

06868-4

06868-4

NO. 66868-4-I

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

---

UNITED STATES MISSION CORPORATION,

Appellant/Cross-Respondent,

v.

KIRO TV, INC.,

Respondent/Cross-Appellant.

---

ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF  
OF KIRO TV, INC.

---

Bruce E.H. Johnson  
Ambika Kumar Doran  
Davis Wright Tremaine LLP  
Attorneys for Respondent KIRO TV, Inc.

1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
Phone: (206) 622-3150  
Fax: (206) 757-7700

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 OCT 17 PM 2:48

ORIGINAL

DWT 18358068v2 0721090-000058

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ISSUES RELATED TO MISSION’S APPEAL OF DISMISSAL..... 3

III. ASSIGNMENTS OF ERROR..... 3

IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR ON KIRO’S CROSS-APPEAL ..... 3

V. STATEMENT OF THE CASE..... 4

    A. KIRO Broadcast and Posted to Its Website Two Reports About Mission’s Admitted Practice of Requiring Residents, Some Criminals, to Perform Door-to-Door Solicitations. .... 4

    B. Mission Presents Only Conclusory Assertions That the Statements Are False. .... 7

    C. The Trial Court Dismissed the Lawsuit Under CR 12, Denied Mission’s Motion for Reconsideration, and Declined to Impose a \$10,000 Penalty and Award KIRO Its Attorneys’ Fees Under the Anti-SLAPP Statute..... 10

VI. ARGUMENT FOR ANSWERING BRIEF..... 11

    A. The Trial Court Properly Dismissed the Complaint Because It Fails to State a Claim Upon Which Relief Can Be Granted..... 11

    B. The Trial Court Did Not Abuse Its Discretion By Denying Mission’s Motion for Reconsideration. .... 24

VII. ARGUMENT FOR KIRO’S CROSS-APPEAL ..... 30

    A. The Trial Court Erred By Failing to Award KIRO Its Attorneys’ Fees and Impose a \$10,000 Penalty, as the Anti-SLAPP Statute Mandates. .... 33

    B. The Court Should Reject Mission’s Constitutional Challenges to the Anti-SLAPP Statute. .... 39

VIII. ATTORNEYS’ FEES ON APPEAL ..... 46

IX. CONCLUSION..... 47

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.</i> , 114 Wn. App. 371, 57 P.3d 1178 (2002).....	22
<i>Anderson Dev. Co. v. Tobias</i> , 116 P.3d 323 (Utah 2005).....	41
<i>Anderson v. Kitsap Cnty.</i> , 2010 WL 2233679 (W.D. Wash. June 1, 2010).....	12
<i>Arista Records, Inc. v. Flea World, Inc.</i> , 356 F. Supp. 2d 411 (D.N.J. 2005).....	24
<i>Aronson v. Dog Eat Dog Films, Inc.</i> , 738 F. Supp. 2d 1104 (W.D. Wash. 2010).....	31, 35, 36
<i>Auvil v. CBS "60 Minutes,"</i> 67 F.3d 816 (9th Cir. 1995) .....	12, 14
<i>Balzaga v. Fox News Network, LLC</i> , 173 Cal. App. 4th 1325, 93 Cal. Rptr. 3d 782 (2009).....	29
<i>Bank of Am., NT &amp; SA v. PENGWIN</i> , 175 F.3d 1109 (9th Cir. 1999) .....	44
<i>Beaumont v. Basham</i> , 205 S.W.3d 608 (Tex. Ct. App. 2006).....	38
<i>Black v. Nashville Publ'g Co.</i> , 24 Tenn. App. 137, 141 S.W.2d 908 (1939).....	29
<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	37
<i>Bosley Med. Inst., Inc. v. Kremer</i> , 403 F.3d 672 (2005).....	44

<i>Brzak v. United Nations</i> , 597 F.3d 107 (2d Cir. 2010).....	43
<i>Castello v. City of Seattle</i> , 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010) .....	31, 35, 38
<i>Chapin v. Knight-Ridder, Inc.</i> , 993 F.2d 1087 (4th Cir. 1993) .....	15, 20
<i>Chase v. Daily Record, Inc.</i> , 83 Wn.2d 37, 515 P.3d 154 (1973).....	16
<i>City of Seattle v. Montana</i> , 129 Wn.2d 583, 919 P.2d 1218 (1996).....	39
<i>City of Seattle v. Yeager</i> , 67 Wn. App. 41, 834 P.2d 73 (1992).....	39
<i>Clapp v. Olympic View Publ'g Co.</i> , 137 Wn. App. 470, 154 P.3d 230 (2007).....	22
<i>Clardy v. Cowles Publ'g Co.</i> , 81 Wn. App. 53, 912 P.2d 1078 (1996).....	20
<i>Cnty. Newspaper Holdings, Inc. v. King</i> , 299 Ga. App. 267, 682 S.E.2d 346 (2009).....	27
<i>Corey v. Pierce County</i> , 154 Wn. App. 752, 225 P.3d 367 (2010).....	15
<i>Crall v. Gannett Satellite Information Network, Inc.</i> , 1992 WL 400713 (S.D. Ohio Nov. 6, 1992).....	27, 28, 30
<i>Cross v. Guy Gannett Publ'g Co.</i> , 121 A.2d 355 (Me. 1956).....	28
<i>Eastwood v. Nat'l Enquirer, Inc.</i> , 123 F.3d 1249 (9th Cir. 1997) .....	28
<i>Equilon Enters. v. Consumer Cause, Inc.</i> , 29 Cal. 4th 53, 24 Cal. Rptr. 2d 507 (2002).....	41, 42, 45

<i>Flight Options, LLC v. State, Dep't of Revenue,</i> 259 P.3d 234 (Wash. 2011).....	33, 39
<i>Flores v. Emerich &amp; Fike,</i> 385 Fed. Appx. 728, 2010 WL 2640625 (9th Cir. June 29, 2010) .....	43
<i>Ford Motor Co. v. Barrett,</i> 115 Wn.2d 556, 800 P.2d 367 (1990).....	45, 46
<i>Forsher v. Bugliosi,</i> 26 Cal. 3d 792, 163 Cal. Rptr. 628 (1980).....	14, 15
<i>Four Navy Seals v. Associated Press,</i> 413 F. Supp. 2d 1136 (S.D. Cal. 2005).....	43
<i>Gamler v. Akron Beacon Journal,</i> 1995 WL 472176 (N.D. Ohio Feb. 28, 1995).....	27
<i>Garcia v. Wyeth-Ayerst Labs.,</i> 385 F.3d 961 (6th Cir. 2004) .....	41
<i>Gaspar v. Peshastin Hi-Up Growers,</i> 131 Wn. App. 630, 128 P.3d 627 (2006).....	11
<i>Gertz v. Robert Welch, Inc.,</i> 418 U.S. 323 (1974).....	23
<i>Gorman v. Garlock, Inc.,</i> 155 Wn.2d 198, 118 P.3d 311 (2005).....	11
<i>Gossett v. Farmers Ins. Co. of Wash.,</i> 133 Wn.2d 954, 948 P.2d 1264 (1997).....	45
<i>Grays Harbor Energy, LLC v. Grays Harbor Cnty.,</i> 151 Wn. App. 550, 213 P.3d 609 (2009).....	46
<i>Guam Greyhound, Inc. v. Brizill,</i> 2008 WL 4206682 (Guam Sept. 11, 2008).....	40, 41
<i>Gunduz v. New York Post Co.,</i> 590 N.Y.S.2d 494, 188 A.D.2d 294 (N.Y. App. Div. 1992) .....	29

<i>Hackney v. Sunset Beach Invs.</i> , 31 Wn. App. 596, 644 P.2d 138 (1982).....	38
<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.</i> , 160 Wn. App. 728, 253 P.3d 101 (2011).....	38
<i>Herron v. Tribune Publ'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	22
<i>Hometown Props., Inc. v. Fleming</i> , 680 A.2d 56 (R.I. 1996).....	41
<i>Hutchins v. Globe Int'l, Inc.</i> , 1995 WL 704983 (E.D. Wash. Oct. 10, 1995) .....	21
<i>In re Restraint of Addleman</i> , 139 Wn.2d 751, 991 P.2d 1123 (2000).....	40
<i>In re Sego</i> , 82 Wn.2d 736, 513 P.2d 831 (1973).....	37
<i>Kaelin v. Globe Communications Corp.</i> , 162 F.3d 1036 (9th Cir. 1998) .....	29
<i>Kamalian v. Reader's Digest Ass'n</i> , 814 N.Y.S.2d 261, 29 A.D.3d 527 (N.Y. App. Div. 2006) .....	29
<i>Kish v. Ins. Co. of N. Am.</i> , 125 Wn.2d 164, 883 P.2d 308 (1994).....	15
<i>Knievel v. ESPN</i> , 393 F.3d 1068 (9th Cir. 2005) .....	15
<i>Koch v. Goldway</i> , 817 F.2d 507 (9th Cir. 1987) .....	15
<i>Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.</i> , 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995).....	41, 42, 43
<i>Lee v. Columbian, Inc.</i> , 64 Wn. App. 534, 826 P.2d 217 (1991).....	13, 25

