

No. 72866-1-I

LANE ELLEN TOLLEFSEN, a Washington resident,

Plaintiff/Appellant,

v.

GREGORY L. JANTZ and LAFON JANTZ, husband and wife, and their marital community; MICHAEL GURIAN and "JANE DOE" GURIAN, husband and wife, and their marital community; ANN MCMURRAY and "JOHN DOE" MCMURRAY, husband and wife, and their marital community; RANDOM HOUSE LLC, a Delaware limited liability company; and CARRIE ABBOTT and "JOHN DOE" ABBOTT, husband and wife, and their marital community,

Defendants/Respondents.

APPEAL FROM THE WASHINGTON STATE SUPERIOR COURT
IN AND FOR THE COUNTY OF SNOHOMISH

Case No. 14-2-05079-6

The Honorable Millie Judge

OPENING BRIEF OF APPELLANT
LANE ELLEN TOLLEFSEN

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I. INTRODUCTION

This case involves Washington's controversial Anti-Strategic Lawsuit Against Public Participation ("Anti-SLAPP") statute and provides the perfect example of how overreaching and unconstitutional Washington's Anti-SLAPP statute is.¹

Washington's current Anti-SLAPP statute was adopted in 2010. The Legislature declared that "it [was] 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[.]" However, in attempting to deter actual frivolous lawsuits, the Legislature instead has made meritorious claims susceptible to the Anti-SLAPP statute and, due to the statute's unconstitutional requirement that a defending party produce "clear and convincing evidence of a probability of prevailing" on their claims, these claims are being dismissed or claimants are not filing their claims for fear of the statute's mandatory \$10,000 civil penalty and attorney fees provision. To make matters worse, the statute stays discovery while the motion

¹ There are currently three cases involving Washington's Anti-SLAPP statute before the Washington State Supreme Court (*Akrie v. Grant, et al*, Case No. 89820-1, *Dillon v. Seattle Deposition Reporters, LLC, et al.*, Case No. 89961-4, and *Davis, et al, v. Cox, et al*, Case No. 90233-0). The Supreme Court has heard oral arguments in all three matters, but has not yet issued its rulings. A petition for review is also pending for a fourth matter (*Alaska Structures, Inc. v. Hedlund*, Case No. 90284-4).

to strike is and pending and only allows limited discovery upon good cause shown.

In this case, the trial improperly applied the statute to Appellant's claims that Respondent Jantz knowingly made false and defamatory statements about Appellant, a sixth grade teacher at King's Schools in Seattle. Moreover, the trial court weighed evidence in the moving parties' favor, despite clearly conflicting stories by Respondent Jantz. The trial court then refused to permit Appellant to conduct the very limited amount of discovery she requested in order to be able to meet her onerous burden of producing "clear and convincing evidence of a probability of prevailing" on her claims.

Washington's Anti-SLAPP statute is unconstitutional and must be struck down.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by ruling that Appellant's claims against Respondents are "based on an action involving public participation and petition".
2. The trial court erred by ruling that Appellant failed to "establish by clear and convincing evidence a probability of prevailing" on her claims against Respondents.
3. The trial court erred by denying Appellant's motion to allow her to conduct limited discovery.

4. The trial court erred by determining that Washington's Anti-SLAPP does not unconstitutionally infringe upon the fundamental right of access to the courts.
5. The trial court erred by determining that Washington's Anti-SLAPP is not unconstitutionally vague.
6. The trial court erred by determining that Washington's Anti-SLAPP is not unconstitutionally overbroad.
7. The trial court erred by determining that Washington's Anti-SLAPP does not unconstitutionally stay discovery.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. Did the trial court err in determining that calculated, or at a minimum reckless, falsehoods are entitled to constitutional protection under the First Amendment?
2. Did the trial court err in determining the content Respondent Jantz's defamatory statements are issues of public concern?
3. Did the trial court error in granting the motion to strike when Appellant produced substantial evidence of the merits of her claims?
4. Did the trial court erroneously weigh the evidence and the inferences there from in favor of Respondents, who were the moving party?
5. Does Washington's Anti-SLAPP statute unconstitutionally deny claimants their right of access to the courts?

6. Are the phrase "issues of public concern" and "clear and convincing evidence of a probability of prevailing" unconstitutionally vague because they are unclear and fail to provide fair warning?
7. Does Washington's Anti-SLAPP statute violate separation of powers by imposing procedures that directly conflict with Washington court rules?
8. Is Washington's Anti-SLAPP statute mandatory stay of discovery unconstitutional and was the trial court's denial of Appellant request for discovery unconstitutional?
9. Was the trial court award of statutory penalties and attorney fees excessive when Respondents suffered minimal, if any, harm?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Appellant Lane Tollefsen has worked at King's Elementary School in Seattle, WA for 16 years and has taught sixth grade for 14 years.² In March of 2012 she received the *Martin Award for Innovative Teaching* from King's Schools, a teacher-endowment award for teaching excellence. In October 2011, she spoke at the National Association for Single Sex Public Education national seminar in Orlando, Florida on the topic of how to teach a single gender (i.e. boys or girls) in a mixed-gender (boys and girls)

² On April 16, 2015, Mrs. Tollefsen was informed her annual teaching contract with King's Schools would not be renewed.

classroom.³

King's Elementary School is a part of CRISTA, a group of Christian ministries. One of several other ministries is CRISTA Media, which includes radio station KCIS. KCIS is a source of information about King's Schools and is listened to by parents, teachers, and school administrators.⁴ Respondents Dr. Gregory Jantz ("Gregg Jantz") and Carrie Abbott both have their own radio shows on KCIS. Respondent Jantz is also a regular guest on Respondent Abbott's show, *Legacy Out Loud*.⁵

Dr. Jantz is a Washington state-certified psychologist. Dr. Jantz is nationally known, having appeared on CNN Headline News and also having done interviews with multiple national news syndicates. Dr. Jantz is a best-selling author on various psychological issues and disorders.⁶ Dr. Jantz is also a prominent figure in the CRISTA community. In addition to his radio show and regular appearances on Respondent Abbott's show, Dr. Jantz is a substantial benefactor of the CRISTA ministries.⁷ Dr. Jantz's sons have both attended King's Schools.⁸

³ CP 189 (Declaration of Lane Tollefsen, ¶ 4).

⁴ CP 189 (Declaration of Lane Tollefsen, ¶ 5).

⁵ CP 352-411 (Answer), CP 345-351 (Declaration of Gregg Jantz), and CP 308-317 (Declaration of Carrie Abbott).

⁶ CP 345-351 (Declaration of Gregg Jantz).

⁷ CP 190 (Declaration of Lane Tollefsen, ¶ 6).

⁸ CP 190 (Declaration of Lane Tollefsen, ¶ 6) and CP 345-351 (Declaration of Gregg Jantz).

In the fall of 2010, Dr. Jantz's son, Gregg Jantz, Jr., was a student in Mrs. Tollefsen's sixth grade class. From the beginning, Gregg Jr. exhibited serious behavioral issues and was a constant distraction in Mrs. Tollefsen's class. Gregg Jr. could not stay in his seat, blurted out constantly, fidgeted, and was disruptive to the learning of his fellow students. Mrs. Tollefsen made efforts to redirect Gregg Jr.'s behavior, but she found that her efforts made no difference. It became clear to her that Gregg Jr. was a child who expected to get his own way.⁹

When a student is markedly inattentive, disruptive, cannot sit still, is unable to complete work in class, shows hyperactive behavior, distractibility, forgetfulness, or poor organizational skills, teachers and the student's parents become concerned. When a teacher notices these types of issues, the teacher points out the problems to the parents that their child is having and may recommend that the child be tested for various learning or developmental issues.¹⁰

At King's Schools, parent-teacher conferences are held the first week of November. When Gregg Jr. continued to exhibit many of the same concerning behavioral issues, Mrs. Tollefsen raised the subject with Dr. and Mrs. Jantz during their parent-teacher

⁹ CP 190 (Declaration of Lane Tollefsen, ¶ 7).

