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No. 71706-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ANN RULE,

*Appellant,*

v.

RICK SWART, et al.,

*Respondents.*

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Laura Inveen

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

RCW 4.24.525 has spawned much litigation regarding its constitutionality and proper construction. Five cases involving the statute are now pending in the Supreme Court.<sup>1</sup> In this appeal, Appellant Rule has raised several constitutional issues, some of which have also been raised in those five pending cases. This Court could wait to see how one or more of these constitutional issues are decided before deciding this case. But that is not necessary, since a quicker resolution of the case presents itself.

Assuming, *arguendo*, that RCW 4.24.525 is constitutional in all respects, the Superior Court still erred when it granted Swart's motion to strike and dismissed Rule's case. The statute provides that a motion to strike should be denied if the nonmoving party "establish[es] by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). Rule carried that burden, and therefore the Superior Court erred when it dismissed her claim of defamation by implication arising from the omission of material facts. Rule urges this Court to address this

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<sup>1</sup> In these three cases oral argument has been held and the parties are awaiting a decision: *Akrie v. Grant*, 178 Wn. App. 506, 315 P.3d 567 (2013), *rev. granted*, 180 Wn.2d 1008 (2014); *Henne v. Yakima*, 177 Wn. App. 583, 313 P.3d 1188 (2013), *rev. granted*, 179 Wn.2d 1022 (2014); *Dillon v. Seattle Deposition Reporters*, 179 Wn.App. 41, 316 P.3d 1119, *rev. granted*, 180 Wn.2d 1009 (2014). In *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255, *rev. granted*, \_\_\_ Wn.2d \_\_\_ (October 10, 2014), oral argument is scheduled for January 20, 2015. In *Alaska Structures v. Hedlund*, 180 Wn. App. 591, 323 P.3d 1082 (2014), the petition for review has been stayed pending a decision in *Dillon*.

issue first. If this Court agrees that Rule met her statutory burden, then it will not be necessary to decide any of the constitutional or statutory construction questions, and there will be no need to wait to see how the Supreme Court resolves them.

## II. ARGUMENT

### **A. In an Effort to Convince This Court That Rule's Defamation Claim Was Unlikely to Succeed, Swart Ignores Both Law and The Facts.**

#### **1. Swart Misrepresents *Mohr v. Grant*, and Ignores Washington Case Law Recognizing Actions for Defamation by Omission.**

If a plaintiff establishes a probability of prevailing on the merits by clear and convincing evidence then the defendant's motion to strike must be denied. RCW 4.24.525. Rule contends that she made this showing; Swart argues she did not. Swart contends that she failed to show that she would be able to prove the element of falsity required to show defamation.

Swart repeatedly insists that a defamation claim cannot be predicated upon the failure to state some omitted fact. He begins his flawed analysis by erroneously relying on a concurring opinion that expressed the views of only three justices, and by ignoring the fact that the other six justices expressed the opposite view. There were three opinions in *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005). Swart relies on a passage from Chief Justice Alexander's opinion, in which he concurred *in*

*the result* reached by the lead opinion, even though six justices expressly disagreed with the Chief Justice. Swart argues to this Court:

Rule does not point to any *false* statement or any true statement that leaves a *false impression*. Instead, she is asserting that Swart defamed her by *omission*.

***“There is no Washington authority that supports the recognition of defamation by omission.”*** [Mohr v. Grant, 153 Wn.2d] at 830 (Alexander, C.J. concurring). The absence of a statement cannot be defamatory because, in addition to falsity, defamation requires publication, and an unspoken thought by definition cannot be published. ***Defamation as a cause of action simply cannot be predicated on the omission of certain statements.***

*Response*, at 35 (emphasis added).

But Chief Justice Alexander’s view did not carry the day and thus it is *not* the law in this State. Although the Chief Justice concurred in the *result* that the Court reached in *Mohr*, he wrote a separate opinion to express his disagreement with the Court’s holding that defamation *can* be predicated on the omission of material facts:

***I write separately in order to disassociate myself from the majority’s apparent recognition of a tort of defamation by implication “caused by certain material omissions.”*** Majority at 828. There is no Washington authority that supports the recognition of defamation by omission and ***we should not recognize such a cause of action now.***

*Mohr*, 153 Wn.2d at 830 (Alexander, C.J., concurring) (emphasis added).

Endorsing the Chief Justice’s failed argument for what the law of defamation *should* be, Swart argues that Rule’s suit was properly

dismissed because her defamation claim is based solely on the omission of facts:

Rule contends that by omitting statements about Swart's relationship with Northon, the Article contains the false implication that the article is accurate. [<sup>2</sup>]. Rule does not cite to any actual statements in the Article that are allegedly inaccurate, but points only to the omitted statement as the sole inaccuracy. ***If no statement contained in the article is false, then the Article cannot be defamatory.*** . . . She is asking the Court to read the Article as false without pointing to any false statements. ***This is not the law.***

*Response* at 36 (emphasis added).