<i>Lee v. Pennington</i> , 830 So. 2d 1037 (La. Ct. App. 2002).....	41
<i>Loeb v. New Times Commc'ns Corp.</i> , 497 F. Supp. 85 (S.D.N.Y. 1980) .....	14
<i>Mahnkey v. King</i> , 5 Wn. App. 555, 489 P.2d 361 (1971).....	45
<i>Margoles v. Hubbart</i> , 111 Wn.2d 195, 760 P.2d 324 (1988).....	21
<i>Mark v. Seattle Times</i> , 96 Wn.2d 473, 635 P.2d 1081 (1981).....	12, 21, 46
<i>McNair v. Hearst Corp.</i> , 494 F.2d 1309 (9th Cir. 1974) .....	29, 30
<i>MGIC Indem. Corp. v. Weisman</i> , 803 F.2d 500 (9th Cir. 1986) .....	11
<i>Mohr v. Grant</i> , 153Wn.2d 812, 108 P.3d 768 (2005).....	13
<i>Molin v. The Trentonian</i> , 297 N.J. Super. 153, 687 A.2d 1022 (App. Div. 1997) .....	26, 27
<i>Monterey Plaza Hotel v. Hotel Emps &amp; Rest. Emps. Local 483</i> , 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10 (1999).....	29
<i>New York Studio, Inc. v. Better Bus. Bureau of Alaska, Or., &amp; W. Wash.</i> , 2011 WL 2414452 (W.D. Wash. June 13, 2011).....	13, 35
<i>Nexus v. Swift</i> , 785 N.W.2d 771 (Minn. Ct. App. 2010).....	41
<i>Nygaard, Inc. v. Uusi-Kerttula</i> , 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210 (2008).....	35
<i>Partington v. Bugliosi</i> , 56 F.3d 1147 (9th Cir. 1995) .....	15

<i>Phantom Touring, Inc. v. Affiliated Publ'ns</i> , 953 F.2d 724 (1st Cir. 1992).....	15
<i>Phoenix Trading, Inc. v. Kayser</i> , 2011 WL 3158416 (W.D. Wash. July 25, 2011).....	31, 35
<i>Porous Media Corp. v. Pall Corp.</i> , 173 F.3d 1109 (8th Cir. 1999).....	38
<i>Price v. Stossel</i> , 620 F.3d 992 (9th Cir. 2010).....	30
<i>Purvis v. Bremer's, Inc.</i> , 54 Wn.2d 743, 344 P.2d 705 (1959).....	23
<i>Putman v. Wenatchee Valley Medical Center</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	43, 44
<i>Reardon v. News-Journal Co.</i> , 164 A.2d 263 (Del. 1960).....	28
<i>Reid v. Dalton</i> , 124 Wn. App. 113, 100 P.3d 349 (2004).....	40
<i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council</i> , 146 Wn.2d 370, 46 P.3d 789 (2002).....	42
<i>Ritter v. Hughes Aircraft Co.</i> , 58 F.3d 454 (9th Cir. 1995).....	11
<i>Robel v. Roundup Corp.</i> , 103 Wn. App. 75, 10 P.3d 1104 (2000).....	23
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	11
<i>Rubin v. U.S. News &amp; World Report, Inc.</i> , 271 F.3d 1305 (11th Cir. 2001).....	14
<i>Sandholm v. Kuecker</i> , 405 Ill. App. 3d 835, 942 N.E.2d 544 (2010).....	41

<i>Sch. Dist. Alliance for Adequate Funding of Special Educ. v. State,</i> 170 Wn.2d 599, 244 P.3d 1 (2010).....	39
<i>Schermerhorn v. Rosenberg,</i> 426 N.Y.S.2d 274, 73 A.D.2d 276 (N.Y. App. Div. 1980) .....	29
<i>Schmalenberg v. Tacoma News, Inc.,</i> 87 Wn. App. 579, 943 P.2d 350 (1997).....	20, 21, 26
<i>Scott Fetzer Co. v. Weeks,</i> 114 Wn.2d 109, 786 P.2d 265 (1990).....	45
<i>Seattle Sch. Dist. No. 1 v. Dep’t of Labor &amp; Indus.,</i> 116 Wn.2d 352, 804 P.2d 621 (1991).....	45
<i>Sharbono v. Universal Underwriters Ins. Co.,</i> 139 Wn. App. 383, 161 P.3d 406 (2007).....	47
<i>Sims v. Kiro, Inc.,</i> 20 Wn. App. 229, 580 P.2d 642 (1978).....	26, 29
<i>Sprouse v. Clay Commc’n, Inc.,</i> 158 W. Va. 427, 211 S.E.2d 674 (1975).....	28
<i>Stewart v. Rolling Stone LLC,</i> 181 Cal. App. 4th 664, 105 Cal. Rptr. 3d 98 (2010).....	37
<i>Taskett v. KING Broad. Co.,</i> 86 Wn.2d 439, 546 P.2d 81 (1976).....	29
<i>Wash. State Farm Bureau Fed’n v. Gregoire,</i> 162 Wn.2d 284, 174 P.3d 1142 (2007).....	33
<i>White v. Berkshire-Hathaway, Inc.,</i> 802 N.Y.S.2d 910, 10 Misc.3d 254 (N.Y. Sup. Ct. 2005) .....	29
<i>Wilcox v. Lexington Eye Inst.,</i> 130 Wn. App. 234, 122 P.3d 729 (2005).....	24
<i>Yeakey v. Hearst Commc’ns, Inc.,</i> 156 Wn. App. 787, 234 P.3d 332 (2010).....	12, 13

**STATUTES**

RCW 4.12.090 ..... 46

RCW 4.24.235 ..... 42

RCW 4.24.240 ..... 42

RCW 4.24.250 ..... 42

RCW 4.24.260 ..... 42

RCW 4.24.270 ..... 42

RCW 4.24.300 ..... 42

RCW 4.24.400 ..... 42

RCW 4.24.410 ..... 42

RCW 4.24.510 ..... 35, 45

RCW 4.24.525 ..... passim

RCW 4.24.730 ..... 43

RCW 4.24.740 ..... 43

RCW 4.84.185 ..... 45

RCW 7.04A.140..... 46

RCW 13.36.060 ..... 46

RCW 19.86.090 ..... 45

RCW 19.134.080 ..... 46

RCW 19.142.110 ..... 46

RCW 19.182.150 ..... 46

RCW 26.10.190 ..... 45

**RULES**

CR 8 ..... 44

CR 9 ..... 23

CR 11 ..... 44, 45

CR 12 ..... passim

CR 56 ..... 44

CR 59 ..... 24

ER 404 ..... 38

ER 602 ..... 38

ER 802 ..... 38

MAR 7.3 ..... 46

**OTHER AUTHORITIES**

S.B. 6395, 61st Leg., Reg. Sess. (Wash. 2010) ..... 30, 35, 36

U.S. CONST. amend. I..... 40, 44

WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1983) ..... 25

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)..... 18

## I. INTRODUCTION

Appellant halfway house United States Mission Corporation (“Mission”) undisputedly houses criminals, requires them to perform door-to-door solicitations, and retains much of the proceeds. Respondent KIRO TV, Inc. (“KIRO”) reported these facts in two news broadcasts, prompting King County jail to remove Mission from a referral list and an investigation into Mission’s status as a religious organization. Angry about the negative press, Mission filed a lawsuit.

Mission cannot point to a single statement, taken *verbatim* from either report, that is false. Instead, Mission cherry picks words, some from the broadcasts and others from thin air, to create sentences that entirely change the words’ meaning, and impute to the broadcast non-existent implications. Mission points to just two statements that it claims are literally false, the headline “Jailhouse Used to Find Door-to-Door Solicitors” and the statement that Mission “recruits felons,” but bases even those on strained interpretations of “use” and “recruit.”

The trial court properly dismissed the lawsuit for three reasons. *First*, Washington law does not recognize claims for libel by implication premised on the juxtaposition of statements that the plaintiff does not allege are false, one of four prima facie defamation elements. *Second*, even if the news reports contain false implications, the alleged “thrust”—

that Mission “deliberately” recruits felons to solicit—does not materially alter the reports’ (admittedly true) gist: that Mission houses criminals whom it requires to solicit. *Third*, Mission has made little or no attempt to show the remaining defamation elements, that the statements were unprivileged, made with negligence, or caused it damage.

This is precisely the type of “Strategic Lawsuit Against Public Participation” (SLAPP) the Washington legislature intended to deter when it enacted RCW 4.24.525, which requires plaintiffs targeting free speech to prove a probability of prevailing on the merits by clear and convincing evidence early on. A failure to do so subjects the plaintiff to dismissal of its claims, a \$10,000 penalty, and an attorneys’ fee award.

Although KIRO filed an anti-SLAPP motion, the trial court dismissed Mission’s lawsuit under CR 12(c). The court declined to impose a penalty or fee award to avoid deciding Mission’s arguments that the anti-SLAPP statute is unconstitutional. But the principle requiring courts to avoid constitutional issues does not apply where it is impossible to resolve such an issue without doing so. The trial court could not (and did not) decide whether to impose a penalty or fee award. Because the statute is constitutional and its remedies mandatory, the trial court erred.

## **II. ISSUES RELATED TO MISSION’S APPEAL OF DISMISSAL**

1. Did the trial court err by finding that the complaint fails to state a claim upon which relief can be granted because it does not allege the reports’ statements are false, Washington does not recognize claims for libel by implication through the juxtaposition of truthful statements, the alleged implications do not change the “sting” of the news reports, the statements are absolutely privileged because they fairly abridge public records, and the complaint fails to allege special damages?

2. Did the trial court abuse its discretion by denying Mission’s motion for reconsideration because Mission untimely raised a new legal theory and cannot show the headline “Jailhouse Used to Find Door-to-Door Solicitors” is false and unprivileged?

## **III. ASSIGNMENTS OF ERROR**

1. The trial court erred by failing to award KIRO its reasonable attorneys’ fees and \$10,000 penalty because Washington’s new anti-SLAPP statute, RCW 4.24.525, requires such an award upon dismissal of a lawsuit targeting claims involving the exercise of free speech in connection with an issue of public concern.