¹⁰ CP 190 (Declaration of Lane Tollefsen, ¶ 8).

conference. Mrs. Tollefsen described Gregg Jr.'s behavior and how disruptive it had become for other students in the class. Mrs. Tollefsen recommended that Gregg Jr. be tested for "attention and focus". She felt it would help her understand Gregg Jr.'s learning style and better adapt to his needs.¹¹

Mrs. Tollefsen did not diagnose Gregg Jr. with any specific disorder, nor did she recommend medication of any kind. In Gregg Jr.'s case, as with all her students, Mrs. Tollefsen merely recommended having Gregg Jr. tested and then left it to his parents to follow or not to follow her recommendation.¹²

When Mrs. Tollefsen suggested that Gregg Jr. be screened by a medical professional, Dr. and Mrs. Jantz reacted hostilely. They insisted that Gregg Jr.'s behavior was just his "learning style", that Mrs. Tollefsen was the problem, and that a better teacher would not be having the same issues.¹³

Mrs. Tollefsen did not have any other interactions with the Jantzs until December 2010. Just before Christmas vacation, Mrs. Jantz arrived 30-45 minutes early for the class Christmas party. Mrs. Tollefsen was administering a spelling test and Mrs. Jantz's presence distracted the students. Mrs. Tollefsen quietly asked Mrs.

¹¹ CP 190 (Declaration of Lane Tollefsen, ¶ 9).

¹² CP 190-191 (Declaration of Lane Tollefsen, ¶ 10).

¹³ CP 191 (Declaration of Lane Tollefsen, ¶ 11).

Jantz to “please leave and come back in 30 minutes”, which she did.¹⁴

Following the Christmas break, Mrs. Jantz went to the principal’s office, accused Mrs. Tollefsen of yelling at her in front of the whole classroom before the Christmas party, and insisted that she and Dr. Jantz could no longer tolerate Mrs. Tollefsen as Gregg Jr.’s teacher. Soon thereafter, Gregg Jr. was removed from Mrs. Tollefsen class. The removal of a student from a teacher’s class is an extraordinary occurrence at King's Schools. The entire situation humiliated Mrs. Tollefsen. Since then, she has not had any interactions with Dr. and Mrs. Jantz, though Gregg Jr. did remain in her social studies class for the remainder of the 2010-2011 school year.¹⁵

A. Respondent Jantz’s defamatory statements.

On October 16, 2013, a fellow teacher at King’s Schools, Rona Cornell, sent a text to Mrs. Tollefsen. Ms. Cornell stated that she had heard Dr. Jantz on CRISTA Ministries’ radio station KCIS talking about his new book, *Raising Boys By Design*.¹⁶ Ms. Cornell

¹⁴ CP 191 (Declaration of Lane Tollefsen, ¶ 12).

¹⁵ CP 191 (Declaration of Lane Tollefsen, ¶ 13).

¹⁶ CP 191 (Declaration of Lane Tollefsen, ¶ 14) and CP 313-315 (Exhibit B to the Declaration of Carrie Abbott).

informed Mrs. Tollefsen that she knew the teacher Dr. Jantz was referring to was Mrs. Tollefsen.¹⁷

During the week of October 21, 2013, Dr. Jantz distributed free copies of the book *Raising Boys By Design* to all King's Schools teachers and administrators. Shortly after Dr. Jantz had distributed his book to the King's Schools staff, a fellow teacher, Katrina Pepler, approached Mrs. Tollefsen and said the book contained a story about her.¹⁸ Ms. Pepler showed Mrs. Tollefsen a passage on pages 8-9 of the book that was similar to the fabrication Dr. Jantz had told on *Legacy Out Loud* on October 16, 2013:

As I established my career, I thought I had put all of that early anxiety and struggle behind me. Imagine to my surprise when many of those feelings came flooding back as my sons began their schooling. Through my sons' eyes, I realized that not much had changed since I'd been in school. The tipping point toward looking at the design of boys for the sake of my sons came soon after my oldest - my namesake, Gregg - started sixth grade at a new school. One day he reported a weird thing that had caught his attention. At the start of the day, a line of boys paraded up to the teacher's desk and took some sort of pill. When he relayed this oddity, my heart sank. The only conclusion I could draw was that these boys

¹⁷ CP 191 (Declaration of Lane Tollefsen, ¶ 14).

¹⁸ CP 191-192 (Declaration of Lane Tollefsen, ¶ 15).

were being medicated, probably with Ritalin or a similar drug, probably for ADD or ADHD.¹⁹

When Mrs. Tollefsen read the false passage, she burst into tears. Since then, she has suffered repeated bouts of depression, has had anti-depression medications prescribed, has suffered from insomnia, and has experienced severe mental distress.²⁰

In April 2014, Mrs. Tollefsen served all Respondents, with the exception of Carrie Abbott, with a complaint setting forth claims of defamation and emotional distress based on Respondent Jantz's defamatory statements in *Raising Boys By Design* and in the radio interview on *Legacy Out Loud*. The complaint was served but never filed.²¹

In May 2014, counsel for Respondents provided Appellant's counsel with a proposed clarification of the defamatory statements in the book and in the radio interview. Respondent Jantz would read the proposed clarification during an airing of *Legacy Out Loud*. Before Appellant's counsel could fully comment on the inadequacy of the clarification, Respondent Jantz moved forward with publishing the clarification.²² On May 21 and 23, 2014, the

¹⁹ CP 191-192 (Declaration of Lane Tollefsen, ¶¶ 15) and CP 351 (Pages 8-9 of Exhibit A to the Declaration of Gregg Jantz).

²⁰ CP 192 (Declaration of Lane Tollefsen, ¶¶ 16).

²¹ CP 207 and CP 209-220 (Declaration of Chris Rosfjord, ¶¶ 4 and Rosfjord Exhibit 1).

²² CP 207-208 and CP 221-223 and 224-226 (Declaration of Chris Rosfjord, ¶¶ 5 and Rosfjord Exhibits 2 and 3).

following statement by Respondent Jantz was aired during *Legacy Out Loud*:

Hi, this is Dr. Gregg Jantz. On October 16, 2013, I appeared on this program to discuss a book I co-authored, *Raising Boys by Design*. In the book and on the broadcast, I described an experience my son had in elementary school. My son recounted a daily routine in which several boys proceeded to the front of the classroom to take a pill in the morning. The pill, I explained on this program, was for “attention issues.” An elementary school teacher has filed a lawsuit against me and the others, claiming I falsely accused her of distributing controlled substances to boys and therefore engaged in criminal acts. I wish to clarify that neither my co-authors nor I intended to imply that any teacher had engaged in any criminal activity whatsoever, nor do I have any reason to believe any teachers did. I believed, and expected readers and listeners to believe, that the medication was legally prescribed and parents had authorized this conduct in school.²³

B. Medications at King’s Schools.

Like all schools, King’s Schools has a strict policy regarding the administration of over-the-counter and prescription medications.²⁴ The policy is based on RCW 28A.210.260, which provides detailed conditions that must be followed to avoid criminal prosecution and the institution of civil proceedings. They include the preparation of a written school policy regarding safeguarding of the drugs, maintaining a record of administration of the drugs, a

²³ CP 316-317 (Exhibit C to the Declaration of Carrie Abbott).

²⁴ CP 192 (Declaration of Lane Tollefsen, ¶ 17).

form signed by the child's physician, and administration by a trained school employee.

