or in part at procuring favorable [American] ***government action.***" Minn. Stat. §§ 554.01, 554.02 (emphasis added). Appellants' suit—pertaining to conduct Respondents wrongly claim to be lawful "free speech [on] an issue of public concern"—would not be subject to Minnesota's statute.

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[19] Respondents assert for the first time that Appellants were only required to establish a "prima facie" case to meet their burden. Resp. Br. at 34. That position is difficult to square with the statute or *Jones*. 2012 WL 1899228, at *3 ("The significance of [Washington's] heightened evidentiary burden cannot be overstated."). It is also not the burden imposed by the trial court. *See* CP 979, 984-85, 989-90, 992, 995. If true, however, Appellants clearly met the test. *See Nopson v. City of Seattle*, 33 Wn.2d 772, 795-96, 207 P.2d 674 (1949) (*prima facie* case is one where the evidence is sufficient to justify, but not to compel, an inference of liability).

Even more important, though, is that notwithstanding the narrow scope of their state's anti-SLAPP law, Minnesota courts have taken additional steps to ensure that it is applied constitutionally. Among other things, the courts have limited the statute's reach by interpreting its clear and convincing evidence burden as meaning clear and convincing evidence *in light of* Rule 56 (or Rule 12, if only pleadings are at issue) standards for granting judgment. *Nexus v. Swift,* 785 N.W.2d 771, 781-82 (Minn. App. 2010). Thus the court must view the evidence in the light most favorable to the nonmoving party and draw inferences in his or her favor. *Id.* The trial court here took the opposite approach, which at a minimum makes RCW 4.24.525 unconstitutional as applied.

2. *Putman v. Wenatchee Medical Center*[20] Cannot Be Limited to Its Facts

Respondents address Appellants' multiple *Putnam*-based challenges to the constitutionality of RCW 4.24.525 by arguing that *Putman* is inapposite because (1) the statute at issue there "required plaintiffs to submit a medical expert's certificate of merit *before* filing a malpractice lawsuit," and thus improperly imposed "preconditions to filing"; and (2) "the statute there did not include a good cause requirement to obtain discovery[.]" Resp. Br. at 31-32. Respondents mischaracterize the statute in issue in *Putnam.* Under RCW 7.70.150(4), plaintiffs could move for additional time "to file the certificate of merit, not to exceed

[20] 166 Wn.2d 974, 216 P.3d 374 (2009).

ninety days, if the court finds there is good cause for the extension." In other words, *Putman* declared invalid a statute that excused preconditions and allowed plaintiffs 90 days of complete discovery upon a showing of good cause after they filed their complaint. That 90-day period is more than sufficient to complete written discovery and conduct depositions. *See* CR 30-31, 33-34, 36.[21] Respondents' efforts to distinguish *Putman* lack merit, and the constitutional bases for invalidating RCW 7.70.150 apply with equal vigor to the anti-SLAPP Act.

3. Respondents' TEDRA Comparison Fails

Respondents also argue that the anti-SLAPP act's restrictions on discovery are constitutional because a similar restriction in a TEDRA statute was upheld. Resp. Br. at 33; *see* RCW 11.96A.115. That argument borders on frivolous. A TEDRA action "is a special proceeding" for which the Civil Rules have only limited application. RCW 11.96A.090(1), (4); CR 81(a). TEDRA precedent thus is flatly inapposite. Indeed, the defendant in *Putman* argued (unsuccessfully) that the certificate of merit requirement did not violate the separation of powers doctrine because medical malpractice cases are, like TEDRA actions, "special proceedings." This Court disagreed:

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[21] As a separate but related matter, RCW 7.70.150(1) provided another exception—one that did not require a showing of good cause—to the pre-filing deadline for a certificate of merit: "If the action is commenced within forty-five days prior to the expiration of the applicable statute of limitations, the plaintiff must file the certificate of merit no later than forty-five days after commencing the action." A plaintiff in this particular position was free to conduct all manner of discovery before having to file his certificate.

> [Defendant's] argument is unsustainable because it places no limits on the ability of the legislature to determine procedural rules. Under this standard, the legislature could reclassify any common law action as a special proceeding by passing statutes regulating its procedures, thereby eroding this court's power to determine its own court rules.

Putnam, 166 Wn.2d at 981. This case, of course, is neither a TEDRA action nor any other kind of "special proceeding." It is therefore not exempt from application of the Civil Rules, and the anti-SLAPP Act is unconstitutional insofar as it conflicts with those Rules.[22]

F. Appellants Established "Good Cause" for Discovery

The trial court also committed reversible error by denying Appellants any opportunity to conduct discovery. Its denial was based on three inaccurate conclusions: (1) Appellants' requests came "at the end of the process"; (2) their discovery requests were "not focused;" and (3) they had a duty to acquire all necessary evidence before filing suit. CP 963.

Appellants served their initial discovery requests on Respondents with the summons and complaint, *see* CP 566 ¶ 3; and filed their cross-motion with their opposition to Respondents' anti-SLAPP motion, CP 362, 378-405. That hardly qualifies as dilatory.