## **IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR ON KIRO’S CROSS-APPEAL**

1. Does Washington’s anti-SLAPP statute, which applies to statements reasonably likely to effect consideration of an issue in a

governmental proceeding, those made in a public forum in connection with an issue of public concern, and any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with such an issue, apply to news reports about a halfway house that King County jail listed as a place for released criminals, which admittedly houses criminals and requires residents to solicit door-to-door?

2. Did the trial court err by failing to award KIRO its attorneys' fees and a \$10,000 penalty after it dismissed the complaint under Rule 12(c), or, alternatively, because Mission failed to show a probability of prevailing on the merits by clear and convincing evidence?

3. Does the anti-SLAPP statute violate separation of powers, or the rights of petition, access to the courts, or equal protection?

4. Should this Court award KIRO its attorneys' fees on appeal when the anti-SLAPP statute mandates an award to prevailing parties?

## V. STATEMENT OF THE CASE

### A. **KIRO Broadcast and Posted to Its Website Two Reports About Mission's Admitted Practice of Requiring Residents, Some Criminals, to Perform Door-to-Door Solicitations.**

In February 2010, KIRO aired and posted a report to its website about Mission. *See* CP 2 ¶ 3.1, 7-8; *see also* FE 9A ¶ 3, Ex. A, B. The article discusses Mission's admitted practice of housing recently paroled

criminals, requiring them to perform door-to-door solicitations, and keeping much of the proceeds. *Id.* As it repeatedly notes, the article relies on public records, including King County's listing of Mission as a place to live after leaving jail and records suggesting that numerous criminals, including two sex offenders, registered to live at Mission. FE 9A, Ex. D-P. The first report also features an interview with Mission's "secretary general," Brian Jones. CP 7-8, FE 9A, Ex. A, B. After the broadcast aired, King County took Mission off its referral list. CP 10-12.

Mission does not allege the first article contains any literally false statements. This is not a "misrepresentation of the record," let alone a "blatant" one. App. Br. at 25-26. The first article contains *none* of the statements Mission cites in its complaint: Mission "deliberately recruited violent criminals to solicit donations to the organization," CP 3 ¶ 3.17; Mission "deliberately employs known criminals to solicit donations as a tactic because use of such people to solicit donations is an effective means of threatening people with harm if they do not contribute," *id.* ¶ 3.18; "a significant proportion of [Mission's] solicitors have criminal records as violent felons," CP 4 ¶ 3.19; or Mission "falsely pretends to have a religious mission in order to escape government regulation," *id.* ¶ 3.20. *See* CP 7-8; FE 9A, Ex. A, B.

Nor does the first article contain any of the following statements, as Mission now claims: “Mission deliberately recruited criminals from the county jail to live in their homes and solicit funds for them”; “Mission had a need or desire to employ felons and dangerous criminals, which caused it to act”; “the criminal conviction records of those in the county jail was what caused Mission to ‘seek’ to ‘secure the services’ of felons”; “Mission was engaged in the intentional recruitment of criminals”; “Mission did not just occasionally have a felon going door to door to solicit funds”; “use of criminals was not simply occasional or sporadic”; or Mission “secret[ly]” “wanted to use the jail as a recruitment source.” *See* App. Br. at 27-30.

For the first time in a motion for reconsideration, Mission claimed the headline “Jailhouse Used to Find Door-to-Door Solicitors” was false because Mission did not “use” the jail. CP 409-20; App. Br. at 27-37.

On March 2, 2010, KIRO broadcast and posted to its website a second report. *See* CP 4 ¶¶ 3.21-3.22, 10-12; *see also* FE 9A, Ex. A, C. It contains portions of an interview with a former Mission solicitor and Mr. Jones, and reports on Seattle Police Department visits to Mission. *Id.* Mission claims two statements in the second article are false: Mission “recruits felons,” *id.* ¶ 3.24, and “these individuals were right out of jail,” *id.* ¶ 3.26. App. Br. at 26. The article does not state that “these individuals were right out of jail,” but that “*the kinds of guys coming to*

*your door* are basically *the kind* right out of jail.” See CP 10-12, FE 9A, Ex. A, C (emphasis added).

**B. Mission Presents Only Conclusory Assertions That the Statements Are False.**

Mission has provided no evidence that any statements the reports contained are false. Like the complaint, a declaration by Mr. Jones identifies statements the articles allegedly *imply*. See CP 124-48.

*First*, neither article states that Mission is “not a real church.” CP 124-25 ¶¶ 3-5, 137 ¶ 62. KIRO stated that Mission calls its solicitors “emissaries of Christ,” homeowners whom solicitors visited did not report hearing about religion, Mission is a “self-proclaimed church,” and one former solicitor said “none of it was religious.” CP 7, 10-12. Mission does not allege these statements are false and proclaims itself a church.

*Second*, the reports do not state Mission has a “tactic” or “motive” of “deliberately” recruiting “violent,” “dangerous” felons, Mission “seek[s] out” criminals, or sends “a bevy” of “violent” ones to solicit, CP 129-37 ¶¶ 22, 23, 25, 30, 56, 58, 62. The first article states KIRO went “undercover to reveal [Mission’s] motives and tactics,” Mission houses felons, and residents must solicit. CP 7-8. The second states Mission “recruits felons, *some* with violent criminal histories” and is “sending a bevy of *historically* violent felons, burglars, and robbers to your house.”

CP 10-12 (emphasis added). Neither states the felons were violent, or that Mission intentionally recruited them. Mission does not dispute the existence of the jail referral list, or that some criminals with violent records lived there. Mr. Jones’s interview states that Mission “might take” “[p]eople convicted of assault or another violent crime.” CP 7-8.

**Third**, the articles do not state that Mission “‘typically’ sends a van full of known criminals to go soliciting door to door,” CP 130 ¶ 26. The first report states that Mission “typically load[s] up a van-full of *recent transients and* known criminals....” CP 7-8 (emphasis added).<sup>1</sup>

**Fourth**, the reports do not purport to quantify the number of felons who lived at Mission, the percentage of residents who were criminals, or which Mission residents were “right out of jail” the day Mr. Jones signed his declaration. CP 130-37 ¶¶ 27, 30, 47-55, 61. The second article states only that “the kinds of guys coming to your door are basically the kind right out of jail.” Mission provides no evidence that the felons KIRO identified as living at Mission did not live there, or were not felons.

**Fifth**, KIRO did not “use[] Demry and Wilson to support its allegation that Mission recruits felons out of the King County Jail,” state that either man recently lived at Mission’s house, lived at Mission immediately after leaving jail, or was referred by King County jail, CP

---

<sup>1</sup> Mission erroneously criticizes the trial court for finding otherwise. App. Br. at 30.

131-37 ¶¶ 32, 44-45, 46, 59, 60. The first report states that “*police records show*” “convicted rapist Willie Edward Wilson *registered to live* at the mission house in *late 1998*” and that “after getting out of prison for raping and kidnapping a stranger, Demry moved into the U.S. Mission’s Seattle home in late 2004.” CP 7-8 (emphasis added). Mission does not dispute that police records reflect these facts.

Where Mr. Jones *does* discuss statements from KIRO’s reports, he provides no evidence that they are false. *See, e.g.*, CP 129 ¶ 21 (“Mission does not recruit felons”). He suggests Mission can “easily prove” this “by clear and convincing evidence,” CP 137 ¶ 63, but effectively admits it cannot. *See, e.g.*, CP 131 ¶ 32 (Mission does “not know if [Demry or Wilson] actually lived [at Mission] or not.”).

In fact, Mr. Jones’s declaration (and prior sworn testimony) confirm the articles’ main assertions. He admits residents “engage in door-to-door fundraising” and Mission “accept[s] some people who have criminal records.” CP 126-29 ¶¶ 8, 24. As the first report notes, Mission has challenged rules requiring criminal background checks for solicitors. CP 7-8. In that context, Mr. Jones stated that residents “likely” have a criminal record, including “occasionally felonies.” CP 279 ¶ 9, 362 ¶ 5.

Mr. Jones’s interview with KIRO casts even more doubt on his declaration. In the latter, Mr. Jones states he was “unaware” of the jail

referral list. CP 128 ¶ 17. But KIRO informed him in a January 25, 2010 interview. Supp. CP \_\_ [Sub No. 32A, Ex. A]. On hearing Mission must have an “association” with the jail, Mr. Jones nodded his head. *Id.* When asked to “address... homeowners... fearful to have felons... come to the door,” he said: “We can’t live our lives in fear.” *Id.* at 2:11-30.

**C. The Trial Court Dismissed the Lawsuit Under CR 12, Denied Mission’s Motion for Reconsideration, and Declined to Impose a \$10,000 Penalty and Award KIRO Its Attorneys’ Fees Under the Anti-SLAPP Statute.**

On August 25, 2010, Mission filed its complaint, to which KIRO filed an answer October 6, 2010. CP 1-18. On October 25, 2010, KIRO filed a special motion to strike the complaint under RCW 4.24.525, the new anti-SLAPP law, and alternatively, to dismiss it under CR 12(c). CP 19-35. On November 29, 2010, Mission filed a response and cross-motion to strike KIRO’s motion. CP 37-68, 154-77. The trial court heard oral argument January 28, 2011. On February 2, 2011, it granted KIRO’s CR 12 motion and found it “[un]necessary to make any ruling on the defendant’s motion to strike,” because it wanted to “avoid constitutional adjudication.” CP 407; CP 437 at 14:8-10.

On February 14, 2011, Mission filed a motion for reconsideration. CP 409-20. The trial court denied it March 9, 2011, after considering KIRO’s response and Mission’s reply. CP 445-69. Mission filed a notice

of appeal March 28, 2011, and KIRO filed a notice of cross-review April 5, 2011. CP 470-79, Supp. CP \_ [Sub No. 50].