But in fact, it *is* the law. In fact, an Article can be defamatory, and actionable as such, even though no statement in the Article is expressly false. Although Swart may not like it, six justices in *Mohr* held that Washington *does* recognize the tort of defamation by implication that is proved when the author makes material omissions from an article that contains no expressly false statements.

Justice Fairhurst's opinion for three justices clearly states:

Defamation by implication occurs where "the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, ***or creates a defamatory implication by omitting facts.***" [Citations]. Although the Court of Appeals stated that "[n]o Washington case directly addresses the problem of material

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<sup>2</sup> This characterization of Rule's position is not quite accurate. Rule contends that *without* the omitted fact the Article repeatedly implies that Swart's article was the product of a professional, experienced, objective, and unbiased reporter. *With* the omitted fact, this implied assertion is shown to be completely false. Swart's article was the product of an extremely biased author with an enormous motive to slant the facts so that he can present Northon in the best possible light, and Rule in the worst possible light.

omissions,” [citation], this court has recognized instances of defamation by implication.

*Mohr*, 153 Wn.2d at 823 (emphasis added).

At page 827 (emphasis added) that opinion further states:

***In a defamation by omission case, the plaintiff must show with respect to the element of falsity that the communication left a false impression that would be contradicted by the inclusion of omitted facts.***

*Mohr*, 153 Wn.2d at 827 (emphasis added). Applying this rule of law to the facts of the case, Justice Fairhurst concluded that *Mohr* “has not made a prima facie showing that the communication left a false impression that would be contradicted by the inclusion of omitted facts.” *Id.* at 830. So *Mohr* lost, and the Chief Justice concurred in that *result*.

In Justice Chambers’ opinion, three more justices unambiguously joined in the holding in Justice Fairhurst’s opinion that defamation by omission exists and can be actionable. His only disagreement with the lead opinion was that he believed that the news broadcast at issue *did* leave a false impression which would have been contradicted had omitted facts been included:

***I agree*** with my colleagues that falsity may be established by implication and ***that the omission of facts may result in defamation by implication.*** See Majority at 823, 826-27.

*Mohr v. Grant*, 153 Wn.2d at 833 (Chambers, J., concurring in part and dissenting in part) (emphasis added).

Three plus three is six, and six is a majority. In *Mohr* a solid majority of six justices held that an article *can* be false and defamatory and actionable, even if every statement in the article is literally true. Swart may dislike this holding, but that does not change the fact that defamation by omission *is* recognized as actionable in this State.<sup>3</sup> As noted below, it is uncontested that Swart omitted the fact that he had a romantic relationship with Northon and that he was engaged to marry her. Swart simply ignores the impact of that omission on the entire article.

**2. By Portraying Himself as a Journalist With a Professional Interest in Liysa Northon’s Case, and Concealing the Fact that He was Her Fiancée, He Created a False Impression That He Was Presenting An Objective Assessment of Ann Rule’s Abilities as a Professional Writer.**

In the article’s first three paragraphs Swart portrays himself as an independent journalist with only a professional interest in Northon’s case:

The day after Liysa Northon shot and killed her husband Chris, I remember thinking it was an open and shut case. It was a Tuesday, October 9, 2000, when word came that the local sheriff was investigating a homicide in a national forest near my home town of Enterprise, in the far northeastern corner of Oregon.

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<sup>3</sup> Swart cites to two pre-*Mohr* cases, *Lee v. Columbia*, 64 Wn. App. 534, 826 P.2d 217 (1991) and *Sims v. KIRO*, 20 Wn. App. 229, 580 P.2d 642 (1978). But the plaintiffs in those cases never argued that the news stories about them were defamatory by omission. Thus, the language quoted by Swart cannot be read as rejecting actionability of that form of defamation. This Court’s post-*Mohr* decision in *Corey v. Pierce County*, 154 Wn. App. 752, 761, 225 P.3d 367 (2010), cited by Rule, explicitly recognized the actionability of defamation by omission, and affirmed a verdict in favor of the plaintiff. Swart, however, chooses to simply ignore the *Corey* case.

*Murders* were not unheard of in Enterprise (pop. 2,000). But they were unusual enough that they *always made the front page of the newspaper, and it was my job to put them there.*

*News of the killing arrived while I was laying out the Wallowa County Chieftain, just as I had for the past 20 years, and just as the men in my family had for the 40 before that.* I knew the campground where the murder took place because it was a few miles from the hunting cabin where my grandfather hobnobbed with local bigwigs like former U.S. Supreme Court Justice William O. Douglas.

