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No. 71706-5-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ANN RULE,

Appellant,
vs.

RICK SWART, *et al.*,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
The Honorable Laura Inveen

RESPONSE BRIEF OF RICK SWART

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I. INTRODUCTION

Appellant Ann Rule filed this defamation lawsuit to punish and silence her critic Rick Swart and his publishers (the Media Defendants). But Washington values a vigorous and open debate on matters of public concern, and has enacted an anti-SLAPP statute to protect those values. Accordingly, Defendants/Respondents Seattle Weekly and Rick Swart moved to dismiss Rule's complaint under Washington's anti-SLAPP statute, RCW 4.24.525.

This case represents the Platonic form of a SLAPP case to which RCW 4.24.525 plainly applies, and the Superior Court so ruled. The Court found that Swart wrote on an issue of public concern in a public forum or was otherwise exercising his first amendment rights. The burden then shifted to Rule to present sufficient evidence on each element of her claim. Notably, she failed to prove falsity, the most basic element of a defamation claim. Following RCW 4.24.525's clear directive, the Superior Court dismissed Rule's complaint and awarded the Defendants their statutorily mandated attorney's fees and damages. This appeal followed the denial of Rule's motion for reconsideration.

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II. ALTERNATE STATEMENT OF THE CASE

This appeal is the continuation of the passionate dispute between Rule on the one hand, and Liysa Northon and her supporters on the other, over the events surrounding the 2000 killing of Northon's spouse in the rural Oregon mountains. Northon pled guilty of the crime of manslaughter "by reason of extreme emotional disturbance". Rule, the famous true crime writer, wrote "A Heart Full of Lies" (the "Book") about Northon, the killing, her defense and the resulting trial.

Swart was the former editor of the local newspaper in the community where Northon's husband died. CP 48 para 3. Years after the killing, he began investigating the incident after reading the Book. *Id.* at para 7. In the course of that investigation, he began a romantic relationship with Northon.¹ Rule portrayed Northon as a sociopath in the Book. Swart's freelance article criticized Rule for reaching that conclusion without ever interviewing Northon and for overlooking substantial evidence that Northon was a domestic violence victim driven to protect herself and her children from a violent abuser. *See generally id.*

¹ Rule asserts that Swart's relationship with Northon predated his investigation. Though not germane to this case, the relationship began during the course of Swart's investigation.

Swart shopped his article around to various newspapers. CP 224 ¶ 2. It was ultimately published July 2011 in *The Seattle Weekly* as “Murderer She Wrote: How Seattle’s Queen of True Crime Turned a Battered Wife Into a Killer Sociopath” (the “Article”). *Id.* ¶ 7. In submitting the Article, Swart did not disclose that he had formed a romantic relationship with Northon during the course of his investigation. *Id.* at ¶ 6. The revelation of Swart’s relationship after the Article’s publication caused *The Seattle Weekly* to scrutinize the entire Article and publish an editorial statement in the next edition. *Id.* at ¶¶ 10, 11. Its investigation revealed that the Article was substantially true, and that it contained only six immaterial errors. *Id.* at ¶ 15. Swart has consistently asserted that the Article is true. CP 68.

This suit is the second civil suit to be borne from the Book. Rule was previously sued by Northon and her family for defamation based on the Book. Rule successfully defended under Oregon’s anti-SLAPP statute because she argued that writing the Book was conduct in furtherance of her constitutional right of free speech. CP 195–96. Both suits alleged defamation (or similar claims) and both suits were dismissed under their respective state’s anti-SLAPP laws. CP 128; CP 28–29.

In the present case, Superior Court Judge Inveen held that Rule's suit was subject the Washington anti-SLAPP statute and that Rule failed to present sufficient evidence of falsity on her claims against Swart. CP 693 ¶ 1. Without falsity, Rule's claims necessarily failed, and pursuant to RCW 4.24.525(6)(a), her claims were dismissed. Swart was awarded his attorney's fees and \$10,000 statutory damages. CP 693-94.

Rule now appeals the Superior Court's decision. On appeal Rule has substantially abandoned her claims on the merits. She now vigorously asserts that the anti-SLAPP statute doesn't apply to these facts and is unconstitutional for various reasons, several of which were not raised at the Superior Court. Rule fails to distinguish the constitutional issues in this case from the Court's recent decision in *Davis v. Cox*, a case which should nearly dispose of Rule's constitutional arguments. *See* 180 Wn. App. 514 (2014).

Furthermore, Rule's appeal is misplaced. Rule encourages reversal based on a technical and highly nuanced reading of the statute that would result in significantly diminished protection for those speaking out on issues of public concern, and ignores the legislature's instructions to liberally construe the anti-SLAPP statute. On the merits, no error can be found because Rule did not present evidence that any of

the Article's statements were materially false and were about Rule. Falsity is the bedrock of defamation, and without falsity, no claim can survive. Speaking the truth, no matter how unpleasant it is, is not defamatory.

III. ARGUMENT

A. RCW 4.24.525 plainly applies to the Article and this case.

“Washington's anti-SLAPP statute protects persons who engage in “action[s] involving public participation and petition” from having to defend against a claim based on those actions.” *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 50, *rev. granted*, 180 Wn. 2d 1009 (2014). In 2010, the legislature amended the existing anti-SLAPP statute by adding RCW 4.24.525 to address “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech...” Laws of 2010, ch. 118, § 1(b). These types of suits, known as SLAPPs, can “deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues” because of the costs associated with defending them. *Id.* at § 1(d). The anti-SLAPP statute provides “an efficient, uniform, and comprehensive method for speedy adjudication”

and makes available an award of “attorneys’ fees, costs, and additional relief where appropriate.” *Id.* at §§ 1(c), 2(b), and 2(c).