## VI. ARGUMENT FOR ANSWERING BRIEF

### A. The Trial Court Properly Dismissed the Complaint Because It Fails to State a Claim Upon Which Relief Can Be Granted.

This Court reviews an order granting a CR 12(c) motion de novo. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006). Rule 12(c) requires dismissal when “the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005) (citations omitted) (internal quotation marks omitted). The trial court was “*not* required to accept the complaint’s *legal conclusions* as true.” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008) (emphasis added) (citation omitted).<sup>2</sup>

#### 1. Mission does not allege that the statements in KIRO’s articles are false, only that they create false implications.

##### a. The law disfavors claims for defamation by implication and prohibits them when

---

<sup>2</sup> The trial court properly considered the broadcasts, the public records upon which they rely, and pleadings from and news articles about Mission’s prior litigation. Courts may “take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss.” *Rodriguez*, 144 Wn. App. at 725-26. “Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered.” *Id.* at 726. *See also Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (news articles); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (pleadings from prior lawsuit).

**they are premised on the juxtaposition of truthful statements.**

Defamation by implication claims expand on what libel law traditionally considers a “statement.” A libel plaintiff must show by clear and convincing evidence that an allegedly defamatory statement is false, unprivileged, was made with the requisite level of fault, and caused damage. *See Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). Implication claims drastically alter this formula by distorting the meaning of a “statement” to include an endless possibility of inferences a speaker never uttered, or never even considered. To protect against the inevitable stifling of legitimate debate that would result from holding the media responsible for every possible inference, Washington courts have rejected libel claims based on “an implied, disparaging message. It is the statements themselves that are of primary concern in the analysis.” *Auvil v. CBS “60 Minutes,”* 67 F.3d 816, 822 (9th Cir. 1995). *See also Anderson v. Kitsap Cnty.*, 2010 WL 2233679, at \*6 (W.D. Wash. June 1, 2010) (“[D]efamation does not support a claim by way of ‘implication.’”).

Although a few decisions suggest that implication claims exist, Washington courts have *not* expanded the tort “to include defamation by implication through juxtaposition of truthful statements.” *Yeakey v.*

*Hearst Commc'ns, Inc.*, 156 Wn. App. 787, 793, 234 P.3d 332 (2010).<sup>3</sup> In *Yeakey*, the court rejected a claim that an article was defamatory because it implied that a crane operator had caused an accident by truthfully reporting the facts about the accident but also the operator's criminal record and prior substance abuse. *Id.* See also *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991) (rejecting claim alleging statements "were false and capable of defamatory meaning, even while conceding that [they] were true").

As one court explained:

The defamatory character of the language must be ***apparent from the words themselves***. Washington courts are bound to invest words with their natural and obvious meaning and ***may not extend language by innuendo or by the conclusions of the pleader***. Even if language is ambiguous, resolution in favor of a disparaging connotation is not justified.

*Id.* (emphasis added) (citations omitted) (internal quotation marks omitted). See also *New York Studio, Inc. v. Better Bus. Bureau of Alaska, Or., & W. Wash.*, 2011 WL 2414452, at \*6 (W.D. Wash. June 13, 2011) ("Defamation by implication will not be found when there is simply a juxtaposition of true statements."). A different rule would create a "great deal of uncertainty," "make it difficult for broadcasters to predict whether

---

<sup>3</sup> Any contrary language in *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005), is *dicta*. 156 Wn. App. at 792.

their work would subject them to tort liability,” and have “a chilling effect on speech.” *Auvil*, 67 F.3d at 822.

As another example, the California Supreme Court rejected a plaintiff’s claim that a book, which recounted the Manson Family murders, implied the plaintiff murdered someone. *Forsher v. Bugliosi*, 26 Cal. 3d 792, 803, 163 Cal. Rptr. 628 (1980). The book asserted the plaintiff and his companion drove the victim to a remote campground where his body was later found; police never verified the plaintiff’s alibi; and his companion was later murdered. *Id.* at 796-802. The court held “the book neither expressly nor by fair implication charges [the plaintiff] with killing or aiding or abetting the killing of [the victim].” *Id.* at 805.

Other courts facing similar claims have reached the same conclusion. *See, e.g., Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305 (11th Cir. 2001) (article did not imply plaintiff engaged in gold smuggling and money laundering despite stating that plaintiff may have smuggled gold and admitted keeping two sets of books); *Loeb v. New Times Commc’ns Corp.*, 497 F. Supp. 85, 90-91 (S.D.N.Y. 1980) (article did not imply plaintiff caused a fire despite stating that the fire was “mysterious” and disposed of plaintiff’s primary competitor).

Because only false statements can be the basis of an implication claim, courts have repeatedly found that merely raising questions about

contradictory information does not imply wrongdoing. For example, the Fourth Circuit held that an investigative report on a charity program could not be defamatory because “*inquiry itself*, however embarrassing or unpleasant to its subject, *is not accusation*.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993) (emphasis added). There must be an “assertion of a false *fact*” and “language used cannot be tortured to ‘make that certain which is in fact uncertain.’” *Id.* (emphasis in original) (citation omitted). *See also Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995) (no claim where book questioned plaintiff attorney’s trial tactics); *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 731 (1st Cir. 1992) (no claim where “[the author’s] readers implicitly were invited to draw their own conclusions”).<sup>4</sup>

Neither case Mission cites directly confronted whether implication claims exist, and the Court “is not bound by [] language when the court did not address or consider the issue directly.” *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994). Moreover, both cases rested on literal falsity. In *Corey v. Pierce County*, that someone was subject to a “pending criminal investigation” was false, where the speaker knew the investigation had revealed nothing. 154 Wn. App. 752, 762-63, 225 P.3d

---

<sup>4</sup> “[W]hether the statement recites or implies factual matters that are defamatory ... is a question of law.” *Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987). *See also Knievel v. ESPN*, 393 F.3d 1068, 1074-75 (9th Cir. 2005) (affirming grant of motion to dismiss); *Forsher*, 26 Cal. 3d at 803 (same); *Chapin*, 993 F.2d at 1093.

367 (2010). In *Chase v. Daily Record, Inc.*, a report about a plaintiff's "repayment" of public funds for a trip he never took was false because he had never received the funds. 83 Wn.2d 37, 44, 515 P.3d 154 (1973). Even characterizing these as implication cases, as the courts did, Mission does not allege that KIRO committed any analogous act, i.e., that it knowingly omitted a specific fact, rendering the statement materially false.

**b. Mission's claim is primarily one for defamation by implication arising from the juxtaposition of truthful statements.**

The trial court properly found that defamatory meaning must "be apparent from the language itself, not an implication of the language" and rejected Mission's attempt to "connect things that weren't literally connected." CP 427 at 4:16-21. Mission does not dispute the propriety of this standard but instead claims it "explicitly alleged that KIRO had published false statements." App. Br. at 25. But those "explicit" allegations fail to identify statements taken from the broadcasts.

Mission points to four paragraphs in the complaint that it claims allege the falsity of statements in the first report. App. Br. at 26 (citing CP 3-4 ¶¶ 3.17-19). Tellingly, it fails to fully quote the allegations, which are *all* prefaced with the phrase "The *thrust* of the news story was that ...." (emphasis added). *None* of the statements appears verbatim in the report.

*First*, the article does not state that Mission “*deliberately* recruited *violent* criminals to solicit donations to the organization.” App. Br. at 26. Instead, it notes that King County listed Mission as a place for criminals to stay, includes Mr. Jones’s statement that Mission might “take” individuals “convicted of assault or another type of violent crime,” and states that Mission has a “pay-to-stay” plan requiring residents to solicit money. *See* CP 7-8, FE 9A, Ex. A, B. The inclusion of Mr. Jones’s interview negates any alleged implication. As the trial court noted, Mr. Jones effectively said, “[W]e try not to [take criminals], but it may happen sometimes.” That is not consistent with the thrust of the story to say that they deliberately recruit them.” CP 434 at 11:8-11; *see also* CP 436 at 13:2-8.

Mission unconvincingly points to other words it believes convey intent. *See* App. Br. at 27-30. For example, neither report purports to disclose Mission’s “motives,” “tactics,” or “secret.” *Id.* at 28, 30. The first article states that KIRO went “undercover to reveal the [Mission’s] motives and tactics,”<sup>5</sup> i.e., that it was *KIRO’s* intent to go “undercover” to reveal “motives and tactics,” not that KIRO did so, or that Mission’s “motive” was to recruit criminals. Nor does the word “recruit” imply

---

<sup>5</sup> Mission contends the trial court “failed to understand *whose* ‘motives and tactics’ were being referred to.” App. Br. at 28 n.12 (emphasis in original). The trial court understood this, stating later it was not “reasonable” to interpret “[t]he statement that the reporter went undercover to find their motives and their tactics” to mean that *Mission* has a “tactic of soliciting known criminals.” CP 434 at 11:21-12:1.

intent. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1899 (2002) ("recruit" means to "strengthen or supply... with additional members"). Finally, the statement that Mission was sending a "bevy" of historically violent felons to solicit does not imply Mission *typically* sent such felons to solicit. *See* App. Br. at 29. As the trial court noted, "bevy" "suggests some number. And it is true that there was some number of historically violent felons." CP 427 at 4:6-9.

*Second*, the report does not state that Mission "employs *known* criminals to solicit donations as a *tactic* because use of such people to solicit donations is an effective means of threatening people with harm if they do not contribute," App. Br. at 26. As the trial court noted:

The only way to get that ... is to ... cut and paste things that were not linked in the story itself. The statement that the reporter went undercover to find [Mission's] motives and ... tactics is now being applied by the Mission to the tactic of soliciting known criminals and the tactic of deliberately threatening people. But that is not a reasonable construction....

The people who suggested the threat ... were members of the public, who gave their opinions about that .... [Mission] takes some words that were said in one context and applies them to another context, which is not the way the story was presented.