The form containing King's School policy is given in a packet of forms distributed to each child at the beginning of the year (a copy is attached as Exhibit 1 to the Declaration of Lane Tollefsen). In addition, the King's Schools weekly newsletter contains a reminder about the form and medications at school.²⁵

King's Elementary designates a trained person to administer medication. That person is in the school office. Appellant has never been a person trained to administer medication, does not have access to the medication locked in the school office, and has never administered medication in the classroom to any student, not even Aspirin.²⁶

B. PROCEDURAL HISTORY

On July 14, 2014, Appellant filed her Complaint against Defendants for Libel, Slander, and Negligent/Intentional Infliction of Emotional Distress.²⁷ On August 8, 2014, Respondents filed their Answer to Complaint for Libel, Slander, and Negligent/Intentional Infliction of Emotional Distress.²⁸

²⁵ CP 192 and CP 195-197 and 198-202 (Declaration of Lane Tollefsen, ¶¶ 17-18 and Tollefsen Exhibits 1 and 2).

²⁶ CP 192 (Declaration of Lane Tollefsen, ¶¶ 19).

²⁷ CP 412-430 (Complaint).

²⁸ CP 352-411 (Answer).

On September 12, 2014, Respondents filed Respondents' Special Motion to Strike the Complaint Under RCW 4.24.525 ("Respondents' Motion to Strike").²⁹ Appellant filed her opposition to Respondents' Motion to Strike, on September 29, 2014. In addition to challenging the merits of Respondents' Motion to Strike, Appellant raised numerous issues regarding the constitutionality of Washington's Anti-SLAPP statute. Appellant also moved the trial court for an order allowing limited discovery, which Section 4.24.525(5)(c) of the statute provides for.³⁰ Respondents filed a Reply brief on October 6, 2014.³¹

The trial court heard oral argument from the parties on Respondents' Special Motion to Strike on October 10, 2014. The trial court rejected Appellant's constitutional arguments. The trial court determined that the Anti-SLAPP statute was applicable to Respondents' conduct at issue. The trial court further determined that Appellant failed to prove by clear and convincing evidence her probability of prevailing on the merits of her claims against Respondents. The trial court also denied Appellant's request to conduct limited discovery as may be allowed under the statute. Hence, trial court granted Respondents' Motion and awarded

²⁹ CP 257-287 (Motion to Strike).

³⁰ CP 229-253 (Plaintiff's Opposition to Motion to Strike).

³¹ CP 170-188 (Defendants' Reply).

statutory damages of \$50,000 plus reasonable attorney fees.³²

On October 20, 2014, Appellant filed a Motion to Reconsider. Appellant sought reconsideration of the trial court's determination that Respondents' defamatory statements were made in connection with an issue of public concern. Appellant also asserted that the trial court applied the wrong burden of proof upon Appellant and improperly weighed evidence in favor of Defendants, who were the non-moving party. Appellant further sought reconsideration of the trial court's denial of limited discovery and award of statutory damages and fees.³³

On November 5, 2014, Respondents filed a Response to Appellant's Motion for Reconsideration and Appellant filed her reply on November 6, 2014.³⁴ Appellant requested oral argument on her Motion for Reconsideration, but the trial court declined to set the matter for argument. On November 20, the trial court entered an order denying Appellant's Motion for Reconsideration.³⁵

On October 20, 2014, Respondents filed their Motion for Fees under RCW 4.24.525(6)(a) and set the matter for oral argument.³⁶ On November 12, 2014, Appellant filed her opposition

³² CP 166-168 (Order Granting Motion to Strike).

³³ CP 152-165 (Motion to Reconsider).

³⁴ CP 57-74 (Defendants' Opposition to Motion for Reconsideration) and CP 51-56 (Plaintiff's Reply).

³⁵ CP 18-19 (Order on Motion for Reconsideration).

³⁶ CP 138-146 (Motion for Fees).

to Respondents' Motion for Fees.³⁷ On November 13, 2014, Respondents filed their Reply.³⁸ The parties subsequently agreed to submit the matter to the trial court without oral argument. On November 20, 2014, the trial court entered an order granting Respondents' Motion for Fees.³⁹

V. STANDARD OF REVIEW

The Court reviews a trial court's interpretation of statutes *de novo*.⁴⁰ Thus, the standard for review on matters involving Washington's Anti-SLAPP statute is *de novo*.⁴¹ The Court also reviews the trial court's rulings on constitutional challenges to statutes *de novo*.⁴²

VII. ARGUMENT

A. Washington's Anti-SLAPP statute unconstitutionally infringes upon the fundamental right of access to the courts on multiple grounds.

The due process guaranteed by the Fifth and Fourteenth Amendments⁴³ requires more than just fair process,⁴⁴ and the protection of liberties extends beyond just the absence of physical

³⁷ CP 39-50 (Plaintiff's Response to Motion for Fees).

³⁸ CP 25-38 (Reply on Motion for Fees).

³⁹ CP 15-17 (Order Setting Attorney Fees).

⁴⁰ *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P. 3d 405 (2005).

⁴¹ *Davis v. Cox*, 180 Wn. App. 514, 537 (Wash. Ct. App. 2014).

⁴² *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P. 3d 405 (2005).

⁴³ The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

⁴⁴ *Collins v. Harker Heights*, 503 U.S. 115, 125 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

restraint.⁴⁵ Due process of law also requires substantive due process. Substantive due process prohibits government actions that infringe upon fundamental rights and liberties,⁴⁶ “regardless of the fairness of the procedures used to implement them.”⁴⁷ In such cases, a substantive due process violation has occurred except where the infringement has been narrowly tailored to serve a compelling government interest.⁴⁸

Fundamental rights and liberties are the interests of the People that are “deeply rooted in this Nation’s history and tradition,”⁴⁹ without which “neither liberty nor justice would exist if they were sacrificed.”⁵⁰ In *Marbury v. Madison*, the United States Supreme Court stated, “No constitutional right is safe without effective access to the courts, which, under our system of government, are the ultimate interpreters and guardians of these rights.”⁵¹ Access to the courts is not just a fundamental right, it is *the* fundamental right of the People:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the

⁴⁵ *Wash. v. Glucksberg*, 521 U.S. 702, 719, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).

⁴⁶ *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *Wash. v. Glucksberg*, at 720.

⁴⁷ *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

⁴⁸ *Reno*, 507 U.S. at 301-302.

⁴⁹ *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977).

⁵⁰ *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

⁵¹ *Marbury v. Madison*, 1 Cranch 137 (1803).

highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.⁵²

The fundamental right of access to courts is also inherent in Article I, Section 10 of the Washington State Constitution.⁵³ The Washington State Supreme Court has found, “The people have a right of access to courts; indeed, it is *‘the bedrock foundation upon which rest all the people’s rights and obligations.’*”⁵⁴

1. Washington’s Anti-SLAPP statute violates the separation of powers doctrine.

It is the function of Washington courts to draft and adopt the procedural rules by which the Washington courts operate.⁵⁵ If the Washington legislature enacts a procedural statute, it must not conflict with any court rule.⁵⁶ If there is a conflict, the reviewing court

⁵² Chambers v. Baltimore & O. R. Co., 207 U.S. 142, 148 (1907).

⁵³ Putnam v. Wenatchee Valley Medical Center, 166 Wn.2d 974, 979, 216 P.3d 374 (2009).

⁵⁴ *Id.* at 979 (emphasis added) (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). See also Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975) (“The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person’s physical well-being and ability to continue to live a decent life.”).

⁵⁵ Putman v. Wenatchee Med. Center, 166 Wn.2d 974, 980, 216 P. 3d 374 (2009).