CP 48 (emphasis added)

Thus the subject of the opening lines of the article *was Swart himself.* Swart began by explaining why *he* was a highly qualified person to make judgments about Liysa Northon's murder conviction. He began by stressing that it was his "job" to put the facts involving any murder into his newspaper. He stressed his experience. He had been publishing a newspaper for 20 years; his family had been operating a newspaper for 60 years. The skills and knowledge necessary to publishing a newspaper were practically a part of Swart's DNA. Moreover, he had newspaper experience covering *murders.* This was *not* the first murder ever to occur in Enterprise. Murders in Enterprise "always made the front page of the newspaper" – Swart's newspaper. Finally, since the killing had happened locally, Swart knew the place where it had occurred. Thus the article began by stressing Swart's credentials. He had decades of general

newspaper experience; he also had experience reporting about murder cases; and he had specific knowledge of the crime scene in this case.

The next paragraph explained that Swart was knowledgeable about police procedure and domestic violence, and that given this knowledge he was surprised to see how Northon's allegedly obvious status as a battered woman was being overlooked:

Word was that Liysa had been found in a hospital emergency room being treated for her own injuries when she was arrested. *After two decades of dealing with the police, I knew that domestic violence calls were the ones cops feared the most* because of their unpredictable nature. It sounded at first like the simple act of a woman who'd had enough finally fighting back.

CR 48 (emphasis added).

After mentioning that it was "a surprise" to him that Northon had pleaded guilty, Swart returned to the theme of his journalistic objectivity and informed the reader that his detached professional interest in the case was retriggered years later when he read Ann Rule's book about Northon:

*As the boss, I was normally our paper's go to guy when it came to covering big trials. But I assigned it to a cub reporter to cover Liysa's trial instead.* Which is why I was so shocked, years after I'd left Enterprise, *when I finally got around to reading Rule's book.* The crime I had thought had been so simple was, in fact, not. In Rule's telling Liysa Northon wasn't a battered wife, she was a sociopath who'd spent years lying about abuse to provide an alibi for cold blooded murder, and afterward to cash an insurance check.

CP 48 (emphasis added). The paragraph above set up a transition to the article's main theme and subject of inquiry: Who did careful, professional, investigative journalism? Ann Rule or Rick Swart?

The next few paragraphs spelled it out for the reader. Rule couldn't even be bothered to interview Northon, but Swart, because he was "curious," went out and got the interview; though Swart initially was somewhat skeptical, he came to the conclusion that Ann Rule had gotten it all wrong, and that the only real liar was Ann Rule herself:

*Equally surprising was Rule's written lament that she wished she could have interviewed Liysa. "Why didn't she?" I thought. The woman was locked up in prison. It wasn't as if she was going anywhere.*

*Last December my curiosity got the better of me and I mailed a letter to Liysa. A few weeks later she replied and granted me the first interview she'd given to any journalist since being locked up in Coffee Creek Correctional Facility almost exactly 10 years ago. I entered that conversation with a healthy dose of skepticism. But after several months spent reviewing more than a thousand pages of court documents and interviewing Liysa and two dozen others with ties to the case, I've arrived at the conclusion that the title of Rule's book, *Heart Full of Lies*, better describes the author than her subject.*

CP 48-49 (emphasis added).

The next three pages (roughly 40 paragraphs) set forth the evidence that Swart felt proved that Liysa was a battered spouse who killed her husband in self-defense. The source of most of this information, naturally, was Liysa Northon. CP 49-52.

At the conclusion of this lengthy section, Swart returned to the subject of Ann Rule. He reminded the reader of his own newspaper reporter background, and then he contrasted his fairness (in interviewing Northon) with Rule's unfairness, in not having interviewed her:

At first Rule was cooperative. She even sounded happy to hear from me – when *I told her that I had edited the Chieftain we very briefly reminisced about how some of my old reporter friends* had helped her do research for *Heart Full of Lies*. She was also cheerful when she told me, as she had told her readers in the book, that she thought Liysa was a sociopath.

It was only when I began asking questions about how Rule went about writing the book that her demeanor changed. *When I asked whether or not she had ever tried to get in touch with Liysa, I got one of many conflicting answers.* At first she said, "If she'd chosen to talk to me that would be fine," as if it had been Liysa's decision not to meet."

CP 52 (emphasis added). Swart wrote when he asked again, Rule said she thought that she had tried to interview Northon. CP 52. Swart wrote that when he asked a third time, "Rule made *what sounded to me like* an admission that she had never attempted to contact Liysa." CP 52 (italics added). Swart wrote that later he tried to interview Rule again because "[t]here were still a lot of follow up questions [he] wanted answered." CP 52. But according to Swart, "unfortunately Rule never called me back." CP 52. According to Swart, Liysa Northon told him that Rule never wrote to her and never came to the prison to visit her. CP 52.