CP 434 at 11:18-12:9. Moreover, any such inference is negated by the report's interview of Mr. Jones, who stated: "We have never ... had an incident involving one of our people ... doing any type of illegal act against a citizen." CP 7-8, FE 9A, Ex. A, B.

**Third**, the article does not state that "a significant proportion of [Mission's] solicitors have criminal records as violent felons." App. Br. at 26. It does not discuss the proportion of Mission participants who are criminals. *See* CP 7-8, FE 9A, Ex. A, B. That the story focuses on their presence at Mission does not imply Mission only or disproportionately houses criminals (let alone violent felons). The trial court agreed, finding the impact may have been the same "if the story had [said] five out of a hundred have criminal records." CP 435 at 12:13-15.

**Finally**, the article does not state that Mission "falsely pretends to have a religious mission in order to escape government regulation." App. Br. at 26. *See* CP 435 at 12:20-21 ("There [are] no specific words that say that."). It reports that Mission calls its solicitors "emissaries of Christ," individuals whom Mission residents solicited said they did not mention religion, and Mission regularly files lawsuits challenging criminal background checks for solicitors. CP 7-8, FE 9A, Ex. A, B; *see also* CP 279 ¶ 9, 362 ¶ 5. It suggests these facts "raise[] the question if this organization might be shrouding their panhandling in religious free

speech,” inviting the audience to reach its own conclusion. *See Chapin*, 993 F.2d at 1095. *See also* CP 433 at 10:15-17.

Mission alleges that two statements in the second report are false: Mission “recruits felons,” and individuals residing at Mission are “right out of jail.” App. Br. at 26; CP 4 ¶¶ 3.24-25. Mission’s argument about the first statement depends on its claim that the story implies intent and fails for the same reasons. Further, the article does not state that any particular individuals were “right out of jail” but that “the kinds of guy coming to your door are basically the kind right out of jail.” CP 10-12. *See also* CP 436 at 13:23-14:1 (“[T]hat is not what it says.”). In any event, as the trial court noted, this is “obviously an opinion” and cannot be defamatory. CP 436 at 13:14-19; *see also Clardy v. Cowles Publ’g Co.*, 81 Wn. App. 53, 57, 912 P.2d 1078 (1996) (plaintiff must prove falsity).

**2. Even construing the reports as Mission does, the implications do not change their “gist” and cannot be defamatory.**

“[W]hen a defamation defendant’s statement is partly true ... and partly false ... the defamation plaintiff may not recover for damage that would have occurred even without the false part.” *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 598, 943 P.2d 350 (1997). “[A] defamation plaintiff may not recover without showing that the false part of the statement increased its ‘sting.’” *Id.* For example, the Washington

Supreme Court dismissed claims based on reports that a plaintiff “bilked the state out of at least \$300,000” when he had been charged with larceny based on a report revealing “at least \$200,000 in fraud billing.” *Mark*, 96 Wn.2d 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 ... than that which the literal truth would produce.”

Several Washington courts have dismissed similar claims. *See, e.g., Schmalenberg*, 87 Wn. App. at 603-04; *Margoles v. Hubbart*, 111 Wn.2d 195, 202-03, 760 P.2d 324 (1988) (dismissing claim based on statement that money was “funneled” to plaintiff through company, where third party paid money for consultant fees to company, which paid plaintiff); *Hutchins v. Globe Int’l, Inc.*, 1995 WL 704983, at \*4-7 (E.D. Wash. Oct. 10, 1995) (dismissing reverend’s claim that article portrayed him as “untrustworthy, lying, power-hungry, greedy, religion-crazed fanatic” where it truthfully reported he was charged with arson for burning down his church to use the insurance proceeds to build another).

Even if KIRO’s news reports contain the implications Mission alleges, those implications do not change the gist of the reports: that Mission housed criminals, including (public records show) two sex offenders, and required those criminals to solicit door-to-door on its behalf, creating safety concerns among neighbors, purportedly for a

religious purpose. Reporting that Mission does not “deliberately” house criminals, its criminal residents are “typically” not felons, and Mission *is* a religious organization, would not have materially changed the “sting.” The omission of these statements cannot be the basis of a libel claim.

**3. Mission failed to show the vast majority of the broadcast’s statements are unprivileged.**

In addition to failing to show falsity, Mission failed to show a second prima facie element: that the statements are unprivileged. The fair reporting privilege shields publishers from liability when a broadcaster attributes a statement to an official record. *Clapp v. Olympic View Publ’g Co.*, 137 Wn. App. 470, 475-76, 154 P.3d 230 (2007). “So long as the publication is attributable to an official proceeding and is an accurate report or a fair abridgement thereof, it is privileged.” *Alpine Indus. Computers, Inc. v. Cowles Publ’g Co.*, 114 Wn. App. 371, 385, 57 P.3d 1178 (2002). This rule applies even if the speaker suspects or knows the statements in the official report are false. *Id.* at 384. The media “should not have to worry about how a court would rewrite or edit” its reports “in search of a perfect balance.” *Clapp*, 137 Wn. App. at 479; *see also Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 182, 736 P.2d 249 (1987) (applying privilege to recall petition).

Undisputedly, KIRO relied on public records to support most of the statements in the article, primarily a county website listing Mission as a place to live after getting out of jail. It also gathered information about the individuals who lived at Mission from police records, court records, and the Washington State Patrol website. *See* FE 9A, Ex. D-P. Thus, the stories' statements about criminals who lived at Mission, including that Mission "recruits felons" and "the kinds of guys coming to your door are basically the kind right out of jail," are privileged.

**4. Mission failed to allege special damages.**

Mission's claims also fail because it has neither alleged nor shown a third prima facie element, damages. "[I]n a defamation action, the plaintiff must present evidence of special or actual damages resulting from the statement. An exception to this rule is libel *per se*." *Robel v. Roundup Corp.*, 103 Wn. App. 75, 92-93, 10 P.3d 1104 (2000), *rev'd on other grounds*, 148 Wn.2d 35, 59 P.3d 611 (2002). Proof of actual injury is a "constitutional command." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). Under CR 9(g), a plaintiff must plead special damages with particularity. For example, the state Supreme Court dismissed a claim alleging injury to the plaintiff's reputation and \$75,000 in damage. *Purvis v. Bremer's, Inc.*, 54 Wn.2d 743, 746-47, 344 P.2d 705 (1959).

Mission alleges that “[i]ts reputation has been injured, and its ability to collect donations has been harmed.” CP 4 ¶ 3.28. It failed to provide any evidence of special damages, offering only an untimely declaration stating that one individual ordered Mission off his property after viewing the news reports. CP 443-44. This is insufficient as a matter of law. *See, e.g., Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 428 (D.N.J. 2005) (“special damages requires that Plaintiffs allege either the loss of particular customers by name, or a general diminution in its business, and extrinsic facts showing that such special damages were the natural and direct result of the false publication”).

**B. The Trial Court Did Not Abuse Its Discretion By Denying Mission’s Motion for Reconsideration.**

This Court “will not reverse a trial court’s ruling” on a motion for reconsideration “absent a showing of manifest abuse of discretion.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). The trial court properly denied Mission’s reconsideration motion, which impermissibly raised a new legal theory. *Id.* at 241 (“CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.”). Even considering the merits of Mission’s argument, the trial court did not abuse its discretion by denying the motion. In addition to failing to show the statement is

unprivileged or caused it damage for the reasons discussed above, Mission also failed to show that the headline is false.

**1. The trial court properly found that Mission failed to show the headline is false.**

The trial court found the headline “is an accurate characterization” of the record, i.e., that the “undisputed facts” “indicate[] that the jail had... a list of housing referrals that they gave out” that “some people who were released from the jail used to find the Mission.” CP 426 at 3:05-15. Mission does not dispute this, and instead claims the headline “conveyed the message” (i.e. *implied*) that it “deliberately sought out criminals from the jail ... to use them as ... solicitors.” App. Br. at 31.

Mission relies on strained interpretations of the words “find” and “use.” Although Mission claims “one common meaning” of “find” is to “come upon by searching or effort,” App. Br. at 29, the dictionary Mission cites suggests the primary meaning is “to come upon *accidentally*.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 463-64 (1983). Where two meanings exist, “resolution in favor of a disparaging connotation is not justified.” *Lee*, 64 Wn. App. at 538. Even accepting Mission’s definition of “use” to be “put into action or service,” App. Br. at 29, the jail was “put into action” to find solicitors. Whether Mission was the one

that “used” the jailhouse or even *knew* it was being used is irrelevant (even though footage of Mr. Jones’s interview suggests it *did*).

**2. The trial court properly found that the remaining parts of the article dispel any implication the headline creates.**

Even if the Court reads the headline to imply Mission intentionally looks for felons, the trial court did not abuse its discretion by finding that “people understand that headlines are abbreviated” or by “considering the fact that that is the headline and everything that comes after that ... explains in more detail what was intended.” CP 426 at 3:05-20.

Washington law requires an allegedly defamatory article to “be considered as a complete picture and not by isolated segments.” *Sims v. Kiro, Inc.*, 20 Wn. App. 229, 234, 580 P.2d 642 (1978). Finding a headline alone is libelous would undermine this basic principle and ignore the headline’s effect on the article’s sting. Moreover, contrary to Mission’s assertion, in Washington, “[t]he court determines whether a communication is capable of a defamatory meaning; if not, the case is dismissed as a matter of law.” *Schmalenberg*, 87 Wn. App. at 600 n.58.