⁵⁶ Putman, 166 Wn.2d 974 at 980

will try to give both the statute and the court rule effect.⁵⁷ However, if the court cannot resolve the conflict, it defers to the court rule.⁵⁸

Washington's Anti-SLAPP statute imposes upon a claimant the burden of producing clear and convincing evidence of a probability of prevailing of their claims. Additionally, the Anti-SLAPP statute contains a provision which automatically stays discovery upon the filing of a motion to strike under RCW 4.24.525. As such, Anti-SLAPP statute is procedural in nature and it is in direct conflict with numerous Washington Rules of Civil Procedure.⁵⁹

Like a motion to dismiss under CR 12(b) and a motion for summary judgment under CR 56, a motion to strike under Washington's Anti-SLAPP statute provides a procedure by which a defendant may challenge the merits of a claim in advance of trial.⁶⁰ However, the burden imposed upon a defendant to trigger a plaintiff's burden to the defeat the motion is relatively minimal.⁶¹ Meanwhile, a plaintiff's burden in defending a motion to strike exceeds and does not follow any other burden imposed by the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See CR 12 and CR 56; see also CR 8, 11, 12, 15 and 26-34.

⁶⁰ RCW 4.24.525.

⁶¹ RCW 4.24.525.

Washington Civil Rules.⁶² Additionally, as explained below, the defendant's burden in invoking the statute and the plaintiff's burden to overcome a motion to strike are both unconstitutionally vague and overbroad.

A plaintiff's burdens in defending a motion brought pursuant to CR 12(b) or CR 56 are well-defined by statute and interpretative case law. Under CR 12(b), the initial burden lies upon the moving party to show that the complaint does not contain sufficient facts to state a claim for relief on its face.⁶³ Under CR 56, the moving party must first demonstrate that the record presents no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.⁶⁴

In the case of a CR 12(b) motion, if the court can draw reasonable inferences that plaintiff has a plausible claim, then the plaintiff's claims will survive a motion to dismiss.⁶⁵ In opposing a motion for summary judgment, the claimant need only demonstrate a single issue of material fact as to just one element of the claim.⁶⁶

⁶² See RCW 4.24.525 and CR 12 and CR 56.

⁶³ McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101 (Wash. 2010).

⁶⁴ Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

⁶⁵ McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101 (2010).

⁶⁶ Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

On the other hand, under RCW 4.24.525, a defendant only needs to show that the plaintiff's claims are based on an action involving public participation and petition - which is overbroad and not clearly defined. Then, the burden is shifted to the plaintiff to prove by the "clear and convincing evidence of the probability of prevailing" on each of its claims - a confusing and one-of-a-kind standard. These burdens, on both moving and non-moving party, differ from those proscribed by CR 12 and CR 56 and, for the non-moving party present more difficult standards.

The "clear and convincing evidence of the probability of prevailing" also imposes a higher burden than the plaintiff would have to prove at trial, which a preponderance of the evidence standard.

In addition to the burden of proof matters, Washington's Anti-SLAPP statute unconstitutionally stays discovery. Per RCW 4.24.525(5)(c), immediately upon the filing of a motion to strike under 4.24.525(4) - which must be filed within 60 days of the complaint, all discovery is stayed until the entry of the order ruling on the motion. At the same time, the statute forces a plaintiff to prove each of its claims by clear and convincing evidence the probability of prevailing on the merits, without the benefit of discovery. This clearly conflicts with CR 26 and the other discovery

rules and violates a plaintiff's fundamental right of access to the courts:

"The people have a right of access to courts... This right of access to courts 'includes the right of discovery authorized by the civil rules.' As we have said before, 'it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense.'"⁶⁷

Because the Anti-SLAPP statute is procedural and requires a plaintiff to prove her case without being able to conduct extensive discovery first, it reconcilably conflicts with Washington Rules of Civil Procedure and unconstitutionally restricts the plaintiff's fundamental right of access to the courts.

2. Washington's Anti-SLAPP statute is void for vagueness and overbreadth.

Washington's Anti-SLAPP statute contains two phrases that were left undefined by the Legislature - "issue of public concern" and "clear and convincing evidence a probability of prevailing". When a law is vague, it offends due process in two respects: 1) it is unclear and, thus, fails to provide citizens with fair warning of what is prohibited or restricted; and 2) its lack of clear and explicit

⁶⁷ Putman v. Wenatchee Valley Medical Center. P.S., 166 Wn. 2d 974, 979, 216 P.3d 374 (2009) (citing Doe v. Puget Sound Blood Ctr., 117 Wash.2d 772, 780, 819 P.2d 370 (1991)).

standards allows for arbitrary and discriminatory enforcement.⁶⁸ As a result, citizens refrain from conduct, which might otherwise be lawful and permissible, in order to avoid violating the statute.⁶⁹ The vagueness becomes an even greater constitutional issue when it involves First Amendment freedoms.⁷⁰

The Washington Anti-SLAPP statute was adopted to address and dissuade “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances”. A Respondent may file a motion to strike any “action involving public participation and petition”. If the action is found to involve “public participation and petition”, the responding party must “establish by clear and convincing evidence a probability of prevailing on the claim”. If the moving party prevails, the statute contains a provision for a mandatory \$10,000 civil penalty and attorney fees for instituting a lawsuit in violation of the statute.

Since the Anti-SLAPP statute contains a mandatory penalty and attorney fees provision, a claimant must weigh the costs and benefits of filing a claim that may fall within the reach of the statute.

⁶⁸ Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); and Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91 (1965).

⁶⁹ Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); Burien Bark Supply v. King County, 106 Wn.2d 868, 871, 725 P. 2d 994 (1986).

⁷⁰ *Id.*

Washington's Anti-SLAPP statute, however, contains two undefined phrases that are unclear and susceptible to multiple, overbroad interpretations. The terms are "issues of public concern" and "clear and convincing evidence a probability of prevailing".

A claimant who is unsure of the meaning of "issues of public concern" and who cannot anticipate the breadth with which a judge may interpret the term, will be dissuaded from filing suit for fear that he or she would then need to demonstrate the strength of their case - potentially without any shred of discovery - or face the mandatory penalty and attorney fees.

Likewise, the Legislature's phrase "clear and convincing evidence a probability of prevailing" is an entirely new and utterly confusing legal standard. There is no legal precedent to guide courts in interpreting the phrase, let alone the average citizen attempting to discern whether or not to proceed with a potential claim.

The uncertainty in meaning of either phrase and the statute's mandatory penalty and fee provisions raise the potential that a person exercising his or her fundamental right of access to the courts could be punished for normally protected conduct.⁷¹ The result is citizens forgoing their fundamental right of access to the

⁷¹ See Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

courts to avoid this uncertainty.

As noted above, though, access to the courts is not just a fundamental right, it is *the* fundamental right of the People.⁷² “The people have a right of access to courts; indeed, it is *‘the bedrock foundation upon which rest all the people’s rights and obligations.’*”⁷³ Washington’s Anti-SLAPP statute’s vagueness and overbreadth and the resulting deterrence of citizens from exercising their fundamental right of access to the courts renders the statute void.

B. The trial court erred in determining that Washington’s Anti-SLAPP Statute applies to Respondent Gregg Jantz’s defamatory statements.

When deciding a motion to strike under the Washington Anti-SLAPP statute, the court follows a two-step process. The party bringing a special motion to strike a claim has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.⁷⁴ 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.⁷⁵ If the responding party

⁷² *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

⁷³ *Id.* at 979 (emphasis added) (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

⁷⁴ RCW 4.24.525(4)(b).

⁷⁵ *Id.*

meets this burden, then the court shall deny the special motion.⁷⁶

In making this determination, the court considers the pleadings and supporting and opposing affidavits stating the facts upon which liability is based.⁷⁷

1. The trial court erred in finding that Respondent Jantz's defamatory statements involve "public participation and petition".