Then came two and a half more pages devoted to how Liysa was not treated fairly by her own attorney, or by the prosecutor who handled her case. At the very end of the article, Swart returned one last time to the theme that he had treated Northon fairly by giving her a chance to tell her story, but Rule had not, and *still* would not. He “asked Rule if she’d ever consider debating Liysa. Her response: ‘Everything I have to say I said in my book.’” CP 54.

Thus Swart completed his comparative analysis of two writers. There was Rule, the lazy author who didn’t even interview Northon; and there was Swart, the experienced journalist who came to his conclusions only after painstakingly “interviewing” Northon and dozens of others, and only after reading reams of documents.

But what he didn’t mention was that decades ago he had fallen in love with Liysa Northon as a teenager, and that he had recently proposed marriage to her, she’d accepted, and they were now engaged.

**3. The Omitted Facts, Had They Been Included, Would Have Contradicted The False Impression of Professional Objectivity That The Article Conveyed.**

Inclusion of these crucial omitted facts transforms the entire article into what is in essence a rant by a member of Liysa Northon’s family. The “grant” of an interview looks quite different when it is revealed to be a meeting with one’s fiancée. What was portrayed as an exclusive

“interview” granted to the experienced journalist turns out to be a conversation with the man she had decided to marry. The motive for reading over a thousand pages no longer looks like a journalist’s search for the truth; it looks like an effort to clear the name of the person Swart loved and wanted to spend the rest of his life with (when she gets out of prison).

The test of the actionability of a claim of defamation by omission is whether “the communication left a false impression that would be contradicted by the inclusion of omitted facts.” *Mohr*, at 830. The facts of this case easily meet that test. Even by the high standard of clear and convincing evidence, Rule demonstrated that the article left a false impression. It left the impression that Swart was simply a neutral and highly experienced professional, journalist, with no personal motive to slant the facts, who simply “did his job,” conducted interviews, read documents, and arrived at his conclusion about Liysa Northon in an objective manner.

In a subsequent article Swart admitted that he deliberately concealed the fact of his romantic relationship with Northon because he learned that if he revealed his secret, *no paper or magazine would publish his article*. Journalism Professor Thomas Berner analyzed Swart’s excuse for this deliberate omission:

Mr. Swart is dismissive about the obvious conflict of interest that he hid from Mr. Hannan. This one is a double whammy.

According to the Portland Tribune, *Mr. Swart knew and was smitten by Northon, then Lisa DeWitt, when she was 17 and he was 22. So he had an even deeper and longer connection to her than just being her fiancée when he wrote about her two decades plus later. On top of that, he admits that when he did reveal the relationship to other publications, they refused to publish his story. Even his former newspaper, the Wallowa County Chieftain, would not publish his story.* So in addition to not revealing his relationship to the Seattle Weekly, he also did not reveal the history of the rejection of his story. He knew the story was toxic.

Even worse, Mr. Swart actively concealed this information. *In Mr. Swart's subsequent article "Why I fell on the sword for Liysa Northon," he admits that when he disclosed his relationship with Liysa Northon, newspapers would not print his story, so he "systematically shopped" his story without the up-front disclosure.* Mr. Swart intensifies the misdirection in the Article by stating that in the prior December his "curiosity got the better of [him]" and he mailed a letter to Liysa Northon in prison, at which point she "granted" him an interview. This has the obvious effect of making Mr. Swart seem as though he is at an arm's length from Liysa Northon despite being engaged in a romantic relationship with her. This active concealment allowed Mr. Swart to market [sic] provides false legitimacy to the story which repeatedly attacks the non-fiction writing credentials of Ann Rule. In my opinion, this blatantly evidences malice.

CP 311-12 (emphasis added) (attached as Appendix A).

Swart's admission that he deliberately concealed the nature of his relationship to Northon in order to persuade a paper to publish the article demonstrates that the concealed facts – had they been disclosed – would have contradicted the false impression of professional objectivity. *Mohr*, 153 Wn.2d at 830. The concealed facts, once revealed, utterly destroyed the myth of Swart's professed journalistic and objective judgment about

Northon and her crime. To paraphrase Swart's own article, once these facts were revealed, it is clear that any reasonable reader of Swart's article would "arrive[] at the conclusion that the title of Rule's book, *Heart Full of Lies*, better describes" Swart himself, than it does Ann Rule, "the subject of [his] article."

Rule met the statutory standard of RCW 4.24.525 for surviving a motion to dismiss. Since the undisputed facts showed by clear and convincing evidence that there was a probability that Rule would prevail on her claim, the Superior Court erred in dismissing it.