As one New Jersey court recognized, this is the majority view. *Molin v. The Trentonian*, 297 N.J. Super. 153, 155-60, 687 A.2d 1022 (App. Div. 1997) (collecting cases). A different standard “would [accept] that headlines wield more influence than the more substantive body of the

article.” *Id.* at 158. *Molin* and other cases have dismissed libel claims based on headlines as a matter of law. *See, e.g., id.* at 159; *Gamler v. Akron Beacon Journal*, 1995 WL 472176, at \*7 (N.D. Ohio Feb. 28, 1995) (“Figure in drug case sues for \$80 million” was not defamatory because plaintiff was a “figure” in a drug case); *Cnty. Newspaper Holdings, Inc. v. King*, 299 Ga. App. 267, 270-71, 682 S.E.2d 346 (2009) (dismissing claim that “Escape accomplice arrested” implied plaintiff was an accomplice, where article stated he was charged).

Consider *Crall v. Gannett Satellite Information Network, Inc.*, where the plaintiff alleged the headline “Show and tell lands father in jail on drug charge” was defamatory because the father did not go to jail. 1992 WL 400713, at \*4 (S.D. Ohio Nov. 6, 1992). The headline was not libelous because it did not identify the plaintiff, and the content of the article “tempered” any allegedly defamatory meaning by making clear the plaintiff was not in jail. *Id.* The court rejected the plaintiff’s argument that the public would read the article “hastily or imperfectly” because the article was “short and unambiguous.” *Id.*

Using these principles, the trial court properly denied Mission’s motion for reconsideration. Mission’s argument that the article does not “dispel” the notion that it “deliberately” used the jail to find door-to-door solicitors misses the point. The headline does not state that any use of the

jail was “deliberate,” or that Mission was the one using it. Whether considered in context, or in isolation, no jury could (lawfully) impute to it the meaning Mission urges. Moreover, the third and fourth sentences of the article *do* dispel any notion that Mission acted “deliberately”: They state that “[f]or years, when a criminal was kicked loose from the King County Jail, he was handed a flyer that lists places to live” including Mission and that Mission has a “pay-to-stay plan that requires door-to-door panhandling.” CP 7-8. Further, the article later quotes Mr. Jones, who confirmed Mission accepts residents with criminal convictions. *Id.*

Not a single case Mission cites states that “a defamatory headline, in and of itself, can support an action for defamation.” App. Br. at 32. The vast majority admit “the article must be read as a whole.” *Cross v. Guy Gannett Publ’g Co.*, 121 A.2d 355, 357-58 (Me. 1956) (considering headlines to note they did not “minimize the impact of the main article”; portion Mission quotes, App. Br. at 32, is *dicta*); *see also, e.g., Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997) (neither the headline nor “any one of these things is dispositive”); *Sprouse v. Clay Comm’n, Inc.*, 158 W. Va. 427, 441, 211 S.E.2d 674, 686 (1975) (noting this is the default rule); *Reardon v. News-Journal Co.*, 164 A.2d 263, 265

(Del. 1960) (declining to adopt either standard, dismissing complaint as a matter of law; portion Mission quotes, App. Br. at 33 n.16, is *dicta*).<sup>6</sup>

Mission emphasizes two cases courts later limited to facts not present here. In *Kaelin v. Globe Communications Corp.*, the Ninth Circuit found the tabloid headline “Cops Think Kato Did It!” could be defamatory because it was published just one week after O.J. Simpson’s acquittal, and the article, which explained the headline, appeared 17 pages later. 162 F.3d 1036, 1041 (9th Cir. 1998). In *McNair v. Hearst Corp.*, 494 F.2d 1309, 1310-11 (9th Cir. 1974), the court found that an article’s headline and first two paragraphs could be defamatory because a reader would have to sift through 50 paragraphs on three pages to understand the context.<sup>7</sup> *Cf. Balzaga v. Fox News Network, LLC*, 173 Cal. App. 4th 1325, 93 Cal. Rptr. 3d 782 (2009) (distinguishing both cases); *Monterey Plaza Hotel v. Hotel Emps. & Rest. Emps. Local 483*, 69 Cal. App. 4th 1057, 1066, 82 Cal.

---

<sup>6</sup> Several cases Mission cites apply the “fair index” doctrine, under which a court must decide whether a headline is a “fair index” of the article, which itself requires considering the text. *See Schermerhorn v. Rosenberg*, 426 N.Y.S.2d 274, 73 A.D.2d 276, 287 (N.Y. App. Div. 1980) (headline was not a “fair index” of article; portion Mission quotes, App. Br. at 32, is *dicta*); *Black v. Nashville Publ’g Co.*, 24 Tenn. App. 137, 141 S.W.2d 908, 912-13 (1939); *Gunduz v. New York Post Co.*, 590 N.Y.S.2d 494, 188 A.D.2d 294 (N.Y. App. Div. 1992); *Kamalian v. Reader’s Digest Ass’n*, 814 N.Y.S.2d 261, 29 A.D.3d 527, 528 (N.Y. App. Div. 2006) (granting motion to dismiss claim because headline was a fair index of the article); *White v. Berkshire-Hathaway, Inc.*, 802 N.Y.S.2d 910, 10 Misc.3d 254, 256 (N.Y. Sup. Ct. 2005) (headline was fair index).

<sup>7</sup> *McNair* is outdated. Not only did it allow a claim for defamation by implication, but it was also decided at a time when libel defendants were required to prove truth, meaning a court presumed falsity and cases were very likely to go to the jury. *See, e.g., Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 458, 546 P.2d 81 (1976) (describing common law rule). By 1978, the law had changed. *See, e.g., Sims*, 20 Wn. App. at 233 (“The burden of proving the elements of [defamation] are on the plaintiff.”).

Rptr. 2d 10 (1999) (distinguishing *McNair*: the “broadcast was significantly shorter and the information that clarified the allegedly slanderous statement was clearly and repeatedly provided....”).

Unlike in *McNair* and *Kaelin*, the article here is not “long and complex,” nor are its “headlines and subheadlines numerous [or] sensational.” *Crall*, 1992 WL 400713, at \*4. “[T]he true and correct version of the facts” is not “hidden deep in the text of the article.” *Id.* The report is a brief counterpart to a television broadcast with just one (true) headline whose basis the article discloses within its first four sentences. *See* CP 7-8. “[A] speaker who outlines the factual basis for his conclusion is protected by the First Amendment.” *See Price v. Stossel*, 620 F.3d 992, 1004 (9th Cir. 2010). This is particularly salient here, where a reader would have had to read the article to find out who was “using” the jail.

## **VII. ARGUMENT FOR KIRO’S CROSS-APPEAL**

The legislature enacted RCW 4.24.525 to curb “lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech.” S.B. 6395, 61st Leg., Reg. Sess. (Wash. 2010). 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,” deterring them from “fully exercising their constitutional rights.” *Id.*

The statute allows defendants to bring a special motion to strike at the outset, and requires the responding party to show a probability of prevailing by clear and convincing evidence. *See Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (dismissing claims under anti-SLAPP statute); *Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416 (W.D. Wash. July 25, 2011) (same); *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010) (same). It also stays discovery pending a decision on the motion, and a responding party who fails to make this showing is subject to dismissal of its claims, a \$10,000 penalty, and attorneys' fee award. RCW 4.24.525(5)(c), (6)(a).

Although KIRO filed an anti-SLAPP motion, the trial court did not decide it, preferring a Rule 12 dismissal to "avoid a constitutional adjudication," given Mission's claims that the anti-SLAPP statute is unconstitutional. CP 406-08; CP 437 at 14:8-10. But the principle requiring courts to avoid deciding issues on non-constitutional grounds applies only where there is an alternate basis for deciding the issue. The trial court had no other basis upon which to decide whether to award fees and impose a \$10,000 penalty. It should have decided whether the anti-SLAPP statute applies and if so, imposed its mandatory remedies.

Mission argues that the anti-SLAPP statute does not bar its claims, and that its discovery stay and remedies are unconstitutional. App. Br . at

38-68. If the Court affirms the trial court's Rule 12 dismissal, it need only consider whether the anti-SLAPP statute applies here, and the constitutionality of the statute's remedies, not whether Mission has a probability of prevailing on the merits, or the constitutionality of the discovery stay. Even if the Court reverses the Rule 12 decision, the anti-SLAPP statute bars Mission's claims for the following reasons.

*First*, the law is *not* confined to communications made to the government. It broadly applies to “[a]ny... statement made... in a place open to the public or a public forum” and “[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). A news broadcast about a halfway house a county lists as a place for parolees, which has housed criminals and requires its residents to perform door-to-door solicitations, is just that.

*Second*, Mission failed to show by clear and convincing evidence a probability of prevailing. The trial court's Rule 12 decision, if affirmed, mandates this result. Even if this Court reverses that ruling, as discussed, Mission failed to show the news reports are false, unprivileged, and damaged it, three of four *required* defamation elements. It makes only passing attempts to show KIRO acted negligently, the remaining element.

*Finally*, Mission lacks standing to bring its constitutional challenges, but even if it did have standing, the anti-SLAPP statute, like its nationwide counterparts, is constitutional.

**A. The Trial Court Erred By Failing to Award KIRO Its Attorneys' Fees and Impose a \$10,000 Penalty, as the Anti-SLAPP Statute Mandates.**

The trial court found that Mission's complaint fails to state a claim upon which relief can be granted under CR 12(c). It chose Rule 12 to "avoid constitutional adjudication" of the anti-SLAPP statute because "another method" for dismissal existed. CP 437 at 14:8-10. Courts do avoid deciding issues on constitutional grounds where other grounds exist. *See, e.g., Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 291 n.7, 174 P.3d 1142 (2007). But that principle does not apply where the trial court does not decide the issue at all—in this case, whether to impose a fee award and penalty. For example, if the anti-SLAPP statute did not provide for these remedies, dismissal under Rule 12 would have had the same effect as dismissal under the anti-SLAPP statute. But it does, and the trial court erred by not deciding whether to impose them.