Under the anti-SLAPP statute, a party may bring a special motion to strike “any claim that is based on an action involving public participation and petition.” RCW 4.24.525(4)(a). In deciding an anti-SLAPP motion, a court must follow a two-step process. A party moving to strike a claim has the initial burden of showing by a preponderance of the evidence that the claim targets activity “involving public participation and petition,” as described in RCW 4.24.525(2). If the moving party meets this burden, 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 meet its burden, the court must grant the motion, dismiss the claim, and award the moving party its attorney’s fees and \$10,000 as statutory damages. RCW 4.24.525(6)(a)(i)–(ii).

Writing and publishing the Article is plainly an act involving public participation and petition that is protectable under RCW 4.24.525. The Article was on an issue of public concern, and published in a public forum or was in furtherance of Swart’s constitutional right of free speech. Rule concedes that the subject of the Article is an issue of

public concern, and does not raise that argument on appeal, but she contests the public forum or constitutional right element.

This case is precisely the type of situation that the legislature intended the anti-SLAPP statute to apply to: a speaker addressing a controversial subject who is sued to stop him from speaking by a powerful adversary, and where the effect of the suit is not justice but silence and potential bankruptcy. Not applying the anti-SLAPP statute here would contradict its express mandate to be interpreted liberally and protect participants, like Swart, who speak on controversial subjects.

1. California law is instructive when analyzing Washington's anti-SLAPP statute.

California's anti-SLAPP statute is the foundation on which Washington's analogue is based. Washington's statute was amended into its current form in 2010. *See* Senate Bill 6395, 61st Leg., 1st Sess. (Wash 2010). While Washington is generally credited with enacting the first anti-SLAPP law in 1982, in the time since that law's initial enactment other states had moved beyond its initial protections and provided broader First Amendment protections. Tom Wyrwich, *A Cure for A "Public Concern": Washington's New Anti-Slapp Law*, 86 Wash. L. Rev. 663, 669–71 (2010). California's statute is the most notable, and serves as a model from which other states craft their own similar

legislation. *See id.* at 672 (“The Washington Act bears a close resemblance to the California law and courts have taken notice”); *see also Hearing on HB 2460 Before the Oregon H. Comm. on Judiciary, Subcomm. on Civil Law*, March 19, 2001 (testimony of Dave Heynderickx, Legislative Counsel, stating that Oregon’s anti-SLAPP statute was closely modeled on California’s statute).

Rule argues that there is no support for the proposition that the Washington anti-SLAPP statute was modeled on the California statute, and therefore citations to California cases are inappropriate. App. Br. at 13. She argues, correctly, that there is no Washington legislative history that *conclusively* establishes the California statute as the basis of the Washington statute.

This argument entirely ignores obvious indicators that the Washington legislature relied on California’s statute in drafting the Washington anti-SLAPP statute. In interpreting the statute for the first time, Federal Magistrate Judge Strombom noted that the Washington “legislation mirrors the California Anti-SLAPP Act.” *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1110 (W.D. Wash. 2010). District Judge Pechman concurred that the two statutes mirrored each other and “likewise look[ed] to California precedent as persuasive authority concerning the new Anti-SLAPP statute”. *Castello v. City of*

Seattle, No. C10-1457MJP, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010). A detailed comparison of each State’s statutory provisions is found in Appendix 1, and the full text of both statutes are found in Appendix 2 and Appendix 3. A reasonable comparison supports the conclusions of these two Federal judges. Because of its unmistakable California origins, this Court is urged to look to California decisions in guiding its judgment on points where the statutes agree.

2. *The Seattle Weekly* is a “public forum.”

Rule argues that the use of the phrase “public forum” in the anti-SLAPP statute restricts RCW 4.24.525(d)’s application to only “traditional public forums” as defined in First Amendment jurisprudence. But “public forum” is a descriptive phrase, to be liberally construed in the anti-SLAPP statute, and California case law bears this out in practice. A public forum is a place open to the general public for purposes of assembly, communicating thoughts between citizens and discussing public questions. *Weinberg v. Feisel*, 110 Cal App 4th, 1122,1130 (3d Dist. 2001). Public forums are not limited to government-owned property, and no case holds otherwise.

a. Public forums are not limited to government-owned property under RCW 4.24.525.

Rule urges this Court to reject California’s interpretation of “public forum” because, she argues, “public forum” must be a technical term and given a restrictive constitutional meaning from another area of federal

First Amendment jurisprudence. However, technical terms refer to technical fields and industries where courts consult technical dictionaries, not ordinary dictionaries, to determine legislative intent. *Tingey v. Haisch*, 159 Wn. 2d 652, 658 (2007). “When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition.” *Id.* (Citing *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wn. 2d 445 (2002)).

“Public forum” is not a technical term used in a technical field, so its ordinary meaning is used in interpreting the statute. The Washington Revised Code and Constitution use the term “public forum” in at least seven instances besides the anti-SLAPP statute, each of them undefined². Just like in *Tingey*, this usage is strongly suggestive of the legislature’s intent that the plain meaning of the word be utilized. *See* 159 Wn. 2d at 659 (“The term ‘account receivable’ appears elsewhere in the Revised Code of Washington more than 10 times and is nowhere defined. The legislature makes it apparent through this pattern of use that it considers the term ‘account receivable’ to have a plain meaning”).

Case law makes it clear that government ownership *can* create a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460

² Const. art. I, § 5; RCW 35.95A.080; RCW 35A.08.070; RCW 28A.710.140; RCW 47.01.075; RCW 70.119A.180; RCW 79.10.0001.