**B. A Newspaper is Not A Public Forum So Subsection (2)(d) of the Statute Doesn't Apply.**

In her opening brief, Rule outlined the radically different approaches to freedom of speech and public forum analysis that have been taken by the California Supreme Court on the one hand, and the Washington Supreme Court and the U.S. Supreme Court on the other. Washington has adhered to the federal approach and has rejected the idea that private property can constitute a "public forum." See Brief of Appellant at 15-17 and its discussion of *Southcenter Joint Venture v. Nat'l Democratic Policy Committee*, 113 Wn.2d 413, 780 P.2d 1282 (1989), which explicitly rejected California's definition of a public forum adopted in *Robbins v. Pruneyard Shopping Center*, 23 Cal.Rptr. 899, 592 P.2d 341

(1979). Respondent Swart simply chooses to ignore these cases and the disparate state constitutional history of the two States.

Acknowledging that the Washington Legislature did not define the term “public forum,” Swart argues that “public forum” is not a technical term, and therefore courts are advised to consult “a regular dictionary” to ascertain the “ordinary meaning” of the phrase. *Response* at 10. But then Swart fails to follow his own advice and does not offer any “regular dictionary” definition of the phrase.<sup>4</sup>

The phrase “public forum” originated with the Romans. The forum in Rome was a place where anyone could go to meet and discuss public affairs. This characteristic of openness is reflected in the ordinary dictionary definition of the word “forum” in English today. Webster’s

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<sup>4</sup> Swart asserts that the term “public forum” is used in the State Constitution in art I, §5 and that the term is not defined there either. *Response* at 10. This is simply untrue. Article I, §5 does *not* use the term “public forum.” It does say, “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Thus, art. I, §5 guarantees Swart’s right to speak on the subject of how two journalists – Ann Rule and himself - went about investigating the truth about Liysa Northon’s killing of her husband. But it never uses the phrase “public forum.” On the other hand, art. I, §5 explicitly recognizes *Ann Rule’s constitutional right to hold Swart “responsible for the abuse of [the] right”* to speak on the subject of her journalistic professionalism and ethics.

Swart also cites to statutes which use the term “public forum” but do not define it. These statutes, such as RCW 35.95A.050, actually support Rule’s position. That statute defines a “public corridor hearing” as a hearing that “provides a full opportunity for presenting views on transportation facility location.” By publishing his article, the *Weekly* provided Swart roughly five pages to present his anti-Rule views. It did not provide Rule, or anyone else, a similar “full opportunity” to present the contrary view. And as the Supreme Court has recognized, it would be unconstitutional to legislatively compel the *Weekly* to provide Rule with such a right of reply. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

Ninth New Collegiate Dictionary 486 (1983) first gives its historical meaning as “the public place of an ancient Roman city,” and then defines a forum as “a public meeting place for open discussion.”

Not everyone can publish in a privately owned newspaper. The *Seattle Weekly* does not let everyone publish in its paper. It selects the few articles it wishes to publish. Its pages do not constitute a public forum. Swart dodges this point by pointing to the ability of readers to post online their comments about the *Weekly*'s articles. But this is irrelevant. Rule did not sue because one of the comments posted by a reader defamed her. She sued because Swart defamed her.

As Rule noted in her opening brief, even if we were in California, those cases are split on whether a newspaper is a public forum for purposes of California's anti-SLAPP law. But this is not California. And our statute is substantially different from California's statute. *See Dillon*, 179 Wn. App. at 87 (due to the difference in statutory language “we do not find California law to be persuasive on this point.”). In this state, a newspaper is not a public forum.

**C. Making a Written Statement in a Newspaper Article is Not “Other” Conduct That Distinguishes it From the Making of a Written Statement in the Preceding Subsections of the Statute, So Subsection (2)(e) of the Statute Also Doesn’t Apply.**

In her opening brief Rule noted that construing the phrase “other lawful conduct” in subsection (2)(e) to cover the making of a written statement would render the references to written statements in subsections (a) through (d) superfluous. Swart responds that this Court should construe “other lawful conduct” as meaning conduct “that occurs in a different location.” *Response* at 19. But a location is not conduct. A location is not a form of human activity. The nature of the “conduct” of making a written statement does not change when the location of the submission of the writing changes. Swart’s proposed construction of the phrase “other lawful conduct” makes no sense.<sup>5</sup>

**D. The Separation of Powers and Access to Courts Claims Will Likely be Resolved by the Supreme Court in *Davis*.**

Rule maintains that the statute violates the state constitutional doctrine of separation of powers and the constitutional right of access to the courts. These issues will likely be resolved by the Supreme Court in the *Davis* case, which will be argued on January 20, 2015. For the

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<sup>5</sup> But Rule’s does. “Written” and “oral” conduct is placed into one category, and “other” expressive conduct refers to all of the other activities that comprise decades upon decades of First Amendment jurisprudence – such as saluting, pointing, or making some other physical or symbolic gesture (like displaying a flag, an armband, the peace sign, or the victory sign). In a Venn diagram where “written and oral” conduct comprises one circle, and “other” conduct is a second circle, the two do not intersect.”

present, Rule reaffirms her position that this statute, like the one at issue in *Putman v. Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009), violates these constitutional rights because the statute conflicts with the judicially-established rules governing discovery and the imposition of sanctions for filing a meritless case.