In its analysis, the Court must first determine whether or not Appellant's lawsuit against Dr. Jantz for his defamatory statements is an "action involving public participation and petition".⁷⁸ RCW 4.24.525(2) sets forth five situations that are deemed to be "action[s] involving public participation and petition". RCW 4.24.525(a)-(c) require that the matter involve a "legislative, executive, or judicial proceeding or other governmental proceeding authorized by law".⁷⁹ Under RCW 4.24.525(d) statements made "in a place open to the public or a public forum in connection with an issue of public concern" are "action[s] involving public participation and petition". And, per RCW 4.24.525(e), "public participation and petition" means "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with

⁷⁶ *Id.*

⁷⁷ RCW 4.24.525(4)(c).

⁷⁸ 4.24.525(2).

⁷⁹ None of Dr. Jantz's defamatory statements were in the context of a "legislative, executive, or judicial proceeding or other governmental proceeding authorized by law".

an issue of public concern, or in furtherance of the exercise of the constitutional right of petition”.

- a. The trial court properly ruled Respondent Jantz’s defamatory statements were not made “in a place open to the public or a public forum”.

One category of statements potentially afforded protection under the Washington Anti-SLAPP statute are statements “in a place open to the public or a public forum in connection with an issue of public concern”. The U.S. Supreme Court has identified three types of forums for purposes of First Amendment issues: 1) traditional public forums; 2) government-dedicated public forums; and 3) non-public forums.⁸⁰

“Traditional public forums” are those places that “by long tradition or by government fiat have been devoted to assembly and debate”, i.e. parks, public streets, and sidewalks.⁸¹ The designation of “traditional public forum” is limited to those places where everyone has a right of access and a right to speak. If the ability to access a place is selective or restricted for purposes of

⁸⁰ Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

⁸¹ Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)); See also International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 679, 120 L. Ed. 2d 541, 550, 112 S. Ct. 2701 (1992).

communicating, then the place is not a “public forum”.⁸² Since traditional general access is absent, newspapers, newsletters, radio, and television are not public forums.⁸³

A government body may also designate “a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects”.⁸⁴ In these instances, the specific forum must actually be dedicated by the government entity as being for public use.⁸⁵

In this case, the defamatory statements about Mrs. Tollefsen were published: 1) in the book *Raising Boys By Design*, and 2) on the KCIS radio program “Legacy Out Loud”. Neither the book nor the radio program falls under the definition of “traditional public forum”. Moreover, Respondents clearly cannot show or even assert that a government entity dedicated either the book or the radio program for use by the public. Therefore, 4.24.525(2)(d) is inapplicable to the defamatory statements at issue in this matter.

⁸² Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1130-1131(2003) (citing Arkansas Educ. TV v. Forbes, 523 U.S. 666, 678-680, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998)).

⁸³ *Id.* See also City of New York Municipal Broadcasting System, 56 F.C.C.2d 169 (1975) (radio and television not public forums); Knights of the Ku Klux Klan v. Bennett, 29 F. Supp. 2d 576, 587 (E.D. Mo.1998) (public radio station not a public forum).

⁸⁴ Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)).

⁸⁵ Muir v. Alabama Television Commission, 656 F.2d 1012, 1020 (5th Cir 1981).

- b. The trial court erroneously determined that Respondent Jantz's defamatory statements constituted lawful conduct made in connection with an "issue of public concern".**

Under both 4.24.525(d) and (e), an action does not "involve public participation and petition" unless the statement or other exercise of freedom of speech involves an "issue of public concern". Unfortunately, Washington's Anti-SLAPP statute does not elaborate on the definition of "issue of public concern".

However, even more important to this matter is the fact that the Washington and U.S. Constitutions do not protect the type of conduct Respondent Jantz engaged in and, therefore, Washington's Anti-SLAPP statute is inapplicable. The trial court failed to recognize the true nature of Dr. Jantz's false and defamatory statements and improperly afforded them constitutional protection.

- (1) The trial court failed to recognize that Dr. Jantz's lies and his other false statements made with reckless disregard for the truth do not enjoy constitutional protection.**

The purpose of the Washington Anti-SLAPP statute is deterring "lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition". However, courts have long held that "calculated falsehoods" do not enjoy the protection of the constitution. In *Garrison v. Louisiana*, the U.S. Supreme Court

explained, "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality...'" "Calculated falsehoods" include knowingly false statements and false statements made with reckless disregard for the truth.⁸⁶

Indeed, Dr. Jantz's story about children taking illegal medication in front of Mrs. Tollefsen in her classroom is completely fabricated. Aside from the known fact that Mrs. Tollefsen did not distribute medication to her students, Dr. Jantz's telling multiple versions of what purportedly occurred, i.e. in one version he asks his son to count the number of boys taking a pill each day, and in another his son just tells him out of the blue that boys are lining up to take a pill each morning, demonstrate, at a minimum Dr. Jantz's reckless disregard for the truth. However, the fact that Dr. Jantz knows his statements are untrue and still refuses to admit that the statements are untrue demonstrate that this is more than an utter disregard for the truth, it is a perpetuation of lies. Dr. Jantz's behavior and the consequences his lies and falsehoods have caused Mrs. Tollefsen do not deserve First Amendment

⁸⁶ Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).

protections.

- (2) The Court should construe the term "issue of public concern" as being narrower than an "issue of public interest".

Washington's Anti-SLAPP statute was adopted in 2010 and is still in its infancy. As mentioned above, there are multiple issues the Washington Supreme Court has already chosen to address and other issues are on petition for review.

Washington's Anti-SLAPP statute is apparently based on California's anti-SLAPP statute - but it is clearly not a "mirror image".⁸⁷ The Washington legislature could have easily adopted the California anti-SLAPP statute word for word, but it chose not to. Instead, there are several distinctions between the two statutes.⁸⁸ The most important distinction pertains to the "catchall" provisions of the anti-SLAPP statutes. Rather than using the term "issues of public interest", the Washington legislature chose the narrower term "issues of public concern". Despite a long line of case law in Washington and the U.S. Supreme Court defining matters of "public concern",⁸⁹ the Washington Courts of Appeals have

⁸⁷ Compare RCW 4.24.525 and Cal. Civ. Proc. Code § 425.16.

⁸⁸ Wyrwich, Tom, *Comment: A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 Wash. L. Rev. 663, 682-686 (2011).

⁸⁹ See Connick v. Myers, 461 U.S. 138, 147-48, 103 S. Ct. 1684 (1983); Garcetti v. Ceballos, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); Snyder v. Phelps, 131 S. Ct. 1207 (2011); Wilson v. State, 84 Wn. App. 332, 341, 929 P.2d 448 (1996), review denied, 131 Wn.2d 1022, cert. denied, 522 U.S. 949 (1997).

embarked on a trail that relies on California courts' interpretation of the term "issue of public interest".⁹⁰

- (3) The trial court should have applied the *Connick* test to determine whether or not Respondent Jantz's defamatory statements do not involve an "issue of public concern".

Unfortunately and unbeknownst to the parties, the trial court did not record the hearing on Respondents' special motion to strike. Appellant urged the trial court to apply the test adopted by the U.S. Supreme in *Connick*, while Respondents asked the court to apply the test from *Weinberg* as employed by this Court in *Alaska Structures, Inc. v. Hedlund*. It is unclear if the trial court applied both or just the *Weinberg* test, but the *Connick* test is the proper test for this Court to apply.

In *Connick*, the U.S. Supreme Court developed a three factor test to determine when an employee's speech touched on an "issue of public concern" and, thus, was entitled to First Amendment protection.⁹¹ Courts look to: the content, the form, and the context of the speech.⁹² "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it

⁹⁰ *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 599 (2014).