U.S. 37, 45 (1983). But while government ownership is *sufficient* for the creation of a public forum, it is not *necessary*. The cases cited by Rule address the issue of what type of restrictions the government can place on speech which occurs on certain types of property. *See Perry*, 460 U.S. 37 (1983) (Restricting access to government owned mailboxes); *See also City of Seattle v. Mighty Movers Inc*, 152 Wn. 2d 343(2004) (restricting access to public utility poles). She cites other cases that address when private property owners are compelled to allow speech based on the same constitutional standards as the government. *See Denver Area Educ. Telecoms Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) (government restrictions on cable television operations); *see also Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (government compelled newspaper to provide space for competing political candidates). But none of those cases are like this case: a private owner is establishing itself as a public forum to allow speech, not restrict it. Public forums may exist independent of government ownership, and no case cited by Rule points to the contrary.

California and Washington may differ as to when private property can become a compelled public forum. But that distinction is not relevant here. California interprets “public forum” broadly to protect speakers by concluding that “public forum” is a descriptive phrase. There are numerous California cases where private mediums are anti-SLAPP public

forums. Those same forums would not be “traditional public forums” in a case involving government restrictions on speech.

Recognized public forums, like streets and parks are clearly public forums in California, even under Rule’s narrow analysis. *Zhao v. Wong*, 48 Cal App 4th 1114, 1125–26 (1st Dist. 1996), *disapproved on other grounds* by *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999). California has found the following mediums to be anti-SLAPP public forums: the US Mail (*Macias v. Hartwell*, 55 Cal App 4th 669, 674 (2d Dist. 1997)); newsletters (*Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475 (4th Dist. 2000)); newspapers (*Maranatha Corrections LLC v. Department of Corrections and Rehabilitation*, 158 Cal. App. 4th 1075, 1086 (3d Dist. 2008)); magazines (*Sipple v. Foundation for Nat. Progress* 71 Cal.App.4th 226, 238 (2d Dist. 1999)); radio (*Seelig v. Infinity Broadcasting Corp.*, 97 Cal App 4th 798, 807 (1st Dist. 2002)); television (*Metabolife Internat., Inc. v. Wornick*, 72 F.Supp.2d 1160, 1165 (S.D.Cal. 1999)), and the internet (*ComputerXpress Inc v. Jackson*, 93 Cal. App 4th 993, 1006 (4th Dist. 2001)). Most of these mediums are privately owned, but it is highly unlikely that any of them would be *compelled* to carry content that they did not otherwise approve of, like in *Perry* or *Mighty Movers Inc.* 460 U.S. 37 (1983); 152 Wn. 2d

343(2004). Nonetheless, they are anti-SLAPP public forums because they are places open to the public for the exchange of ideas.

There is a plain difference between cases seeking to restrict speech in a public forum and anti-SLAPP cases, and the difference lies in the requirement that the anti-SLAPP statute be interpreted broadly to protect speakers. Rule relies heavily on *Perry* and related cases for the proposition that property *must* be government owned to constitute a public forum. 460 U.S. 37(1983). But in that type of case, the owner of the “public forum” at issue is attempting to limit speech, not expand access to it like *The Seattle Weekly*. *Perry* dealt with Union access to teachers’ internal school mailboxes—public property which was not open to the public. But *Perry* did not deal with the question of whether private property could be a public forum *when the owner intended the property to be such a forum*. The teachers’ mailboxes were clearly government property so the germane question was how much access rival unions were to be granted to the government’s property.

The state, as well as private parties, has the right to allow or disallow certain conduct from occurring on its property. *US Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981) (“the State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is lawfully dedicated”)

(emphasis added). The right to restrict certain activity inherently implies the right to allow that same activity, including the right to create a forum for public debate. See e.g. *Ex parte Jackson*, 96 U.S. 727, 728 (1877) (“The right to designate what shall be carried [in the mails] necessarily involves the right to determine what shall be excluded”). Therefore it logically follows that the state and private parties can create forums for public discussion and debate, and can regulate those forums as they may choose, but when the government is the property owner, “the rights of the state to limit expressive activity are sharply circumscribed.” *Perry*, 460 U.S. at 45.

Simply classifying *The Seattle Weekly* as a public forum does not mean that it must allow substantially all types of speech on its pages, as Rule would imply. It exercises editorial control over its content, but that does not preclude it from acting as a public forum. *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 478 (4th Dist. 2000) (“Read in context of the entire statutory scheme, a “public forum” includes a communication vehicle that is widely distributed to the public and contains topics of public interest, regardless of whether the message is “uninhibited” or “controlled.”)

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b. Newspapers and websites are public forums under Washington's anti-SLAPP law.

The Seattle Weekly is a public forum. It publishes articles submitted by members of the public. CP 224 ¶ 2. The fact that it exercises editorial control does not preclude it from being classified as a public forum. *See Damon*, 85 Cal. App. 4th at 478. *The Seattle Weekly* also solicits the public to contribute to its content. CP 337 ¶ 2.

The Washington Legislature recognizes newspapers, including *The Seattle Weekly*, as public forums. Numerous statutes *require* notices to be published in newspapers of general circulation precisely because they serve as public forums. Newspapers are public forums for the publication of real property foreclosures or sales³, probate of estates⁴, dependency and termination of parental rights⁵, separation contracts made without court decree,⁶ adoption,⁷ proposed constitutional amendments and special elections⁸, public works contracts,⁹ and sale or lease of public property or property held in trust.¹⁰

³ RCW 61.24.040(3).

⁴ RCW 11.40.150, 11.56.060, 11.56.080, 11.95.030.

⁵ RCW 13.34.080.

⁶ RCW 26.09.070(2).

⁷ RCW 26.33.310(3).

⁸ Wash. Const. Art 23, § 1, RCW 29.27.072, 29.68.100.

⁹ RCW 36.32.235(4), 39.04.020, 39.10.050(4).

¹⁰ RCW 47.12.283(2), 47.76.320(2), 36.34.020, 36.34.160, 28A.335.120(2), 70.44.300(3), 11.56.060, 11.56.080.