**E. RCW 4.24.525 is Unconstitutionally Overbroad Because, as This Court Recognized in Dicta in *Akrie*, It “Sweeps Into Its Reach Constitutionally Protected Activity.” At the Very Least, the Statute is Unconstitutional As Applied to this Case Because Rule’s Defamation by Omission Claim Is Not Frivolous. On the Contrary, It is A Very Strong Claim.**

The right to bring a nonfrivolous lawsuit is protected by the First Amendment. *Bill Johnson Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). Even losing retaliatory litigation is protected by the Petition Clause unless it is so devoid of merit as to be “objectively baseless.” *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002). In establishing an entirely new – and far harsher – standard, RCW 4.24.525 mandates the imposition of a penalty upon a party who has exercised this First Amendment right if the party cannot establish a probability of prevailing on his claim by clear and convincing evidence.

In *Akrie*, although the appellant has not raised the issue, this Court recognized the constitutional problem with the statute. But in a lengthy passage of *dicta* this Court recognized that RCW 4.24.525 is

unconstitutionally overbroad precisely because it goes way beyond penalizing only those who file frivolous lawsuits:

***[T]he anti-SLAPP statute does not sanction and frustrate only claims that are frivolous.*** Rather the statute mandates dismissal of all claims based on protected activity where the plaintiff cannot prove by clear and convincing evidence a probability of prevailing on the merits. RCW 4.24.525(4)(b). “A frivolous action is one that cannot be supported by any rational argument on the law or facts.” [Citations]. “But the fact that the complaint ultimately does not prevail is not dispositive” of frivolity. [Citations]. A claim may be dismissed on summary judgment without being frivolous. [Citations]. As the second step of the anti-SLAPP analysis is akin to summary judgment, [citation], a claim may thus be dismissed on an anti-SLAPP motion without being frivolous. Indeed, analyzing whether the burden to prove the claim by “clear and convincing evidence” has been met is vastly different from an inquiry into frivolity. Accordingly, ***it is clear that the anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity.***

*Akrie*, 178 Wn. App. at 513 n.8 (emphasis added).

Although *Akrie* did not raise the overbreadth/right to petition argument in *this* Court, he *did* raise it in his petition for review by the Supreme Court, and the Court granted that petition and has heard argument in the case. Thus, it is likely that the Supreme Court will resolve that issue in that case. But this Court need not wait for the *Akrie* decision to resolve this issue since this Court’s own *Akrie* opinion recognizes that the statute is unconstitutionally overbroad.

Rule reaffirms her position that the statute is overbroad (and thus unconstitutional on its face). It is also unconstitutional as applied to this

case because the Superior Court did not find that Rule's defamation suit was baseless, and this Court, applying *de novo* review, certainly cannot find that her suit is baseless. On the contrary, as noted *infra* on pp. 2-14, Rule's claim for defamation by omission is exceptionally strong.

**F. The Excessive Fines/Due Process Claims Will Likely be Resolved by the Supreme Court in *Akrie*.**

The Supreme Court is likely to resolve these constitutional issues in the *Akrie* case. Appellant Rule adheres to the arguments she made in support of this claim on pages 48-49 of her opening brief.<sup>6</sup>

**G. RCW 4.24.525 Violates the State Constitutional Right to a Jury Trial.**

Rule acknowledges that in this Court's opinions in *Dillon* and *Davis* – both of which are now being reexamined by the Supreme Court – this Court held that the statute did not violate the right to jury trial *because* the proper construction of the statute called for the trial court to apply a standard “akin” to the standard that applies to a summary judgment motion. *Dillon*, 179 Wn. App. at 88; *Davis*, 180 Wn. App. at 532. Rule respectfully adheres to the arguments previously presented in her opening brief on pages 37-39 and continues to maintain that the statute simply

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<sup>6</sup> This issue will likely become moot as soon as the Superior Court approves the settlement agreement between the Media Respondents and Appellant Rule. This Court has granted the Superior Court authority to take that action.

cannot be rewritten in this fashion by the appellate courts so as to cure its unconstitutionality.