⁹¹ *Connick*, 461 U.S. at 147-148.

⁹² *Id.*

was said, and how it was said.”⁹³ Additionally, evidence of a pre-existing conflict between the parties and a resulting motivation to harm may demonstrate that speech on public matters was intended to mask an attack over a private matter.⁹⁴

In *Alaska Structures, Inc. v. Hedlund*, the Division I Court of Appeals employed a test used by California courts to determine when a matter involves an “issue of public interest”.⁹⁵ The *Weinberg* test sets forth a number of “guiding principles” to determine whether an issue is a public or private interest:

First, “public interest” does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker’s conduct should be the public interest rather than a mere effort “to gather ammunition for another round of [private] controversy....” Finally, “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”⁹⁶

⁹³ *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

⁹⁴ *Id.* at 1217. See also *Connick*, 461 U.S. at 148.

⁹⁵ *Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591, 602 (2014).

⁹⁶ *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132, 2 Cal. Rptr. 3d 385 (2003) (citations omitted).

- (1) Regardless of which test applies, Respondent Jantz's defamatory statements do not involve an "issue of public concern".

Looking at the context of Dr. Jantz's defamatory statements reveals that they arise out of a purely private matter - Dr. and Mrs. Jantz's staunch disagreement with Mrs. Tollefsen's recommendation that their son, Gregg Jr., be tested for "attention and focus". The Jantzs did have Gregg Jr. tested for "attention and focus" and he apparently had no such issues. For the Jantzs, that meant they were right and Mrs. Tollefsen was wrong. It is clear that this became the motivation for Dr. Jantz to write *Raising Boys By Design*. Dr. Jantz admits so in his interview with Mrs. Abbott on KCIS radio - "[S]o really it sent me on a little bit of a quest."

Dr. Jantz had a conflict with Mrs. Tollefsen. He disagreed with her recommendation regarding his son and even went so far as to have his son removed from her class - a very rare occurrence at King's Schools. Clearly Dr. Jantz had been offended by Mrs. Tollefsen's suggestion and his revenge was to place her in an unfavorable light - as a teacher who pushes medications upon students. Dr. Jantz fabricated a story about students lining up to take a pill each morning. The defamatory story first appears on the second page of Chapter 1 and is used as a launching point for Dr. Jantz's thesis in the book.

Further evidence of the conflict and intent to harm is the fact that Dr. Jantz distributed free copies of the book to all King's Schools teachers and administrators - something he had not done with any of his 20-plus prior published books. Dr. Jantz then uses the same story in his interview with Mrs. Abbott as the starting point for their discussion on his book. The trial court erroneously determined that Dr. Jantz's statements are an "issue of public concern". However, it is clear from the record that Dr. Jantz's intent was to damage Mrs. Tollefsen's reputation as an outstanding teacher with King's Schools and his defamatory statements were clearly made to serve Dr. Jantz's own private purpose.

C. Appellant established, by clear and convincing evidence, a probability of prevailing on the merits.

Under Washington's Anti-SLAPP statute, "If the moving party meets [its] burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim."⁹⁷ In determining whether the responding party has met its burden under the second prong of the Anti-SLAPP motion to strike analysis, courts apply a summary judgment-like analysis to determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing

⁹⁷ RCW 4.24.525(4)(b).

on the merits.⁹⁸

The reviewing court does not make findings of fact and does not make determinations of credibility.⁹⁹ The court considers the pleadings and supporting and opposing affidavits stating the facts and must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff.¹⁰⁰ The court may also order discovery upon a showing of good cause.¹⁰¹

1. Mrs. Tollefsen has presented clear and convincing evidence of all four elements of a defamation claim.

To establish a prima facie defamation claim, a plaintiff must prove four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages.¹⁰² In the context of a special motion to strike under RCW 4.24.525, the four elements must be proven by "clear and convincing evidence".¹⁰³

a. The statements by Respondent Gregg Jantz are false.

A defamation plaintiff must demonstrate that the alleged defamatory statement is false. A statement satisfies the element of falsity if the statement is actually false or because the statement

⁹⁸ Dillon v. Seattle Deposition Reporters, LLC, 316 P.3d 1119, 1143 (2014).

⁹⁹ *Id.*

¹⁰⁰ RCW 4.24.525(4)(c); Dillon v. Seattle Deposition Reporters, LLC, 316 P.3d 1119, 1143 (2014).

¹⁰¹ RCW 4.24.525(5)(c).

¹⁰² Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982).

¹⁰³ RCW 4.24.525(4)(b).

leaves a false impression.¹⁰⁴

The defamatory statements by Dr. Jantz in this case are completely false. According to Dr. Jantz, Mrs. Tollefsen dispensed - or allowed children to take in front of her - a pill for "attention issues" each morning. No students have ever taken a pill in front of Mrs. Tollefsen, not even Aspirin. This falsity - accusing Mrs. Tollefsen of activity that violates school policy and Washington civil and criminal law - provides the "sting" and proximately caused her damages.¹⁰⁵

(1) The statements are "of and concerning" Mrs. Tollefsen.

A plaintiff must demonstrate that she was the object of the defamatory statement.¹⁰⁶ Although the book and the radio interview did not identify Mrs. Tollefsen by name, it is clear from the language in both that she is the person he is referring to. Dr. Jantz indicates that the sixth grade teacher had suggested his son be tested for attention issues, that he had been having issues with his son's teacher, and - in the interview - after the teacher had recommended testing, Dr. Jantz says he asked his son to count

¹⁰⁴ Mohr v. Grant, 153 Wn.2d 812, 825 (2005).

¹⁰⁵ *Id.* at 826; The court determines whether a statement is capable of defamatory meaning and the jury determines if the recipient understood the statement as being defamatory. Swartz v. World Publishing Co., 57 Wn.2d 213, 215, 356 P.2d 97 (1960).

¹⁰⁶ Sims v. KIRO, Inc., 20 Wash. App. 229, 580 P.2d 642 (1978), cert. denied, 441 U.S. 945 (1979).

how many boys took a pill in front of the teacher. In addition, the dispute Dr. and Mrs. Jantz had with Mrs. Tollefsen was well-known within King's Schools. When the interview aired, Mrs. Tollefsen was contacted immediately by a fellow teacher. After Dr. Jantz distributed the book at King's Schools, Mrs. Tollefsen was informed by a fellow teacher that the book contained a story about her.

b. The Statements were not privileged.

- (1) The "clarification" issued by Respondent Jantz is not entitled to the litigation privilege.**

Absolute privilege does not apply in situations where there are no safeguards against abuse. Absolute privilege only applies in "situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct".¹⁰⁷ In judicial proceedings, the trial judge has the ability to strike statements from the record and impose perjury and contempt sanctions.¹⁰⁸ If the statement occurs off the record and out of the courtroom, the safeguard is unavailable.¹⁰⁹

In this case, Appellant's original complaint had been served, but a lawsuit had not even been filed when Respondent Jantz issued his "clarification" on Respondent Abbott's radio show - there was no judicial proceeding. Because the "clarification" occurred out

¹⁰⁷ Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 476, 564 P.2d 1131 (1977).

¹⁰⁸ Herron v. Tribune Pub'g Co., 108 Wn.2d 162, 177, 736 P.2d 249 (1987).

¹⁰⁹ Demopolis v. Peoples Nat'l Bank, 59 Wn. App. 105, 112-113 (1990).

of the courtroom and off the record, there were no safeguards to prevent Respondent Jantz from abusing the litigation privilege - exactly what he is attempting to do now. Therefore, the absolute privilege does not apply to the "clarification" issued by Respondent Jantz.