Not every newspaper can qualify to serve as a publisher of these statutory notices; it must contain news of a general interest, in order to insure that statutory notices are indeed disseminated in a public forum. RCW 65.16.020; *Daily Journal of Commerce, Inc. v. Daily Journal Corp.*, 86 Wash. App. 324, 329 (1997). No reasonable argument can be presented that *The Seattle Weekly* is not a forum for the discussion of public issues. It is, therefore, a public forum for anti-SLAPP purposes.

Rule argues that, even in California, there is significant controversy as to whether a newspaper can be a public forum. App. Br. at 17. While at one time there may have been disagreement on this point between the divisions of California's appellate courts, the 1997 amendment to the law largely disposed of that disagreement. That amendment added the requirement that the statute be liberally construed to protect speakers, and was enacted to overrule decisions in cases cited by Rule like *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal App 4th, 855 (5th Dist. 1995). See *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 478 (1st Dist. 2000) (stating that *Lafayette Morehouse* predates the 1997 amendment requiring a broad interpretation of section 425.16 and stating that the *Lafayette Morehouse* courts' conclusions appear to be at odds with the definition of a "public forum" under the term's plain meaning). The post-

amendment cases now typically hold that newspapers are public forums. See *Annette F. v. Sharon S.* 119 Cal App 4th 1146, 1161 (4th Dist. 2004); see also *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal App 4th 1027, 1037–38(2d Dist. 2008).

Rule cites *Weinberg v. Feisel* for the proposition that “most newspapers” are not public forums, 110 Cal. App. 4th 1122, 1131 (3rd Dist. 2003). That case concerned a collector’s newsletter distributed to 700 members, not a newspaper, and went on to conclude there was nothing in the record to demonstrate that the newsletter was sufficiently open to general public access to be considered a public forum. *Id.* *The Seattle Weekly* is distributed to far more locations than the token collector’s newsletter in *Weinberg* and would be a public forum under the public access standard of that case.

c. Rule does not address *The Seattle Weekly’s* website and the Article’s public comments posted there.

Rule’s brief wholly ignores the contemporaneous publication of the Article on *The Seattle Weekly’s* website. Statements made on the internet “hardly could be more public”. *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 895(1st Dist. 2004)(“...any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages...the same individual

can become a pamphleteer.”) (citations omitted); *see Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, fn 4 (2006) (“Web sites accessible to the public. . . are “public forums” for purposes of the anti-SLAPP statute”); *see also ComputerXpress v. Jackson*, 93 Cal.App.4th 993, 1007 (4th Dist. 2001) (holding that disparaging remarks made on websites were made in a public forum when the evidence showed that the Web sites were accessible free of charge to any member of the public and persons who chose to do so could post their own opinions there).

Division 2 of this Court, in an unpublished opinion, has also concurred with the long list of California cases by finding that a website can be a public forum. *Kruger v. Daniel*, 176 Wn. App. 1028 (Div 2 2013) (“Here, the profile pages on the Zillow.com web site, like a public bulletin board, constitute a medium for public discussion of significant real estate issues reaching a large community.”)

The Seattle Weekly website is free of charge and available to any member of the public who chooses to visit it. CP 337 ¶ 3. Articles posted on its website include the ability to comment. *Id.* As of the date of Swart’s Reply to his Special Motion to Strike, the Article on *The Seattle Weekly*’s website contains eight comments from members of the general public. *Id.* The case law and facts fully support the conclusion that the internet version and the hard copy version of *The Seattle Weekly* are public forums.

3. The Article also constitutes lawful conduct “in furtherance of the exercise of the constitutional right of free speech” under subsection 2(e).

Alternatively, the Article falls under RCW 4.24.525(2)(e) because writing and publishing it was conduct in furtherance of the exercise of the constitutional right of free speech.

Subsection (2)(e) establishes a catch-all for conduct, including speech, on an issue of public concern that occurs in places other than public forums or those open to the public. It specifies that the statute covers “[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition”. RCW 4.24.525(2)(e). The use of the word “other” can only be reasonably interpreted to mean *any* constitutional activity that occurs in any *other* location. Rule would have this Court exclude speech from subsection (e) and create an absurdity. Under Rule’s interpretation, speech would only be protected if made in a public forum or a place open to the public, but expressive non-speech conduct would be protected regardless of the location of its occurrence. Such a construction would explicitly classify constitutionally protected speech as *less* worthy of statutory protection than expressive conduct, because constitutional speech would be protected only if it was made in certain

locations specified in subsection (d). Such a result is inconsistent with the express intent of the statute to protect those who validly exercise their constitutional rights of freedom of speech and petition.

Rule also contends that under the principles of *State v. Plastino*, “other conduct” cannot refer to speech because the previous four subsections of the statute discuss all possible types of speech, and therefore, “other conduct” must refer to something other than speech. App. Br. at 20; 67 Wash. 374 (1912).

Rule misreads the case and the statute. *Plastino* states that “where particular words exhaust the class, the general words must be construed as embracing something outside that class”. 67 Wash. at 376. The particular words in that case were parent, parents or persons having custody of a child. Those particular words referred to the entire universe of parents having custody of a child. The “other” there referred to all other persons; namely, those *without* custody of the child.

Her error is in assuming that the class of speakers is exhausted by subsections (a)–(d). It is not. Subsection (a) deals with statements or documents made as part of a government proceeding. Subsection (b) deals with statements or documents submitted in connection with an issue under consideration by government proceeding. Subsection (c) deals with statements or documents submitted to encourage public

participation to effect consideration or a review of an issue in a government proceeding. Subsection (d) deals with statements or documents submitted in public forums on issues of public concern. The class of speakers is not exhausted by these sections. Speakers making statements on issues not under consideration by the government in private forums are not part of the class of people addressed in subsections (a)–(d).