**1. The anti-SLAPP statute bars Mission's claims.**

This Court reviews statutory interpretation questions de novo. *Flight Options, LLC v. State, Dep't of Revenue*, 259 P.3d 234 (Wash.

2011). The anti-SLAPP statute outlines a two-step process to decide whether to strike a claim.

*First*, “[a] moving party bringing a special motion to strike a claim ... 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), which includes:

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding ....

(d) Any oral statement made, or written statement or other document submitted, in ... a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern....

RCW 4.24.525(2).

*Second*, “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). If the responding party fails to do this, the court must grant the motion and award the movant its attorneys’ fees and a \$10,000 penalty. RCW 4.24.525(6).

**a. Mission’s claims target actions involving public participation and petition.**

Mission claims the anti-SLAPP statute applies only to statements to government. But RCW 4.24.525(2)(c), (d), and (e) do not state this, App. Br. at 39-44, nor does the legislative history suggest otherwise. It states that “[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.” S.B. 6395, 61st Leg., Reg. Sess. (Wash. 2010) (emphasis added).

Several courts have recognized “[t]he 2010 amendments to the Washington Anti-Slapp Act *vastly expand the type of conduct protected.*” *Aronson*, 738 F. Supp. 2d at 1109. *See also New York Studio, Inc.*, 2011 WL 2414452, at \*4 (applying statute to press release). One court expressly found that some claims were subject to the old anti-SLAPP statute, RCW 4.24.510, but others, based on statements made to the media, were subject only to the new anti-SLAPP statute. *Phoenix Trading, Inc.*, 2011 WL 3158416, at \*7. *See also Castello*, 2010 WL 4857022, at \*5-6 (“a major television network’s local news broadcast constitutes a ‘public forum’”).<sup>8</sup> Mission’s cases interpret the *old* anti-SLAPP statute, RCW 4.24.510, and are irrelevant.

---

<sup>8</sup> Cases interpreting the California anti-SLAPP statute, after which Washington’s was modeled, are consistent. *See, e.g., Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027,

KIRO's news reports fall within RCW 4.24.525(2)(d) and (e).<sup>9</sup> They are based on statements made in a public forum (a news broadcast) about an issue of public concern (door-to-door solicitations by halfway house residents, including some felons). *See* RCW 4.24.525(2)(d). They are also "lawful conduct in furtherance of the exercise of the constitutional right of free speech." RCW 4.24.525(2)(e). The statute does not confine "conduct" to acts other than speech, nor does use of the word "other" in "all other lawful conduct" change the meaning of "conduct." The legislature was concerned about *all* free speech conduct.

If there were any doubt, the legislature directed that the statute "be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." S.B. 6395, 61st Leg., Reg. Sess. (Wash. 2010).

**b. Mission failed to show a probability of prevailing on the merits by clear and convincing evidence.**

Because the trial court found that the complaint fails to state a claim upon which relief can be granted, by definition Mission did not have

---

1042, 72 Cal. Rptr. 3d 210 (2008) (applying statute to magazine). Federal courts applying the new Washington law have relied on California cases. *See, e.g., Aronson*, 738 F. Supp. 2d at 1110.

<sup>9</sup> As KIRO argued in the trial court, its statements also fall within subsection (c) because the broadcasts led to two investigations—one resulting in Mission's removal from a King County list, CP 7-8, FE 9A, Ex. A, B, and another into its status as a religious organization, CP 10-12, FE 9A, Ex. A, C.

*any* chance, let alone a probability, of prevailing on the merits. But even if the Court finds the trial court erred by dismissing Mission’s lawsuit under Rule 12, Mission still failed to prove such a probability.

Under California’s nearly identical anti-SLAPP statute, “probability” requires “a prima facie showing of facts ... admissible at trial ... sufficient to support a judgment in the plaintiff’s favor as a matter of law, as on a motion for summary judgment.” *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98 (2010). RCW 4.24.525 requires such a showing “by clear and convincing evidence”—more than “a mere preponderance of the evidence,” *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963), i.e., a showing that a fact is “highly probable,” *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

Again, as Mission admits, to prevail, it must show “falsity, unprivileged communication, fault and damages.” App. Br. at 52. KIRO addressed falsity, damages, and privilege in its response to Mission’s appeal. Mission does not attempt to provide *any* evidence of negligence, the fourth element,<sup>10</sup> let alone “clear and convincing evidence.” It instead cites two prior lawsuits against KIRO’s reporter, Chris Halsne, and criticism about another, wholly unrelated story by a group that calls itself the Washington News Council. App. Br. at 20-23, 53-54. KIRO disputes

---

<sup>10</sup> KIRO believes the appropriate standard of fault is actual malice, not negligence, but because the parties did not fully brief this point, addresses the negligence standard here.

Mission's characterizations, but in any event, this evidence is not admissible. The declarations by a Council representative and Mission's attorney contain assertions about which they lack any personal knowledge and which are hearsay, violating ER 602 and 802. *See* CP 69-72; 149-50. In addition, under ER 404(b), evidence of allegations about Mr. Halsne's past conduct is inadmissible to show conformity with that conduct.<sup>11</sup>

**2. The anti-SLAPP statute's penalties and fee award are mandatory.**

This Court "review[s] a party's entitlement to attorney fees as an issue of law de novo." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 739, 253 P.3d 101 (2011). It reverses a trial court's erroneous decision not to award fees where they are mandatory. *See, e.g., Hackney v. Sunset Beach Invs.*, 31 Wn. App. 596, 603, 644 P.2d 138 (1982).

Under RCW 4.24.525(6), a moving party who prevails "shall" be awarded its attorneys' fees and a \$10,000 penalty. This remedy "is mandatory." *Castello*, 2011 WL 219671, \*4. Because Mission failed to show a probability of prevailing on the merits by clear and convincing evidence, the trial court erred by refusing to impose these remedies.

---

<sup>11</sup> The cases Mission cites, App. Br. at 54 n.24, do not state otherwise. *Beaumont v. Basham*, 205 S.W.3d 608 (Tex. Ct. App. 2006) did not allow introduction of prior acts of libel to show conformity with that action in a separate incident. *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999) affirmed a trial court's *limited* allowance of prior libel against the *same plaintiff*.

**B. The Court Should Reject Mission’s Constitutional Challenges to the Anti-SLAPP Statute.**

Washington appellate courts review questions of constitutional interpretation de novo. *Flight Options, LLC*, 259 P.3d 234. “[S]tatutes are presumed constitutional and [] a statute’s challenger ... must prove that the statute is unconstitutional *beyond a reasonable doubt*.” *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010) (emphasis added).

**1. Mission lacks standing to bring some or all of its constitutional challenges.**

Because the anti-SLAPP statute does not burden constitutionally protected activity, “the court considers only whether the statute is sufficiently definite *as applied* to the defendant’s particular conduct.” *City of Seattle v. Montana*, 129 Wn.2d 583, 597, 919 P.2d 1218 (1996) (emphasis added); *City of Seattle v. Yeager*, 67 Wn. App. 41, 44, 834 P.2d 73 (1992) (same). The anti-SLAPP statute does not chill “a substantial amount of protected speech,” App. Br. at 63 n.28, because there is no constitutional right to bring a meritless lawsuit. *See infra* at VII.A.1.a.

Applying this principle here, if the Court affirms the trial court’s Rule 12(c) ruling, it need only consider the constitutionality of the anti-SLAPP remedies as applied to Mission. It may only consider Mission’s remaining arguments if it finds the trial court should have dismissed the

lawsuit under the anti-SLAPP statute rather than Rule 12, requiring it to analyze whether the former bars Mission's claims.

**2. The anti-SLAPP statute's discovery stay does not infringe the right of access, petition, or the separation of powers doctrine.**

Referring to the right of access and to petition interchangeably, Mission claims the anti-SLAPP statute is unconstitutional because it "punish[es]" a litigant for bringing a lawsuit that requires him to "prove by clear and convincing evidence that he is likely to win his lawsuit at the end of the day" without discovery. App. Br. at 63.<sup>12</sup>

"Litigation that does not involve a *bona fide* grievance does not come within the First Amendment right to petition." *Reid v. Dalton*, 124 Wn. App. 113, 126, 100 P.3d 349 (2004). *See also Guam Greyhound, Inc. v. Brizill*, 2008 WL 4206682, at \*4-5 (Guam Sept. 11, 2008) (there is no "constitutional right to unfettered defamation claims"). Upholding an anti-SLAPP statute and noting the plaintiff had "selectively quot[ed]" from petition cases, the *Guam Greyhound* court stated:

[A]ntitrust, labor, and racketeering related right to petition cases ... are simply not applicable ... where a legislature has

---

<sup>12</sup> Notably, Mission does not cite a single case on point, instead relying on *In re Restraint of Addleman*, 139 Wn.2d 751, 991 P.2d 1123 (2000), where the state Supreme Court interpreted the federal constitution to bar a sentencing board's retaliation against a prisoner by denying him parole in part because he had filed lawsuits against numerous defendants. *See* App. Br. at 60-62. This case does not apply here, where the legislature deliberately created a qualified immunity from meritless and harassing lawsuits.

specifically exercised its power to limit claims by statute .... When the [anti-SLAPP statute] denies a plaintiff the ability to continue pursuing a defamation claim, it does not unconstitutionally impact that plaintiff's right to petition. It simply limits the plaintiff's ability to pursue that defamation claim, and the Legislature has the power to limit such claims.

*Id.* at \*6-7.