(2) The Fair Reporting Privilege and Common Interest Privilege do not apply to any of the statements.

Defamatory statements that originate in a "report of an official action, proceeding, or meeting open to the public that deals with a matter of public concern" are conditionally privileged.¹¹⁰ Dr. Jantz was not reporting on an official action, proceeding, or public meeting, so his statements are not entitled to this privilege.

Washington also recognizes a "common interest privilege". The privilege applies to organizations, partnerships, and associations and "arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest."¹¹¹ There are no grounds for Respondents to assert a common interest privilege in this case.

¹¹⁰ *Momah v. Bharti*, 144 Wn. App. 731, 745 (2008).

¹¹¹ *Momah v. Bharti*, 144 Wn. App. 731, 747 (2008) (citing *Moe v. Wise*, 97 Wn. App. 950, 957-58 (1999)).

c. The Respondents are at fault.

The standard of liability for a publisher of a defamatory statement is determined by the class of persons to which the plaintiff belongs. A plaintiff in a defamation action may be considered: 1) a private individual; 2) a public official; or 3) a public figure.¹¹² If the plaintiff is a public official/figure, the applicable standard is actual malice.¹¹³ If, however, the plaintiff is a private individual, the plaintiff needs only to prove negligence.¹¹⁴

(1) Mrs. Tollefsen is neither a public official nor a public figure.

“Public figures” are persons who assume roles of special prominence, occupy positions of such persuasive power and influence, or have thrust themselves to the forefront of public controversies.¹¹⁵ Filing a lawsuit does not transform a private individual into a public figure.¹¹⁶ The Respondent in a defamation lawsuit cannot, by their own conduct, transform the plaintiff into a public figure.¹¹⁷

Mrs. Tollefsen is a sixth grade teacher at a private school in

¹¹² See Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

¹¹³ Clawson v. Longview Pub. Co., 91 Wn.2d 408, 414 (1979).

¹¹⁴ Taskett v. King Broad. Co., 86 Wn.2d 439, 445 (1976).

¹¹⁵ Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

¹¹⁶ Momah v. Bharti, 144 Wn. App. 731, 741 (2008).

¹¹⁷ Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979).

Seattle. When Respondent Jantz's son was having behavioral issues at school, Mrs. Tollefsen recommended that he be tested for "attention issues". That was a purely private matter between teacher and parents. Respondent Jantz cannot transform Mrs. Tollefsen into a public figure by publishing defamatory statements about her that arise from a purely private matter between them. Mrs. Tollefsen is a private individual and, therefore, the applicable standard of liability in this case is negligence.

(2) Respondents negligently published defamatory statements about Mrs. Tollefsen.

"[A] private individual, who is neither a public figure nor official, may recover actual damages for a defamatory falsehood, concerning a subject of general or public interest, where the substance makes substantial dangers to reputation apparent, on a showing that in publishing the statement, the Respondent knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect."¹¹⁸

Respondent Jantz knowingly made false and defamatory statements about Mrs. Tollefsen. The other Respondents owed Appellant a duty to exercise reasonable care in publishing the

¹¹⁸ Taskett v. King Broad. Co., 86 Wn.2d 439, 445 (1976).

defamatory statements. As co-authors and publisher, Respondents Gurian, McMurray, and Random House should have exercised reasonable care to ensure any statements referring to any actual individuals were true and accurate, not false and defamatory. It is clear that this did not occur because even the slightest investigation would reveal that the statements could not be true and, if true, would subject Mrs. Tollefsen to criminal charges.

Respondent Abbott was aware that Respondent Jantz was airing a clarification on her show in response to a potential lawsuit Respondent Abbott was aware of the allegations of the lawsuit, as the clarification had been pre-recorded.¹¹⁹ Despite Respondent Jantz being accused of false and defamatory statements, Respondent Abbott did not exercise reasonable care and look into the allegations. As with the other Respondents, the falsity of the statement would have been easily apparent with even minimal investigation. Instead, she published Respondent Jantz's false and defamatory clarification during four broadcasts of her show. Respondent Abbott's airing of the falsehood is also malicious, as she was aware of the high degree of probable falsity.¹²⁰

¹¹⁹ CP 308 - 309 (Declaration of Carrie Abbott).

¹²⁰ See Footnotes 93-94.

(3) Respondent Jantz maliciously published defamatory statements about Mrs. Tollefsen.

A Respondent acts with malice when he publishes a falsehood with actual knowledge of its falsity or with reckless disregard for its truth or falsity.¹²¹ A Respondent acts with reckless disregard when he publishes a falsehood with a “high degree of awareness of ... probable falsity” or serious doubts as to the truth of the publication.¹²²

It is clear from the evidence that Respondent Jantz’s story about his son telling him that several boys lined up at the teacher’s desk each morning is a complete fabrication by Respondent Jantz. The story in his book substantially differs from the story on the radio. In the book, he claims his son relayed that there was a “weird thing that had caught his attention” at school. In the radio interview, though, Respondent Jantz claims that, after Mrs. Tollefsen had brought up his son’s potential attention issues, he set out “on a little bit of a quest” and asked his son to count how many boys in his class took a pill in front of the teacher in the morning. Respondent Jantz informed Mrs. Abbott that the pills were for “attention issues”. How could Respondent Jantz know that the pills were for “attention issues”? He could not, unless he investigated.

¹²¹ Herron v. King Broad. Co., 112 Wn.2d 762, 775 (1989).

¹²² Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); Herron, 112 Wn.2d at 775.

An investigation would have revealed that no students ever took a pill in front of Mrs. Tollefsen, not even Aspirin. The story is a lie made up to help Respondent Jantz support his position.

d. Mrs. Tollefsen has been damaged.

Generally, a plaintiff must present evidence of special or actual damages resulting from a defamatory statement.¹²³ The exception to the rule is libel per se, which allows an award of substantial damages without proof of actual damage.¹²⁴ A statement is libelous per se if it "tends to expose a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or to injure him in his business or occupation."¹²⁵

Respondent Jantz's statements are libelous per se because they have injured Mrs. Tollefsen in her profession. The defamatory statements accuse Mrs. Tollefsen of conduct that would subject her to criminal charges. Additionally, the statements also imply that Mrs. Tollefsen is a bad teacher who thinks that any time a student has learning issues, he should go on medication. Such accusations clearly hurt a teacher's reputation amongst her peers,

¹²³ Purvis v. Bremer's, Inc., 54 Wn.2d 743, 747, 344 P.2d 705 (1959).

¹²⁴ Michielli v. U.S. Mortgage Co., 58 Wn.2d 221, 227, 361 P.2d 758 (1961).

¹²⁵ Purvis, 54 Wn.2d at 751.

administrators, students, and parents. Therefore, Respondent Jantz's statements are libelous per se.

As set forth above, Respondent Jantz maliciously published the defamatory statements about Mrs. Tollefsen. Because Respondent Jantz acted with malice and his statements are libelous per se, Mrs. Tollefsen has presumably been damaged.

In addition to presumed damages, Mrs. Tollefsen has suffered actual out-of-pocket damages. Since learning of the statements, Mrs. Tollefsen has suffered from depression and was placed on anti-depression medication. In addition, there is a high probability that this matter will result in King's Schools' failing to renew Mrs. Tollefsen's teaching contract.

2. Appellant presented clear and convincing evidence of the elements of her emotional distress claims.

The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to Appellant of severe emotional distress.¹²⁶ The first element is satisfied by actions that are "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

¹²⁶ Kloepfel v. Bokor, 149 Wn.2d 192, 195 (2003).

community."¹²⁷

In this case, Mrs. Tollefsen recommended Respondent Jantz's son be tested for "attention and focus issues". He disagreed and subsequent testing did not reveal such issues. Respondent Jantz's response was to fabricate a story about Mrs. Tollefsen that accuses her of distributing prescription medications that would be in violation of school policy and Washington law.¹²⁸ Respondent Jantz recklessly disregarded the fact that his fabrication would affect Mrs. Tollefsen in any way. Instead, he used the fabrication to support his position in the book.