The statute under consideration in *Plastino* has a similar construction as the anti-SLAPP statute: there is a catch-all that tends to subsume classes of conduct that could fall into an earlier enumerated section. *Plastino* said parent, parents or persons having custody of a child. “Persons having custody of a child” subsumes many parents because parents often have custody of their children. The anti-SLAPP statute has the same result: some speech is both a statement made in a public forum on an issue of public concern *and* lawful conduct in furtherance of the constitutional right of free speech.

California treats its equivalent to RCW 4.24.525(2)(e) as a similar catch-all. California Civil Code § 425.16(e)(4) specifies that “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest” is protected under the

statute. This has been interpreted to encompass conduct that would otherwise be found to fall under (e)(3), the “public forum” section.

“[S]ection 425.16, subdivision (e)(4) includes *conduct* in furtherance of free speech rights, regardless whether that conduct occurs in a place where ideas are freely exchanged. Section 425.16, therefore, governs even private communications, so long as they concern a public issue. It follows that even if Wolk’s communications were not made in a public forum, and therefore do not fall under section 425.16, subdivision (e)(3), they fall under subdivision (e)(4).”

Wilbanks v. Wolk, 121 Cal. App. 4th 883, 896 (1st Dist. 2004).

Subsection (e)(4) was added in 1997 to the California statute, and that section necessarily subsumes some conduct that would have fallen into earlier subsections. *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 583 (2nd Dist. 2003) (finding that Defendant’s conduct fell “within one or more of these categories”); *see also* Thomas R. Burke, *Anti-Slapp Litigation* § 3:84(July 2014).

Rule also argues that the Article was not lawful conduct because it was defamatory, and that Swart failed to prove that the article was not defamatory before the burden shifted to Rule. App. Br. at 27. To the extent that he was required to prove that the Article was not defamatory before shifting the burden to Rule, he did. *See* CP 68 (asserting truthfulness); CP 227 ¶ 15 (confirming truthfulness). Rule did not present evidence to counter these two declarations.

Irrespective of the burden shifting argument, writing and publishing the article was lawful conduct. The statute specifies that the *conduct* must be lawful. RCW 4.24.525(2)(e). Writing a newspaper article is lawful conduct. The *lawful* component was inserted into the statute to prevent those sued for illegal *conduct* from claiming the protections of the anti-SLAPP statute. Throwing a brick through a storefront may be an act of protest against globalization, but it is *unlawful* to throw bricks through storefronts, and such a protestor could not utilize the anti-SLAPP statute to defend in such a case.

Defamation is a legal claim, it is not conduct. If Rule's argument was correct, then *every* SLAPP suit that alleged defamation would be taken out of the anti-SLAPP statute's ambit. Every tort case alleges unlawfulness. The statute requires that the defendant's conduct be examined, not the plaintiff's claims, and the defendant's conduct here was lawful.

To the extent that the Article was not made in a public forum or place open to the public, it was made in the furtherance of Swart's constitutional right of free speech in connection with an issue of public concern and is protected by the anti-SLAPP statute.

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4. The anti-SLAPP statute is to be liberally construed to effect its purpose. Not applying it to the case at hand would ignore the legislature's intent.

Interpreting the anti-SLAPP statute in the way suggested by Rule would expressly defeat its purpose. The statute "shall be applied and construed liberally to effectuate its general purpose of *protecting participants in public controversies* from an abusive use of the courts." RCW 4.24.525—Application—Construction (emphasis added). Swart's article is precisely the type of conduct that the anti-SLAPP statute is intended to protect—he is a participant in a public controversy and is being sued because of his participation in that controversy. Writing the Article was an exercise of his constitutional rights that should be protected by the anti-SLAPP statute.

Rule's statutory argument would preclude *all* journalists from the statute's protections. By their very nature, journalists speak or write about public issues and all general media outlets of note in this country are not government owned. Since Rule claims that writing or speaking must occur on government property for subsection (d) to be effective, and that subsection (e) only protects *expressive conduct* and not writing or speech in furtherance of First Amendment rights, then the statute would be effectively gutted of its effectiveness.

Rule's interpretation would relegate the anti-SLAPP statute to only regulating speaking or writing which occurs on government property or silent, expressive conduct regardless of the location of its occurrence. Her interpretation would create another absurdity: silent expressive conduct on the street would be protected, but opening one's mouth to explain such a protest would not be protected.

This conclusion is even more unrealistic because the freedom to speak, write and publish on all subjects is *explicitly* protected in the Washington Constitution, but the right to engage in non-expressive conduct is subsumed in that same constitutional section by judicial interpretation. Cont. art. I, § 3; *City of Seattle v. McConahy*, 86 Wn. App. 557, 567(1997) (“[m]ere conduct is not expressive, and legislation may restrict it. But if the conduct is expressive and central to the actor's message, a law restricting that conduct is subject to a free expression challenge”). Rule seeks to elevate the statutory protections of expressive conduct above speech, even though expressive conduct is *dependent* on the interpretation of the word “speech” for its constitutional power.

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5. Conduct constituting “public participation and petition” is not limited to the list described in the anti-SLAPP statute.

Even if Rule’s statutory interpretation argument was correct, Swart’s conduct should still fall under the ambit of the anti-SLAPP statute. The statute “applies to any claim, however characterized, that is based on an action involving public participation and petition.” RCW 4.24.525(2). The statute goes on to specify that an “action involving public participation and petition *includes*” certain enumerated conduct. *Id.* (emphasis added).