Nor did Appellants' discovery requests lack focus. The cross-motion significantly carved back Appellants' initial requests and sought discovery from only three Respondents. CP 362-66, 926-33. Critically,

[22] TEDRA is also readily distinguishable because it does not impose a heightened burden of proof on plaintiffs, as the anti-SLAPP Act does.

each of those three Respondents submitted extensive declarations supporting Respondents' anti-SLAPP motion—declarations upon which the trial court relied (wrongly) in granting Respondents' motion. CP 39-244, 466-545. Equally critically, in preparing those declarations Respondents (and their attorneys) reviewed many thousands of pages of documents in their exclusive possession. CP 948-50, 1045. That Respondents had unlimited opportunity to cherry-pick documents relating to adoption of the Boycott Policy, while Appellants had no opportunity whatsoever (and, contrary to the trial court's admonition, which Appellants had no means of so doing before filing suit), is more than enough to demonstrate "good cause" for allowing discovery. Among other things, Appellants could have obtained information about the Board's intent when it adopted the Boycott Policy—information that could have clearly and convincingly demonstrated the probability that Appellants will prevail on the merits. RCW 4.24.525(4)(b), (5)(c).

Under the circumstances presented, whether reviewed de novo or for a manifest abuse of discretion, the trial court committed reversible error by denying Appellants any discovery before deciding Respondents' anti-SLAPP motion. *See Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (abuse of discretion to deny 56(f) motion as the "primary consideration ... on the motion ... should have been justice").

G. The Court's Erroneous Evidentiary Rulings Warrant Reversal

The trial court's refusal to consider Ms. Trinin and Mr. Breuer's

declarations was also reversible error. Respondents fail to distinguish *Snohomish County Fire Dist. No. 1 v. Snohomish County*, where the Court concluded that statements made by Board members (statements like those at issue here) were not hearsay. 128 Wn. App. 418, 422, n.1, 115 P.3d 1057 (2005), Nor do Respondents address the fact that if the rule applied in the manner they claim, the evidence upon which the trial court relied to rule in their favor was inadmissible as well. The trial court's refusal to consider Appellants' submissions warrants reversal, as Ms. Trinin's and Mr. Breuer's testimony—which the trial court had to accept as true—established that Respondents' conduct was unlawful and thus necessitated denial of Respondents' anti-SLAPP motion. CP 297 ¶ 3, 337 ¶ 4, 988.

H. The Sanction and Fee Award Was Improper

To defend the trial court's assessment of sanctions and fees against Appellants, Respondents resort to mischaracterizing the record. Not only did the trial court refuse to grant Respondents' CR 12(b)(6) motion attacking Appellants' derivative standing, it and Respondents' counsel referenced and acknowledged that standing.[23] Respondents thus cannot avoid application of the derivative action statutes on that basis.

Moreover, Respondents fail to address the fundamental problem with the trial court's award; namely, that it makes nominal plaintiffs liable for hundreds of thousands of dollars in fees and sanctions—a result not

[23] *See* CP 975, 1251; 7/12 RP at 10:23-11:3, 28:1-10.

allowed at all by RCW 24.03.040, and permitted under RCW 23B.07.400(4) only upon entry of a "no reasonable cause" finding. The non-Washington cases Respondents cite do not support that result. Nor does Respondents' argument that because it is "more specific," RCW 4.24.525 supersedes Washington's derivative action statutes. RCW 4.24.525 does not specifically apply to derivative actions, and it certainly does not specifically allow awards to be made against nominal parties. Likewise, Respondents fail to cite a single case that supports imposing multiple statutory penalties in a case involving collective Board action, particularly where there is no evidence that an individual defendant incurred any expense or suffered any other harm. *See, e.g., Walters v. Center Elec., Inc.*, 8 Wn. App. 322, 329, 506 P.2d 883 (1973).

IV. CONCLUSION

For the reasons stated herein and in their opening brief, Appellants respectfully request that the Court grant all the relief they seek, including an award of attorney fees to Appellants.

DATED this 3rd day of July, 2013.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____
Robert M. Sulkin, WSBA No. 15425
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DECLARATION OF SERVICE

On July 3, 2013, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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

DATED this 3rd day of July, 2013, at Seattle, Washington.

Lisa Nelson, LEGAL ASSISTANT

OFFICE RECEPTIONIST, CLERK

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Subject: No. 87745-9 – Kent L. and Linda Davis, et al. v. Grace Cox, et al. – Appellants' Reply Brief

Respectfully submitted in the above-referenced case is Appellants' Reply Brief. The persons submitting this brief are Robert M. Sulkin (WSBA No. 15425), Barbara H. Schuknecht (WSBA No. 14106), and Avi J. Lipman (WSBA No. 37661), whose email addresses are: rsulkin@mcnaul.com, bschuknecht@mcnaul.com, and alipman@mcnaul.com.

We kindly ask the Court and counsel to acknowledge receipt of the attached document.

Thank you,

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