As a result of Respondent Jantz's intentional and reckless actions, Mrs. Tollefsen has suffered from depression, insomnia, headaches, elevated stress, was placed on anti-depression medication, and has suffered extreme emotional distress.

D. The trial court unconstitutionally denied Appellant to conduct the limited discovery she requested.

Under 4.24.525(c), the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted prior to ruling on a motion to strike. The "good cause" standard is similar to that under the provision in CR 56(f) allowing discovery for purposes of defeating a motion for

¹²⁷ Grimsby v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975).

¹²⁸ RCW 69.50.406.

summary judgment. The party seeking additional discovery must explain what they are seeking, what they expect to discover, and why it's important to the motion.

In this case, Appellant did not have an opportunity to conduct any discovery prior to Respondents' motion to strike. However, discovery was necessary to fully respond to Respondents' motion to strike, and Appellant moved the trial court for an order allowing limited discovery. The trial court, though, deprived Appellant of any opportunity to conduct discovery.

Discovery was necessary to fully respond to Respondents' motion to strike for several reasons. First, Appellant's co-workers, who originally informed her of Respondent Jantz's defamatory statements, have subsequently refused to sign declarations recounting their stories.¹²⁹ Hence, the only way Appellant could have obtained their statements for use in her opposition to the motion was through depositions. Second, Respondent Jantz has clearly told the defamatory story in multiple variations and has claimed that it was his son who relayed the information. It is imperative that Appellant be allowed to take the depositions of both Respondent Jantz and his son to ascertain Respondent Jantz's

¹²⁹ CP 189 (Declaration of Lane Tollefsen, ¶ 20-21).

actual story. Third, Appellant needs to obtain copies of draft versions of the book to see if the defamatory story was changed. If the story appears in multiple versions, it will further demonstrate Respondent Jantz's malice. Fourth, Appellant needs to obtain all communications amongst the Respondents related to the statements, as that may demonstrate actual knowledge of the other Respondents regarding the falsity of the statements. Additionally, King's Schools has attempted to influence Mrs. Tollefsen's pursuit of this legal matter and any communications by King's Schools on the matter must be produced to discover the extent King's Schools may be attempting to influence others and whether Respondents are involved.¹³⁰

1. Pursuant to RAP 9.11, Appellant moves this Court to order additional evidence be taken prior to review.

As noted above, Appellant believes that her employer played a role in her colleagues' refusals to submit declarations regarding their belief that the unnamed teacher in Respondent Jantz's fabrications is undoubtedly Mrs. Tollefsen. In March 2015, subsequent to the trial court's grant of the motion to strike, Mrs. Tollefsen was been contacted by the CEO of Crista Ministries to

¹³⁰ CP 189 (Declaration of Lane Tollefsen, ¶¶ 22-25 and Tollefsen Exhibit 3) and CP 207 (Declaration of Chris Rosfjord, ¶ 6 and Rosfjord Exhibit 4). King's Schools CEO has contacted Mrs. Tollefsen as recently as March 2015, asking to discuss the case and her reasons for filing the lawsuit.

discuss the case and her reasons for moving forward with the lawsuit. Through counsel, Mrs. Tollefsen declined to meet with the CEO given this pending appeal. April 16, 2015 was the date Mrs. Tollefsen's teaching contract with King's Schools as up for renewal. Instead of a contract renewal, Mrs. Tollefsen received a letter criticizing her un-Christian like behavior for not meeting with the CEO to discuss this ongoing Lawsuit.

Mrs. Tollefsen's termination - in the teaching world, failure to renew an annual contract is considered a firing - only solidifies Appellant's argument that further discovery is needed in this case and that trial court must review that evidence and make findings before this Court can issue a decision on Appellant's appeal.

E. The trial court's award of \$50,000 in statutory damages was excessive and unconstitutionally punishes Appellant for exercising her fundamental right.

Washington courts have long held that punitive damages are against Washington public policy.¹³¹ In *State v. WWJ Corp.*, the Washington State Supreme Court was asked to determine whether or not a civil penalty imposed by the jury violated the Fourteenth Amendment.¹³² The court applied a three-part test adopted by the

¹³¹ *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574 (1996).

¹³² *State v. WWJ Corp.*, 138 Wn.2d 595, 606 (1999).

U.S. Supreme Court in *BMW of N. A., Inc. v. Gore*.¹³³ The *BMW* test consists of three guideposts: 1) The degree of reprehensibility of the penalized conduct; 2) comparing the size of the penalty to actual and potential harm caused; and 3) whether the award is comparable to statutory civil penalties in similar cases.¹³⁴ The Washington Supreme Court declined to address whether *BMW* applies to civil penalties.¹³⁵ The first two guideposts are clearly appropriate. The third *BMW* guidepost is not necessary.

Mrs. Tollefsen's conduct was clearly not reprehensible. Defendant Jantz has maliciously published false and defamatory statements about Mrs. Tollefsen. Even though he knows that the statements are false, he refuses to publicly acknowledge that fact for fear that it will damage his own reputation and integrity as an author. Thus, he forced Mrs. Tollefsen to file her lawsuit as the only means of clearing her name. Mrs. Tollefsen's claims clearly have merit and are in no way frivolous. Her filing the lawsuit against Respondents was her last resort and it is in no way reprehensible.

Additionally, the statute contains a provision authorizing an award of attorney fees, so Respondents have not been harmed in

¹³³ *State v. WWJ Corp.*, 138 Wn.2d 595, 606 (1999); See *BMW of N. A., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

¹³⁴ *Id.*

¹³⁵ *Id.*

any way.¹³⁶ Thus, the mandatory nature of the civil penalty, its size, and the clear lack of frivolity of Mrs. Tollefsen's claims render the \$50,000 civil penalty excessive and unconstitutional in violation of due process. At most, the Court should only impose a \$10,000 penalty, plus attorney fees.

F. **The Court should award Appellant her costs and attorney fees and at least \$10,000 in statutory damages under RCW 4.24.525(6)(b).**

Respondent Jantz's defamatory statements about Mrs. Tollefsen are a complete fabrication, and to this day he refuses to admit that the story is a lie. The statements about Mrs. Tollefsen are clearly false, as she could not legally distribute or allow students to take medication in her classroom. Respondent Jantz lied and his lie is not protected by the First Amendment. Respondent Jantz filed the motion to strike in order to protect his lies. The motion is frivolous and Appellant is entitled to costs, fees, and damages as authorized by 4.24.525(6)(b). Respondent Jantz's knowledge should be imputed to the other substantive Defendants and they should each be ordered to pay Plaintiff \$10,000 in statutory damages.

VII. CONCLUSION

As set forth above, Washington's Anti-SLAPP statute is

¹³⁶ Appellant also appeals the award of attorney fees.

plainly unconstitutional. While purporting to protect free speech and the right to petition, the statute and its application have cast a wide net that is effectively denying persons with meritorious claims from seeking redress for their grievances. Therefore, Appellant asks the Court to find that RCW 4.24.525 is unconstitutional on its face and as applied. Appellant asks the Court to vacate the orders dismissing Appellant's claims and awarding attorney fees and penalties. Appellant asks the Court to reverse the trial court's denial of discovery. Appellant also asks the Court to deny Respondents' motion to strike and to award Appellant her attorney fees and a \$10,000 statutory penalty from each Respondent.

DATED this 17TH day of April, 2015,

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