Rule would read the list of five enumerated examples of public participation and petition to be exclusive. Basic statutory construction rules do not support that position. The word “includes” is a term of enlargement, not a term of limitation, in a statute. *Brown v. Scott Paper Worldwide Co.*, 143 Wn. 2d 349, 359 (2001). By making the choice to use the word “includes” and not the word “means” in the anti-SLAPP statute, the legislature left open the possibility that other types of unenumerated conduct, other than the five expressly enumerated types, may constitute public participation and petition.

The publication of the Article should constitute such other unenumerated conduct if it is not protected under the enumerated sections. Freedom of speech is a sacred right under the Washington and

U.S. Constitutions, and to not protect the Article under the anti-SLAPP law because it was *speech* and not *expressive conduct*, in the face of a clear mandate to liberally construe the statute to protect speakers like Swart, would flout the specific instructions of the legislature, and not effectuate the statute's purpose.

6. Rule previously argued that the Book constituted “other conduct”, and no reasonable basis now exists to distinguish the Article from the Book.

As briefly mentioned above, this case is the second SLAPP case brought relating to the Book. In 2005, Northon and her family sued Rule for defamation in Multnomah County Circuit Court in Portland, Oregon. CP 125. Oregon's anti-SLAPP statute, like Washington's, is based on the California anti-SLAPP statute, and protects “any other conduct in furtherance of the exercise of the ...constitutional right of free speech.” ORS § 31.150(2)(d).

Rule's anti-SLAPP motion was ultimately heard in Federal District Court, where she argued that writing the Book was “other conduct”. CP 195–96. Rule's motion was granted by the District Court, and Northon's case was dismissed. *See* CP 215 no. 25.

No rational distinction exists to distinguish the Book from the Article for anti-SLAPP purposes. Both are writings that tell the same story, but from different viewpoints. Both were published by private,

profit making enterprises. It is contradictory for Rule to argue in one case that writing a book is “other conduct” and to then argue in another case that writing an article is not “other conduct”. The Article, like the Book as Rule argued in her previous case, is “other conduct” that falls under the ambit of the anti-SLAPP statute.

B. RCW 4.24.525 is constitutional.

This Court already found the anti-SLAPP statute to be constitutional just a few months ago in *Davis v. Cox.*, 180 Wn. App 514 (2014). Rule substantially reprises the same arguments from *Davis* and adds additional arguments, some of which were not raised at the Superior Court. This Court should decline to revisit the same constitutional questions presented in *Davis*, decline to address those points not raised below, and affirm the constitutionality of the anti-SLAPP statute.

1. The anti-SLAPP statute does not punish a litigant for bringing a non-frivolous lawsuit.

Rule argues that the anti-SLAPP statute is unconstitutional because it violates *her* First Amendment right to bring a non-frivolous lawsuit. *See* App. Br. at 43. The anti-SLAPP statute does not punish the act of bringing a lawsuit, it only provides for presumed statutory

damages when the plaintiff does not present the necessary quantum of evidence.

The case cited by Rule is easily distinguishable. *Addleman* concerned punishment for the *act* of filing suit. 139 Wn.2d 751, 755 (2000) (“We hold the ISRB may not retaliate for the exercise of a constitutionally protected right”). RCW 4.24.525 does not punish Rule for bringing her lawsuit. After bringing her suit, she had the right to seek discovery, hold hearings, and submit other motions to prove the necessary elements of her claim on a showing of good cause. RCW 4.24525(5)(c). The anti-SLAPP statute’s statutory damages comes into play only *after* the plaintiff has been given the opportunity to gather evidence in support of their claim and she has failed to gather that supporting evidence. *See id.*

The legislature recognized that the anti-SLAPP statute must strike a balance between the rights of speakers on controversial topics on the one hand and access to the courts and a trial by jury on the other hand. RCW 4.24.525, Findings 2(a). The purpose of the statute is to correct the imbalance that had developed between those constituencies. Litigants, like Rule, had made an abusive use of the courts to silence speakers, like Swart, and the anti-SLAPP statute corrects that imbalance. The anti-SLAPP statute balances the rights of litigants to

file suit with the rights of speakers to not be harassed by costly litigation.

2. The anti-SLAPP statute does not violate the separation of powers doctrine.

Next, Rule argues that that anti-SLAPP statute violates the separation of powers between the courts and the legislature by imposing a sanction without a finding of frivolity under CR 11. *See* App. Br. at 47. This argument is not well taken.

“When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both. However, if a statute and a court rule cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.” *Davis v. Cox*, 180 Wn. App. 514, 545 (2014) (citations omitted). Even if the statutory damages component of RCW 4.24.525 did conflict with CR 11, the statutory damages award is a substantive right that usurps court rules. It is substantive because the award is a “legal consequence derive[ed] from certain facts”. *Houk v. Best Dev. & Const. Co.*, 179 Wn. App. 908, 914 (2014) (citations omitted). The damages award was the legal consequence of Rule’s failure to prove all of the elements of her claims. The award is substantive, and, therefore, trumps any purported

conflict with the Civil Rules. There is no separation of powers problem posed by the anti-SLAPP statute.

3. RCW 4.24.525 does not violate the right to a jury trial.

Rule next argues the anti-SLAPP statute violates her right to a jury trial because it requires her to establish by clear and convincing evidence a probability of prevailing on the claim. App. Br. at 29. This exact argument was recently rejected by this court in *Davis v. Cox*, 180 Wn.App 514, 546 (2014) (“The Members next contend that the requirement that they establish by clear and convincing evidence a probability of prevailing on their claims violates their right to a jury trial. We disagree.) In *Davis*, this Court affirmed the *Dillon* case, which Rule now urges should be rejected.

Her arguments are, again, not well taken. *Dillon* did not rewrite the statute with a “judicial pen”. App. Br. at 33. She argues that the standard for evaluating an anti-SLAPP motion cannot be akin to a summary judgment standard because each involves a different quantum of evidence to be presented.