But even assuming that the statute can be “saved” by such a judicial construction, that would not save the Superior Court’s decision in this case from appellate reversal. The Superior Court did *not* apply a standard “akin” to the summary judgment motion standard which this Court described in *Dillon and Davis*. *Dillon* suggests that the statute’s “clear and convincing evidence” standard must be construed in light of the standard for granting a summary judgment, otherwise RCW 4.24.525 would violate the right to jury trial. Therefore to survive a motion to strike under this methodology, the nonmoving party need only show that he has made out a prima facie case which raises triable issues. When making this determination “all reasonable inferences must be drawn in favor of the nonmoving party.” *Dillon*, 179 Wn. App. at 88.

In the present case, the Superior Court did *not* apply this summary-judgment-like standard. It did not ask whether Rule had demonstrated the existence of a prima facie case. Nor did it ask whether Rule had created a genuine disputed issue of material fact on the element of falsity. Moreover, even if the Superior Court had applied this type of analysis, it would still be incumbent on this court to review such a “summary-judgment-like” decision under a *de novo* review standard. Under such a

standard, no appellate court could say that Rule had failed to raise a genuine material issue as to falsity. Applying the *Dillon/Davis* standard, it is clear that a rational jury could decide in Rule's favor. A jury could *easily* decide that inclusion of the omitted facts – Swart's love for and his engagement to Liysa Northon – would contradict the article's false implication that Swart's opinion of Ann Rule's journalism was simply the assessment of an unbiased, independent professional journalist with no personal motive to color his view of the facts.

**G. Manifest Constitutional Error May Be Raised for the First Time on Appeal.**

Swart argues that Rule's arguments regarding the unconstitutionality of RCW 4.24.525 should not be addressed by this Court because Rule did not raise them in the Superior Court. Citing *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322 P.3d 6 (2014) and *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001), Swart argues that because "[t]hese arguments are raised for the first time on appeal . . . it is improper to consider them now." *Response* at 33.<sup>7</sup>

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<sup>7</sup> He asserts that "The agreements [sic] presented in pages 43-47 and 48-49 of Rule's appellate brief were not presented at either the initial briefing or on her motion for reconsideration and must not be considered now." *Response* at 34.

Swart overlooks RAP 2.5(a) and the case law implementing it.

The rule provides:

“The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.”

This rule makes no distinction between civil and criminal cases. The plain language of subsection three states a party may challenge for the first time on appeal a manifest error that affects a constitutional right. We have recognized that civil parties may raise constitutional issues on appeal if they satisfy the criteria listed in RAP 2.5(a)(3). See *Richmond v. Thompson*, 130 Wn.2d 368, 385, 922 P.2d 1343 (1996) (citing *Haueter v. Cowles Publ'g Co.*, 61 Wash.App. 572, 577 n.4, 811 P.2d 231 (1991)).

*State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). It is well-settled that manifest constitutional error which violates First Amendment freedoms may be raised for the first time on appeal pursuant to RAP 2.5(a). *In re Dependency of T.L.G.*, 139 Wn. App. 1, 19, 156 P.3d 222 (2007); *State v. Ballew*, 167 Wn. App. 359, 370-71, 272 P.3d 925 (2012). So long as the record is sufficiently developed to permit judicial review, excessive fines claims and due process claims may be raised for the first time on appeal. *WWJ Corp.*, 138 Wn.2d at 603-607. Asserted violations of the right to jury trial may be raised for the first time on appeal. *State v. Lamar*, 180 Wn.2d 576, 589, 327 P.3d 46 (2014) (“The affirmative instruction given to the reconstituted jury constitutes manifest error affecting the constitutional right to a unanimous jury verdict under

article I, section 21 of the Washington Constitution. Accordingly, the defendant could raise the asserted error for the first time on appeal.”).

If this Court finds it necessary to reach these constitutional issues, there is no procedural bar to this Court’s consideration of them. Rule respectfully submits that RCW 4.24.525 is unconstitutional, both on its face, and as applied to this case, because it violates the First Amendment, the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the state constitutional rights to access to courts, separation of powers, and jury trial.

### III. CONCLUSION

For these reasons, Appellant Rule asks this Court to reverse the Superior Court and to remand with directions that Swart’s motion to strike pursuant to RCW 4.24.525 must be denied, either (1) because Rule made the statutorily required showing of a probability of prevailing, or (2) because the statute is unconstitutional, or (3) for both reasons.

Respectfully submitted this 14th day of November, 2014.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF**, on the below-listed attorneys of record by the methods noted:

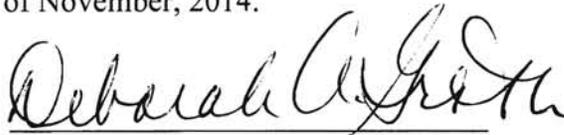
Email and first-class United States mail, postage prepaid, to the following:

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DATED this 19<sup>th</sup> day of November, 2014.