“[T]he argument that a state statute stiffens the standard of proof of a common law claim *does not implicate* [the right of access].” *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 967-68 (6th Cir. 2004). Every court confronted with the constitutionality of an anti-SLAPP statute has found it valid. *See Guam Greyhound*, 2008 WL 4206682 (access and prior restraint); *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 338 (Utah 2005) (bill of attainder); *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 24 Cal. Rptr. 2d 507 (2002) (petition); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996) (numerous grounds, including separation of powers and access); *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 942 N.E.2d 544 (2010) (guarantee to a remedy); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010) (due process and jury trial); *Lee v. Pennington*, 830 So. 2d 1037 (La. Ct. App. 2002) (equal protection and due process); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995) (access).

California courts, interpreting a nearly identical statute, rejected the same arguments. The state’s highest court found that the anti-SLAPP statute “does not bar a plaintiff from litigating an action that arises out of the defendant’s free speech or petitioning. It subjects to potential dismissal only those causes of action to which the plaintiff is unable to show a probability of prevailing on the merits.” *Equilon Enterprises*, 29 Cal. 4th at 63. As another court stated, the legislature “could reasonably conclude [SLAPP] suits should be evaluated in an early and expeditious manner.” *Lafayette Morehouse*, 37 Cal. App. 4th at 865-66.

If adopted, Mission’s theory would require the invalidation of all qualified and absolute immunities. Mission argues that any qualified immunity violates the right to petition because it makes it harder to pursue a claim, implying that any absolute immunity, which presents a complete bar to a claim, is also unconstitutional. The legislature routinely adopts immunities, including the old anti-SLAPP statute, which is constitutional.

*Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146

Wn.2d 370, 46 P.3d 789 (2002).<sup>13</sup> “[I]mmunities of one sort or another

---

<sup>13</sup> KIRO has located at least ten immunities, which under Mission’s theory, violate the right to petition or right of access. *See, e.g.*, RCW 4.24.235 (immunity for doctors’ verification as to whether an individual can provide or refuse to provide verification that an individual cannot wear a safety belt); RCW 4.24.240 (health professional review committee members); RCW 4.24.250 (health care providers who provide evidence against other providers); RCW 4.24.260 (similar); RCW 4.24.270 (health care providers that render emergency care); RCW 4.24.300 (similar); RCW 4.24.400 (building warden who assists others in evacuating building); RCW 4.24.410 (dog handlers using dogs in

have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law.... [Appellants] offer no principled arguments as to why the continuing existence of immunities violates the Constitution.” *Brzak v. United Nations*, 597 F.3d 107, 114 (2d Cir. 2010).

*Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), does not change this result. There, the court invalidated a statute requiring a plaintiff to submit a medical expert’s certificate before filing a malpractice lawsuit. *Id.* at 977. The statute burdened the plaintiff’s right of access, in part by requiring him to submit the certificate before taking discovery. *Id.* at 977-78. But the anti-SLAPP allows discovery “on motion and for good cause shown.” RCW 4.24.525(5)(c).

Mission’s argument “rings hollow” because it did not even make such a motion. *Lafayette Morehouse*, 37 Cal. App. 4th at 867.

“[D]iscovery is still a party-driven process, requiring the [non-moving party] to at least *seek* discovery.” *Flores v. Emerich & Fike*, 385 Fed. Appx. 728, 2010 WL 2640625, at \*2 (9th Cir. June 29, 2010) (anti-SLAPP motion grant where party did not ask for discovery); *see also Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1149 (S.D. Cal. 2005) (same). In an analogous context, courts dismiss claims when a party

---

the line of duty); RCW 4.24.730 (disclosure of employee information to prospective employers); RCW 4.24.740 (injuries sustained in bovine handling).

opposing summary judgment fails to seek discovery under Rule 56(f).  
*See, e.g., Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 678 (2005)  
(affirming grant of summary judgment); *Bank of Am., NT & SA v.*  
*PENGWIN*, 175 F.3d 1109, 1117-18 (9th Cir. 1999) (same).

Nor does the statute violate separation of powers, as in *Putman*.  
App. Br. at 65. There, the statute directly conflicted with CR 11(a) and  
CR 8 because it required an attorney “to submit additional verification of  
the pleadings” and more than a “short and plain statement of the claim.”  
166 Wn.2d at 983. The anti-SLAPP statute does neither. Courts can  
apply CR 11 and RCW 4.24.525 to any case. Moreover, the remedy is not  
invalidation of the statute. Instead, “the court rule will prevail in  
procedural matters and the statute will prevail in substantive matters.” *Id.*  
at 980. Thus, at best, the discovery stay might not apply in all  
circumstances, which (again) is irrelevant here because Mission never  
tried to take discovery or lift the stay.

**3. The anti-SLAPP remedies do not infringe  
access, petition, or equal protection rights.**

Mission argues the anti-SLAPP statutory remedies are invalid for  
two reasons, both which are flawed.

*First*, the statute does not violate the First Amendment by  
“punish[ing]” a plaintiff. App. Br. at 62. The *Equilon Enterprises* court

rejected this argument. 29 Cal. 4th at 63-64. Further, courts routinely “punish” litigants for bringing meritless or frivolous lawsuits. CR 11 allows sanctions where a lawsuit is not “well grounded in fact,” “warranted by existing law” or a good-faith extension of law, or brought for an “improper purpose.” Similarly, RCW 4.84.185 allows the prevailing party to recover attorneys’ fees where a defense or claim was “frivolous and advanced without reasonable cause.”

*Second*, the statute does not violate the Equal Protection Clause by mandating an award to a prevailing movant and requiring a prevailing non-movant to show the motion was frivolous. Washington courts have unanimously rejected similar challenges. *See, e.g., Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 800 P.2d 367 (1990); *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997) (fees for insured but not insurer in coverage disputes); *Seattle Sch. Dist. No. 1 v. Dep’t of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991) (fees for injured workers but not employers); *Mahnkey v. King*, 5 Wn. App. 555, 558-59, 489 P.2d 361 (1971) (fees for non-resident defendants who successfully challenge jurisdiction), *abrogated on other grounds by Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990).<sup>14</sup>

---

<sup>14</sup> Numerous analogous provisions exist, all of which would be invalid under Mission’s theory. *See, e.g.,* RCW 19.86.090 (plaintiff in action under Consumer Protection Act); RCW 4.24.510 (action based on communication to government); RCW 26.10.190 (bad

For example, in *Ford Motor Co.*, the Washington Supreme Court upheld the state’s “lemon law,” which requires a car manufacturer to pay a statutory penalty and attorneys’ fees if it loses an appeal against a customer, but does not impose the same penalty on customers. 115 Wn. 2d at 561-68. Applying minimum scrutiny because “[a]ccess to the courts is not ... a fundamental right,” the court found the statute rationally related to the legislature’s purpose of “protect[ing] the consumer and promot[ing] compliance with the arbitration decision by discouraging manufacturers from bringing meritless appeals.” *Id.* at 562, 567. Here, too, the anti-SLAPP remedies reasonably distinguish between moving and non-moving parties to protect free speech and discourage SLAPPs.<sup>15</sup>

### VIII. ATTORNEYS’ FEES ON APPEAL

Because the anti-SLAPP statute’s award is mandatory for any fees and costs “incurred in connection with each [anti-SLAPP] motion on

---

faith petitions to modify custody); RCW 13.36.060 (guardianship modification); RCW 19.182.150 (consumer in action under Fair Credit Reporting Act); RCW 19.142.110 (consumers in action against health studio); RCW 19.134.080 (buyer in action under Credit Services Organization Act); RCW 7.04A.140 (fees for arbitrator immune from suit); RCW 4.12.090 (fees for prevailing defendant on improper venue motion); MAR 7.3 (unsuccessful mandatory arbitration appeal).

<sup>15</sup> Nor does the statute’s requirement that a SLAPP plaintiff show a probability of prevailing by clear and convincing evidence conflict with the preponderance of the evidence standard applicable to many civil claims. App. Br. at 57. Clear and convincing evidence is the standard in a libel case, even on summary judgment. *Mark*, 96 Wn.2d 473. In any event, because Mission has no constitutional right to a (meritless) defamation claim, it likewise has no such right to a particular standard of proof: The legislature’s power to create qualified and absolute immunities necessarily implies its power to define their scope. Finally, a common law rule may be changed “at the will, or even at the whim, of the legislature.” *Grays Harbor Energy, LLC v. Grays Harbor Cnty.*, 151 Wn. App. 550, 556, 213 P.3d 609 (2009) (quotation marks, citations omitted).

which the moving party prevailed,” RCW 4.24.525(6), KIRO is entitled to its attorneys’ fees on appeal if the Court affirms the trial court’s decision. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007) (“[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal.”).

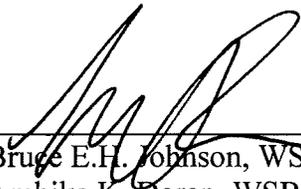
### IX. CONCLUSION

For these reasons, KIRO asks that the Court affirm the trial court’s dismissal of Mission’s lawsuit and award it its attorneys’ fees in the trial court and on appeal, in addition to a \$10,000 penalty.

RESPECTFULLY SUBMITTED this 17th day of October, 2011.

Davis Wright Tremaine LLP  
Attorneys for KIRO TV, Inc.

By



Bruce E.H. Johnson, WSBA # 7667  
Ambika K. Doran, WSBA # 38237  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045  
Telephone: (206) 622-3150  
Fax: (206) 757-7700  
E-mail: brucejohnson@dwt.com  
E-mail: ambikadoran@dwt.com

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2011, I caused to be served, true and correct copies of the following documents filed in connection with the above-referenced matter:

Answering Brief and Opening Cross-Appeal Brief of KIRO TV, Inc.  
upon the following:

James E. Lobsenz  
Carney Badley Spellman PS  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104

Declared under penalty of perjury under the laws of the state of Washington dated at Seattle Washington this 17th day of October, 2011.

  
\_\_\_\_\_  
Barbara J. McAdams