Summary judgment requires the non-movant to present evidence of a genuine issue of material fact. CR 56(e). Any inferences are made in favor of the non-movant. *Young v. Key Pharm., Inc.*, 112 Wn. 2d 216,

226 (1989). The anti-SLAPP statute follows the same protocol, but the quantum of proof required from the non-movant is greater. The *Dillon* court favorably cited the Minnesota Court of Appeals in its description of the operation of Minnesota's statute, which contains the same clear and convincing requirement:

Regardless of [when a] motion to dismiss . . . is made . . . ultimate determinations of fact are not required by the clear-and-convincing standard.... These standards require that reasonable inferences be drawn in favor of the nonmoving party, which is unchanged by the anti-SLAPP statute. **The test is merely whether, in light of those inferences and the view of evidence mandated by the standard . . . the plaintiff has shown that the defendant's speech or conduct was tortious or otherwise unlawful.**

Nexus v. Swift, 785 N.W.2d 771, 781 (Minn.App. 2010) (emphasis added).

Rule failed to present clear and convincing evidence, as required by the statute and her claims were dismissed accordingly.

4. The Superior Court properly considered the relevant cases and constitutionally applied RCW 4.24.525.

Additionally, Rule asserts that the Superior Court failed to constitutionally apply the statute because it was not aware of the *Dillon* case when making its determination. She asserts that no one brought the new case to the Court's attention. App. Br. at 38 (“[t]here is no indication that anyone brought the *Dillon* decision to the Court's attention”). Rule has overlooked her own briefing on *Dillon*. She discussed the case and its

applicability to this situation in over *three pages of analysis* in her motion for reconsideration. *See* CP 516–18. The Court was given the opportunity to review its decision in light of *Dillon*, and it declined to reverse its denial in light of this new case.¹¹ CP 704.

Regardless, the Court constitutionally applied the correct standard. Judge Inveen specifically found that Rule failed to prove falsity to the necessary degree. CP 71. The statute requires falsity to be proven by clear and convincing evidence, like all other elements of Rule’s claims. The statute was constitutionally applied because the necessary elements were not proven to the necessary standard.

5. Rule waived her remaining constitutional arguments by not addressing them at the Superior Court.

For the first time, Rule now argues that the anti-SLAPP statute violates her constitutional rights by requiring sanctions without a finding of frivolousness, and by violating her due process and eighth amendment rights.

These arguments are raised for the first time on appeal, and it is improper to consider them now. The Appellate Court “will not review

¹¹In reconsidering its decision, the Court declined to review the additional factual material that was available to Rule during the main briefing. While Judge Inveen considered Rule’s motion for reconsideration to be “a second bite at the apple” to “interject new facts into the matter, much of which are irrelevant” and “designed to appeal to the passion, prejudice and sympathy of the reader, whether it be the judge, or anticipated wider audience”, she did consider the new legal points addressed in the Motion. *See* CP 705.

an issue, theory, argument, or claim of error not presented at the trial court level.” *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, (2014) (citing *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207 (2001)). The agreements 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 now be considered. CP 277–98 (Rule’s Response to Special Motion to Strike), CP 505–34 (Rule’s Motion for Reconsideration).

C. Rule cannot prevail on the merits of her claim.

The Superior Court found that Rule had not proven falsity. Rule asserts that Swart’s failure to disclose his relationship with Northon constitutes falsity for the purposes of a defamation claim. But to prove defamation, the plaintiff must prove that a published statement is *false*, not that an omitted statement would make the article more accurate.

A plaintiff alleging defamation must show falsity, unprivileged communication, fault, and damages. *Mohr v. Grant*, 153 Wn. 2d 812, 822 (2005). The falsity prong of a defamation claim is satisfied with evidence that a *statement* is probably false or leaves a false impression due to omitted facts. *Id.* at 825–30(emphasis added). But on appeal, 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.” *Id.* at 830 (2005) (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.

Even if including information about Swart’s relationship with Northon would have made the article more balanced, Rule would still not have a basis for her claim. “Merely omitting facts favorable to the plaintiff or facts that the plaintiff thinks should have been included does not make a publication false and subject [a defendant] to defamation liability.” *Mohr v. Grant*, 153 Wn. 2d 812, 827–28 (2005); *Green v. CBS Inc.*, 286 F.3d 281, 285 (5th Cir. 2002). Accurately reporting the facts is what counts; whether or not those facts portray a plaintiff in an attractive light is irrelevant. *See Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985) (rejecting claim to hold magazine liable “for omission of those additional facts that [the plaintiff] believes should have been published, but whose omission did not make what was

unpublished untrue”); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 613 (Tex.Ct.App.2002) (no defamatory false impression where television report omitted facts favorable to plaintiff).

Rule contends that by omitting statements about Swart’s relationship with Northon, the Article contains the false implication that the article is accurate. 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. The “defamatory character of the language must be apparent from the words themselves.” *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538 (1991). Instead, Rule asks that the Court extend her tenuous implication that the inclusion of omitted language would make an article with no material false statements more true. She is asking the Court to read the Article as false without pointing to any false statements. This is not the law. *See id.* She is also asking the Court to extend the Article’s actual language to mean what she concludes the language to mean. This extension is also not the law. Courts must give words their “natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader.” *Id.* (quoting *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 234 (1978)). Including the omitted language has no impact on the veracity of the Article.