  
Deborah A. Groth, Legal Assistant

## **APPENDIX A**

1 Ann Rule is a liar for profit, or that Ann Rule is a person who lies in her nonfiction  
2 works.

3 33. Mr. Swart also writes that Ann Rule told him in a "cheerful" tone that she thought Liysa  
4 Northon was a sociopath, but that her last words to Mr. Swart were "I hope I don't get  
5 sued." Leaving aside the factual dispute of whether those conversations occurred, the  
6 false impression is that Ann Rule is biased (as she is cheerful about her conclusion) and  
7 that Ann Rule is aware of wrongdoing with respect to her book about Liysa Northon.

8 34. These are merely some examples of how ostensibly "factual" statements can be paired or  
9 strategically placed to create a false impression in the reader's mind.

### 10 Malice Can Be Inferred From Rick Swart's Actions

11 35. For the reasons stated above regarding Mr. Hannan's role in The Article, Mr. Swart's  
12 actions violated untold numbers of standards of journalism, and in some cases, more  
13 egregiously than the editor.

### 14 Rick Swart's violations of journalistic standards

15 36. For example, the irrelevant celebrity association employed by Mr. Swart is wholly  
16 unnecessary to the article. It is unclear what purpose Mr. Swart's grandfather's alleged  
17 interactions with U.S. Supreme Court Justice William O. Douglas serve in the context of  
18 the story beyond perhaps attempting to bolster Mr. Swart's own perceived credibility or  
19 legitimacy. Mr. Swart's gratuitous comment that Dan Ousley is the district attorney of  
20 "the least populous [county] in Oregon" similarly serves no function in the context of the  
21 story.

22 37. Mr. Swart's unquestioning reliance on a single source of information – Liysa Northon –  
23 is also extremely suspect. It does not appear from the article that independent sources  
24 were consulted in depth, and it is also evident from Mr. Hannan's "updates" and his  
25 interactions with Mr. Swart that there were no corroborating details.

26 38. Strikingly, Mr. Swart recounts Liysa Northon's version of events without any semblance  
27 of balance. Liysa Northon pleaded guilty to the murder, and no evidence supports her  
28 version of the alleged events. Regardless of what really happened with the shooting, Mr.  
29 Swart had a responsibility to acknowledge the omitted fact that Liysa Northon is the only  
30 person who shares her version of the murder story.

### 31 Rick Swart's deception evidences malice

32 39. Mr. Swart's more serious violations of standards of journalism are ethical violations and  
33 are serious enough to evidence malice.

34 40. Mr. Swart is dismissive about the obvious conflict of interest that he hid from Mr.  
35 Hannan. This one is a double whammy. According to the Portland Tribune, Mr. Swart

1 knew and was smitten with Northon, then Lisa DeWitt, when she was 17 and he was 22.  
2 So he had an even deeper and longer connection to her than just being her fiancé when he  
3 wrote about her two decades plus later. On top of that, he admits that when he did reveal  
4 the relationship to other publications, they refused to publish his story. Even his former  
5 newspaper, the Wallowa County Chieftain, would not publish his story. So in addition to  
6 not revealing his relationship to the Seattle Weekly, he also did not reveal the history of  
7 the rejection of his story. He knew the story was toxic.

8 41. Even worse, Mr. Swart actively concealed this information. In Mr. Swart's subsequent  
9 article "Why I fell on the sword for Liysa Northon," he admits that when he disclosed his  
10 relationship with Liysa Northon, newspapers would not print his story, so he  
11 "systematically shopped" his story without the up-front disclosure. Mr. Swart intensifies  
12 the misdirection in The Article by stating that in the prior December his "curiosity got the  
13 better of [him]" and he mailed a letter to Liysa Northon in prison, at which point she  
14 "granted" him an interview. This has the obvious effect of making Mr. Swart seem as  
15 though he is at an arm's length from Liysa Northon despite being engaged in a romantic  
16 relationship with her. This active concealment allowed Mr. Swart to market provides  
17 false legitimacy to the story which repeatedly attacks the non-fiction writing credentials  
18 of Ann Rule. In my opinion, this blatantly evidences malice.

19 42. Given Mr. Swart's 25 years' experience as a journalist, I would be astonished if he were  
20 not aware of what constitutes a conflict of interest and why they should be avoided. Mr.  
21 Swart should not have written the story in the first place, but since he did, he needed to  
22 reveal to his editor his historical and current relationship with Liysa. Not telling Mr.  
23 Hannan violated the Society of Professional Journalists' Code of Ethics. It was deceitful  
and shows malice aforethought.

(continued on next page)