In a typical defamation case, a plaintiff will identify those false and defamatory statements in the article or newscast. Rule hasn't pointed to any statements in the Article that are false, and instead has elected to assert defamation by omission as her operative legal theory. That is because the Article does not contain any false statements and is *true*. Rule may not care for how she is portrayed in the Article. "But a plaintiff may not base a defamation claim on the negative implication of true statements". *Id.*

Furthermore, even if Swart's omission could satisfy the falsity element, Rule still could not prevail because a false statement must be *about* the plaintiff in order for them to recover. A false statement must be "of and concerning" the plaintiff to predicate recovery. *Hickey v. Capital Cities/ABC, Inc.*, 792 F. Supp. 1195, 1199 (D. Or. 1992) (statement that crime of pet stealing was a "low, repulsive crime" was not of and concerning plaintiff); *See also Sims v. Kiro, Inc.*, 20 Wn. App. 229, 234 (1978) (false statement must refer to plaintiff to be actionable). The omitted statement that Swart had a romantic relationship with Northon is not "of and concerning" Rule, so it cannot satisfy falsity for a defamation claim.

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D. Swart requests his attorneys' fees on appeal.

The anti-SLAPP statute's award is mandatory for any fees and costs "incurred in connection with each [anti-SLAPP] motion on which the moving party prevailed," RCW 4.24.525(6); *see also Davis v. Cox*, 180 Wn. App. 514, 550 (2014). Swart is therefore entitled to his 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 (2007) ("[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal."); *see also* RAP 18.1(a). Accordingly, Swart respectfully requests his attorney's fees, costs, and statutory awards for his protected free-speech activity on appeal.

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IV. CONCLUSION

The Washington anti-SLAPP statute is facially constitutional, and constitutional as applied in this case. It plainly applies to articles published in newspapers and online. The Superior Court correctly concluded that Rule had not met her burden, and dismissed her case against all of the respondents after awarding them their attorney's fees and statutory damages. The decision of the Superior Court should be affirmed in all respects.

RESPECTFULLY SUBMITTED September 10, 2014

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Of Attorneys for Respondent Rick Swart

APPENDIX 1

Comparison between RCW 4.24.525 and California Code of Civil Procedure § 425.16

Both statutes instruct courts to construe them broadly:

Washington	California
"This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts."	"...this section shall be construed broadly."

Both statutes limit discovery using substantially the same language:

Washington	California
"All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted."	"All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

Both statutes contain similar legislative findings:

Washington	California
"(1) The legislature finds and declares that: (a) It is concerned about lawsuits brought primarily to chill the valid exercise of the	The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the

<p>constitutional rights of freedom of speech and petition for the redress of grievances;</p> <p>(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," 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;</p> <p>(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;</p> <p>(d) It 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 through abuse of the judicial process; and</p> <p>(e) An expedited judicial review would avoid the potential for abuse in these cases."</p>	<p>constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.</p>
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Both statues provide for a similar attorney fees scheme:

Washington	California
<p>“(a)The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:</p>	<p>(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds</p>

<p>i. Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;</p> <p>ii. An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and</p> <p>iii. Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.</p> <p>(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:</p> <p>i. Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;</p> <p>ii. An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and</p> <p>iii. Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated."</p>	<p>that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."</p>
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Both statutes instruct courts to consider the same evidence:

Washington	California
"(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."	"(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."

Both statutes prevent a successful anti-SLAPP defense from being admitted in later proceedings:

Washington	California
"(d) If the court determines that the responding party has established a probability of prevailing on the claim: (i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and (ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding."	"(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding."

Both statutes provide for the same expedited timeline:

Washington	California
"(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not	"(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing

<p>later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing.</p> <p>Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.</p> <p>(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.”</p>	<p>not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.”</p>
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Both statutes allow for the immediate appeal of an adverse anti-SLAPP decision:

Washington	California
“(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.”	“(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.”

Both statutes apply to substantially the same conduct:

Washington	California
<p>“(2) As used in this section, an "action involving public participation and petition" includes:</p> <p>(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;</p> <p>(b) Any oral statement made, or</p>	<p>“(e) As used in this section, “act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue” includes:</p> <p>(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.</p>

<p>written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;</p> <p>(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 authorized by law;</p> <p>(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or</p> <p>(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, or in furtherance of the exercise of the constitutional right of petition.”</p>	<p>(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,</p> <p>(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or</p> <p>(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”</p>
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APPENDIX 2: RCW 4.24.525

- (1) As used in this section:
 - (a) “Claim” includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;
 - (b) “Government” includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;
 - (c) “Moving party” means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;
 - (d) “Other governmental proceeding authorized by law” means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency
 - (e) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;
 - (f) “Responding party” means a person against whom the motion described in subsection (4) of this section is filed.
- (2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an “action involving public participation and petition” includes:
 - (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial

proceeding or other governmental proceeding authorized by law;

- (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
- (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 authorized by law;
- (d) Any oral statement made, or written statement or other document submitted, in a place open to the public or 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, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)

- (a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.
- (b) A moving party bringing a special motion to strike a claim under this subsection 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. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence

a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

- (c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
- (d) If the court determines that the responding party has established a probability of prevailing on the claim:
 - i. The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and
 - ii. The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.
- (e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)

- (a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.
- (b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.
- (c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by

this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

- (d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)

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

- i. Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;
- ii. An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and
- iii. Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

- (b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

- i. Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;
- ii. An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and
- iii. Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the

court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

Notes:

Findings -- Purpose -- 2010 c 118:

(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," 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;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It 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 through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

Application -- Construction -- 2010 c 118: This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.

Short title -- 2010 c 118: This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation.

APPENDIX 3: California Code of Civil Procedure § 425.16

- (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.
- (b)
- (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
- (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
- (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.
- (c)
- (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or

(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)

(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I am an employee of Motschenbacher & Blattner LLP, over the age of 18 years, not a party to nor interested in the above-entitled action, and am competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by email/pdf & U.S. MAIL, postage prepaid:

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Holdings, LLC and Caleb Hannan

Dated at Portland Oregon, September 10, 2014.

MOTSCHENBACHER & BLATTNER LLP



Sue Osborn, Legal Assistant